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Post-Tenure Review As If It Mattered

Jayne W. Barnard

William & Mary Law School, jwbarn@wm.edu

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JAYNE W. BARNARD*

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* James Goold Cutler Professor of Law, The College of William & Mary. Special thanks to Brent Dougal, class of 2007, for his excellent research support for this Article. Also to Bill Wang for his thoughtful comments on an earlier draft and to John Tucker, my best critic. Michael DiRoma did a fine job of editing. My thanks to Maimon Schwarzschild for including me in this Symposium.

The workforce is the single most important renewable source of competitive advantage as firms compete more and more through knowledge capital and “brainware.” Those firms that can attract, focus, and motivate the appropriate workforce capabilities and behaviors stand the best chance of not only surviving but thriving in competitive environments.¹

We will prosper as institutions only to the degree we can focus our time and intellectual resources on the things that matter most. We need not be rigid or prohibit explorations of many kinds, but we can be clear to ourselves that we will recognize and reward those activities that advance our shared goals—our mission. We should be held accountable for both the quality and the extent of our contributions to the mission of our academic community through post-tenure review.²

Imagine a sales manager whose team’s performance consistently “meets expectations.” Quarter after quarter, they dutifully hit the company’s sales targets. But the team has been using the same sales strategies and soliciting the same customers for years. Their competitors, by contrast, have been selling more aggressively, and to new markets, and bundling services with products, and generally making themselves indispensable to their customers. One day, the sales manager’s company is bought out, and the sales team is replaced by a more aggressive, agile, and *hungry* sales team. The ousted salesmen—and the sales manager—just shake their heads in wonderment. Somehow, they failed to notice that the market had passed them by.

Or, imagine a skilled assembly-line worker whose output rarely waivers. Fourteen flawless widgets an hour, day after day, year after year. Unaware of changing circumstances, or unable to imagine anything else, he comes to work with a strong work ethic until one day, to his surprise, widgets have become obsolete—replaced by a more adaptable, customizable product. This worker—a very devoted worker—himself has become obsolete.

Finally, imagine a scientist involved in research and development at a pharmaceutical company. The metrics by which her performance is measured are number of experiments conducted, number of initiatives approved for further development, and number of patents secured for her employer. Little attention is paid to the overall success rate of her efforts in terms of products profitably brought to market. In an economic downturn, this industrious and conscientious professional is one of the first employees to be let go.

1. MARK A. HUSELID, BRIAN E. BECKER & RICHARD W. BEATTY, *THE WORKPLACE SCORECARD: MANAGING HUMAN CAPITAL TO EXECUTE STRATEGY* xvi (2005).

2. William Plater, *A Profession at Risk: Using Post-Tenure Review to Create an Intentional Future*, in *POST-TENURE FACULTY REVIEW AND RENEWAL: EXPERIENCED VOICES* 242, 249 (Christine M. Licata & Joseph C. Morreale eds., 2002) [hereinafter *EXPERIENCED VOICES*].

What do these stories have to do with law schools? First, they reflect changing markets and changing customer expectations. They illustrate how good workers—diligent, responsible, but badly-led workers—can perform well, but not well enough in a changing world. They also reflect the failure of managers to identify meaningful performance metrics and to incentivize their employees to adapt to their firms' most important strategic goals.

This Article explores these issues in the law school context. That is, I ask how can law professors be incentivized to improve their performance and adapt to a changing marketplace over the course of their careers? How can law school “managers” identify performance metrics that make sense in this changing marketplace, and create an environment in which change and adaptation are recognized and rewarded?

The question of how to incentivize knowledge workers has been the subject of intense inquiry in business schools and the business world in recent years.³ So-called “knowledge management” has become the organizing theme of many industries that depend on innovation, execution, and distribution of complex outputs. Shouldn't this description include law professors, too?

Of course, no incentive scheme is likely to work without a credible performance assessment process. Performance assessment is deeply embedded in the law school culture already. First, there is the appointments process; then there is the promotion and tenure ordeal; then, there is usually some form of annual review for salary purposes; and finally, in many law schools, a systematic, periodic process of post-tenure review. Unfortunately, we often don't conduct performance assessments very well. And we're especially unlikely to perform post-tenure review very well—for most of us, it is a mechanical (if uncomfortable) process that, in the end, is inconsequential.

This Article imagines how post-tenure review might work if we took the process seriously for *all* faculty members and used it as a management strategy to foster institutional change. It draws on previous

3. See, e.g., THOMAS DAVENPORT, THINKING FOR A LIVING: HOW TO GET BETTER PERFORMANCE RESULTS FROM KNOWLEDGE WORKERS (2005); Allan E. Alter, *Knowledge Workers Need Better Management*, CIO INSIGHT, Aug. 5, 2005, available at <http://www.cioinsight.com/article2/0,1540,1846780,00.asp>; Eric Schmidt & Hal Varian, *Google: Ten Golden Rules—Getting the most out of knowledge workers will be the key to business success for the next quarter century. Here's how we do it at Google*, NEWSWEEK INT'L, Nov. 28, 2005, at 44.

work about the value and mechanics of post-tenure review generally,⁴ and the value specifically of post-tenure review in a law school setting.⁵ It also draws on recent work aimed at redesigning the traditional human resources function within the business corporation.⁶ Whereas the HR function was once characterized by cost-containment and often meaningless paperwork, the HR function and the performance assessment process are today increasingly seen as critical contributors to achieving a company's strategic objectives.

Why focus on post-tenure review? Post-tenure review is just one in a series of management strategies to keep a law school's faculty fresh, engaged, productive, and generative of important and useful ideas. (In provost-speak, what we are seeking is faculty "vitality.") The premise of this article is that post-tenure review can also be a mechanism to achieve specific institutional objectives. Identifying these objectives and then utilizing post-tenure review to reinforce them among senior faculty members can keep law schools alive to the possibility of change. Like other firms in competitive environments, law schools can differentiate themselves, but only if they enlist their key employees to pursue common goals and work as a team.

I. POST-TENURE REVIEW TODAY

Post-tenure review is now a widely-accepted practice. The process, in one form or another, "is now part of the landscape at most public

4. See, e.g., CHRISTINE M. LICATA & JOSEPH C. MORREALE, POST-TENURE FACULTY REVIEW AND RENEWAL III: OUTCOMES AND IMPACT (2006); POST-TENURE FACULTY REVIEW AND RENEWAL II: REPORTING RESULTS AND SHAPING POLICY (Christine M. Licata & Betsy E. Brown eds., 2004); EXPERIENCED VOICES, *supra* note 2; James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771 (2005) (describing current issues surrounding post-tenure review); James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 190-192 (2000) (noting the opportunity costs and disruption of community inherent in any post-tenure review process); Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J. L. & EDUC. 551 (1998) (describing the financial costs of post-tenure review); Kerry Ann O'Meara, *Beliefs About Post-Tenure Review*, 75 J. HIGHER EDUC. 178 (2004) (recounting the results of interviews about the impact of post-tenure review on four university campuses); Lisa Patriquin et al., *Posttenure Review: The Disparity Between Intent and Implementation*, 26 REV. HIGHER EDUC. 275 (2003) (summarizing findings about the post-tenure review process at two public universities); Jeffrey P. Aper & Judith E. Fry, *Post-Tenure Review at Graduate Institutions in the United States*, 74 J. HIGHER EDUC. 241 (2003) (reviewing recent post-tenure review practices in light of AAUP recommendations).

5. See, e.g., Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL'Y REV. 387 (1998).

6. See, e.g., HUSELID ET AL., *supra* note 1.

colleges and universities in the United States. This trend is also gaining momentum in private higher education.”⁷

As currently practiced, post-tenure review is typically a minimalist operation—designed to weed out “deadwood” and to shame a few others into voluntarily taking early retirement. In rare instances, it may even help a professor get back on track with her scholarship or teaching. Researchers have found, however, that post-tenure review has rarely been used as a mechanism to promote specific institutional or departmental values.⁸ That is, post-tenure review to date has been a matter of surveillance rather than of strategy.

The American Association of University Professors (AAUP) has promulgated a statement of principles for post-tenure review:⁹

Post-tenure review ought to be aimed not at accountability, but at faculty development. Post-tenure review must be developed and carried out by faculty. Post-tenure review must not be a reevaluation of tenure, nor may it be used to shift the burden of proof from an institution’s administration (to show cause for dismissal) to the individual faculty member (to show cause why he or she should be retained). Post-tenure review must be conducted according to standards that protect academic freedom and the quality of education.

The AAUP offers this additional guidance:

Individual faculty reviews should . . . focus on the quality of the faculty member’s work and not on such larger considerations as programmatic direction.¹⁰

Finally, the AAUP sets out some “minimum standards for good practice” when conducting a post-tenure review program. These include:

7. LICATA & MORREALE, *supra* note 4, at xvii.

8. See Estela Mara Bensimon, *Is Post-Tenure Review a Lever for Organizational Change?*, in LICATA & MORREALE, *supra* note 4, at 116, 118.

[We did] not find that the evaluation processes for post-tenure review took into account the relevance of research and scholarship vis-a-vis institutional or departmental goals. That is, the criteria for evaluating research were generic and in no way linked to the institution’s mission or to specific goals or to advance particular values. In fact, when we asked directly about the connection between post-tenure review and an institution’s strategic plans or a department’s priorities, we were told that there was little or no connection.

Id.

9. AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS (10th ed. 2006), available at <http://www.aaup.org/AAUP/pubsres/policydocs/PTR.htm>.

10. *Id.*

The written standards and criteria by which faculty members are evaluated in post-tenure review should be developed and periodically reviewed by the faculty. The faculty should also conduct the actual review process. The basic standard for appraisal should be whether the faculty member under review discharges conscientiously and with professional competence the duties appropriately associated with his or her position, not whether the faculty member meets the current standards for the award of tenure as those might have changed since the initial granting of tenure.

* * *

Post-tenure review should be developmental and supported by institutional resources for professional development or a change of professional direction.

* * *

A faculty member should have the right to comment in response to evaluations, and to challenge the findings and correct the record by appeal to an elected faculty grievance committee.¹¹

Not surprisingly, these principles and standards are protectionist and self-interested—they are aimed at maintaining the status of individual faculty members, not at improving the competitive position of the institution.

Thus, under the AAUP guidelines, a knowledgeable professor who is indifferent to student resistance to his monotone lecture style, a classroom teacher who disregards the raised hands of students whom he knows are likely to challenge his views, or a popular teacher who has been using the same notes, and telling the same jokes, for more than a decade but who is a generous grader and therefore forgiven by her students, could all presumably meet the generous standard of “professional competence.”¹² But none of them is likely to play a role in the improvement of the law school, or its competitiveness in a changing world.

11. *Id.*

12. Ditto the scholar who has, in effect, been writing the same article over and over again for the past ten years, with minor variations and little original thought. Or the scholar who has written on topics of interest to no one—not judges, legislators, or other scholars. These un-cited works currently comprise fifty percent of legal scholars’ output. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1331 (2002).

II. AN ALTERNATIVE APPROACH TO POST-TENURE REVIEW

I would state the principles that should govern the post-tenure assessment of law faculty (or any faculty) somewhat differently than the AAUP:

Post-tenure review ought to be aimed at identifying those faculty members who are materially advancing the creation of new knowledge, the intellectual development of their students, and the public profile of their institution. Post-tenure review should be developed and carried out jointly by faculty and administrators, with input by recent graduates, current students, peers outside the institution, and “end users” (in the case of law professors, these would include employers, judges, and practitioners). Post-tenure review should evaluate a faculty member’s overall usefulness to the institution since the most recent performance evaluation. Post-tenure review must also be conducted with an eye toward the changing nature of the discipline in question, changing expectations for teaching and communication, the different phases of a faculty member’s career, and the specific objectives of the institution. Post-tenure review must be conducted according to standards that protect academic freedom and the quality of education.

Then, I would add these items of good practice:

- (1) faculty members subject to post-tenure review should have the opportunity to provide a thorough self-assessment in the initial phase of the post-tenure review process;
- (2) faculty members should have the opportunity to participate in the selection of assessors—peers, outside reviewers, and others with knowledge of their scholarly work;
- (3) faculty members should have the opportunity to respond fully to criticisms by others and to secure additional outside reviews of some or all of their work;
- (4) faculty members should have the option of seeking professional “coaching” both before and after the post-tenure review process;
- (5) faculty members should have the opportunity to provide input into the development of institutional priorities developed through a reasonable process; post-tenure review is not the occasion to challenge institutional priorities.

Obviously, the principles and practices I have outlined here present some opportunities for institutional abuse. For example, a professor whose unpopular views provoke public and alumni outcry might fail a law school’s “usefulness” test even though he would easily pass the AAUP’s “professional competence” test. Or, a professor who is trotted out for fundraising events because he is much beloved by former students might pass a law school’s “usefulness” test even though, by any objective

measure, he might no longer satisfy a “professional competence” test. Neither scenario would be desirable and care must be taken not to abuse the “usefulness” standard.

Still, I think “usefulness” (a concept that anticipates changing circumstances) makes more sense in a competitive environment than “professional competence” (which seems to be a static concept, as well as a lowest common denominator). It also recognizes that faculty members may be “useful” to their law schools in different ways and at different times—some through prodigious and constant output of scholarship; others through occasional but more trenchant written works; some primarily (or solely) because they are effective, challenging teachers; and others because they are stimuli to the best thinking and imaginative works of others, including their colleagues and students. It is important to stress that “one size does not fit all.”

Using a post-tenure review process that is both individually-tailored to a faculty member’s strengths and weaknesses and based on the strategic objectives of the institution is consistent with what business leaders have learned about performance assessment and allocation of talents.¹³ Simply put, some employees are more skillful than others. And some employees make a more important contribution than others to achieving the institution’s stated goals. The challenge is to identify—on a principled basis—who fits into which category.

III. SURVEILLANCE VERSUS STRATEGY

Post-tenure review has a troubling pedigree. In Arizona, post-tenure review developed as an alternative to the elimination of tenure altogether. The Board of Regents there was concerned about faculty productivity and “exasperated” by what they saw as an unduly privileged and inflexible workforce.¹⁴ Ultimately, the Board adopted a post-tenure

13. See *infra* note 25 and accompanying text. Some readers of this Article would be horrified, of course, at the notion that the business model has anything to teach us. See, e.g., Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417 (1998) (decrying the use of “market” measures in assessing faculty performance). Others have wisely recognized that some aspects of the business model—including the articulation and pursuit of a specific educational mission, stringent cost control efforts, and the dismantling of ineffective traditions (however comfortable they may make us feel)—have much to offer to legal education. See, e.g., Donald J. Weidner, *The Crises of Legal Education: A Wake-Up Call for Faculty*, 47 J. LEGAL EDUC. 92 (1997).

14. Gregory R. Wegner, *Arizona State University*, POLICY PERSPECTIVES: EXEMPLARS, Nov. 1999, at 1, <http://www.thelearningalliance.info/Docs/Jun2003/DOC-2003Jun10.1055247902.pdf>.

review program as a mechanism to give the state's universities "real power to take corrective measures when faculty performance was less than satisfactory."¹⁵ The Board insisted that the program include outside reviewers, in part because "[they] basically did not think the faculty alone could be trusted . . . to correct deficiencies in their own ranks."¹⁶ The purpose of post-tenure review in Arizona was obviously to get rid of "deadwood" and other non-productive faculty members. There was very little discussion about what to do to reward or incentivize faculty high-performers.

Colorado offers a similar story. In 2005, the University of Colorado's Board of Regents established an Advisory Committee on Tenure-Related Processes. The expressed concern was that Colorado voters saw tenure as a "job for life," regardless of the quality of faculty performance."¹⁷ There was an overarching sense that the public lacked confidence in the tenure system.¹⁸ The Board of Regents insisted that any review of that system be "conducted under the direction of a distinguished individual from outside academia with the assistance of a working group retained for the purpose."¹⁹ (The "working group" included the accounting firm PricewaterhouseCoopers. The "distinguished individual" was a retired Air Force General.)

To its credit, although inelegantly, the Colorado Advisory Committee ultimately recommended not only a strengthening of the post-tenure review process to better address poor performers but also some attention to creating positive incentives for high performers within the system.²⁰

The problem is that this kind of rhetoric—the notion that post-tenure review offers anything more than a punitive environment and a costly distraction for most professors who do their jobs well—has often been empty. In one study of post-tenure review, the researchers concluded

15. *Id.* at 3.

16. *Id.* at 4 (quoting the then-president of the Faculty Senate at Arizona State University).

17. ADVISORY COMM. ON TENURE-RELATED PROCESSES, UNIV. OF COLO. BD. OF REGENTS, REPORT ON TENURE-RELATED PROCESSES AT THE UNIVERSITY OF COLORADO 5 (2006), <http://www.epi.elps.vt.edu/Perspectives/COLOTenure.pdf>.

18. *Id.* at 3.

19. *Id.* at 7.

20. "Recommendation 36: Post-tenure review should be revised to provide incentives for faculty reward and development and sanctions for faculty discipline and remediation. The university should review the tools available for both to ensure the desired results are being achieved." *Id.* at 158.

that “as a tool for promoting individual and institutional change, [post-tenure review] has not motivated faculty to align their individual goals and practices to those of their institution[s] nor to improve the quality or quantity of their work.”²¹ Another described post-tenure review as “surveillance, not development or assistance.”²²

Recent polls suggest that post-tenure review as currently practiced does very little to improve the performance of those faculty members who are performing adequately.²³ It may also have very little impact even on those faculty members who are performing *inadequately*. One problem has been a lack of commitment and follow-through for poor performers.²⁴ Another is an exaggerated notion of due process that permits remedial “performance” plans to go on for years and years.

Using post-tenure review as a lever for institutional improvement, however, *is* possible. Sophisticated performance evaluation techniques can be employed both to assess current performance levels and to incentivize specific types of improvement desired by the employer.²⁵ We already have many models for conducting thoughtful performance evaluations.²⁶ Recognizing good teaching; identifying scholarly work that is original and challenging; singling out shortcomings in an otherwise admirable job performance; and prescribing specific steps to take to improve, say, one’s skills in leading meetings, or leading classroom discussions, or moderating a panel discussion, or to finish a much worked-over book, are all within our grasp.

21. Patriquin et al., *supra* note 4, at 279.

22. O’Meara, *supra* note 4, at 185.

23. DEBORAH L. RHODE, *IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS, AND ACADEMIC CULTURE* 166 (2006).

24. LICATA & MORREALE, *supra* note 4, at 53 (reporting a “pervasive dissatisfaction on the part of campus stakeholders about the lack of meaningful follow-through.”).

25. See generally HUSELID ET AL., *supra* note 1; BRIAN E. BECKER, MARK A. HUSELID & DAVE ULRICH, *THE HR SCORECARD: LINKING PEOPLE, STRATEGY, AND PERFORMANCE* (2001); and KAREN MCKIRCHY, *POWERFUL PERFORMANCE APPRAISALS: HOW TO SET EXPECTATIONS AND WORK TOGETHER TO IMPROVE PERFORMANCE* (1998).

26. See generally DICK GROTE, *THE COMPLETE GUIDE TO PERFORMANCE APPRAISAL* (1996).

IV. A SAMPLING OF FORMATS

There are many possibilities, of course, for a post-tenure review format.

One possibility would be to have peer groups and/or deans assess faculty members in much the same way as many public school teachers now assess their students, using a “standards-based” assessment model. Appendix I is an adaptation of a “standards-based” report card currently in use in United States public schools.

Another possibility would be to utilize the kind of performance evaluation instrument often used by business leaders in assessing the quality of their middle- and senior managers. Appendix II is an adaptation of a widely-used management performance evaluation instrument.

Yet, another version of a business-based assessment tool, focusing on the “core competencies” identified as essential for business success today can be seen in Appendix III.

While the match is not perfect, all of these formats are at least plausible in the context of a strategic post-tenure review program at a law school. In the next section, I will attempt to set out what I see as an optimum format.

V. METRICS

Post-tenure review raises many challenging issues—should it be “triggered” or periodic; “developmental” or “consequential;” who (peers only or administrators plus peers, outsiders or not) should participate; how should peer-reviewers be trained; should a faculty member’s overall performance be “unsatisfactory” before corrective action is required, or should a single “unsatisfactory” feature of overall performance (e.g., teaching) give rise to required corrective action; how can trust and collegiality within faculties be maintained?

The heart of post-tenure review, however, involves the identification and articulation of the behaviors the institution is trying to encourage. This question is central to the success of any post-tenure review (or, for that matter, tenuring) process. As one observer has pointed out,

[it would seem] prudent to begin research and discussion at institutional and departmental levels about meaningful indicators of professional growth and vitality among tenured senior faculty. Without a clear sense of the goals and benchmarks to which tenured faculty are to be held accountable, the post-tenure review process will remain a rubber stamp for current levels of “acceptable” performance.²⁷

In the next few paragraphs, I will offer one view of the indicators that should govern post-tenure review in law schools, at least for traditional “podium” faculty. A very different set of indicators might be devised to cover clinical faculty or skills-focused faculty, though there should be many areas of overlap among these lists.

A. The Vertical Axis

A meaningful post-tenure assessment of full-time law faculty members should include most, if not all, of the following items, which range from the bare minimum to the aspirational.²⁸ These items need not be afforded equal weight, and each institution should determine its own weight for each item. Indeed, determining the order in which these items should be prioritized should be a key element of each law school’s self-study and strategic planning process. And deciding which *five to eight* of these items are seen as crucial to a particular law school’s success, is what will distinguish one law school from another.²⁹

ELEMENTS OF SUCCESSFUL POST-TENURE PERFORMANCE

- (1) deals effectively with diverse populations; is sensitive to cultural differences, students’ differing learning styles, and colleagues with different backgrounds and viewpoints;
- (2) promotes active learning among his/her students;

27. Patriquin et al., *supra* note 4, at 295.

28. Some of these items may fairly be characterized as “market-based” assessments. Professor Richard Markovits of the University of Texas has criticized such assessments as illegitimate and “irresponsible.” Markovits, *supra* note 13, at 410. I disagree with him on many scores. For example, students have every right to play a role in the assessment of their professors’ teaching abilities, and citations or favorable evaluations by others is one (though only one) of many legitimate measures of scholarship quality and impact on the profession. To pretend otherwise is to ignore the fact that students are paying (and borrowing) for their educations and, as stakeholders, should be part of any assessment process. Professional peers, too, have an important role to play, regardless of the deficiencies of “cite count” studies, the shortcomings of the law review selection market, and the corruptive effects of cronyism, all of which I acknowledge.

29. See BECKER ET AL., *supra* note 25, at 68 (“It is easy to think that everything is important, but if you do this, soon nothing is important. For measurement to matter, you have to measure only what matters.”).

- (3) receives high “customer satisfaction” scores as expressed in students’ course evaluations;
- (4) has demonstrated *improvement* in teaching since the last performance evaluation, as measured by student evaluations and peer observations;
- (5) enjoys a constructive relationship with students outside of class (sponsorship of organizations, attendance at student-sponsored events, support of student projects);
- (6) is physically present in the school and available to students;
- (7) has improved student demand for elective courses since the last performance evaluation;
- (8) maintains currency with legal and policy developments in his/her field;
- (9) maintains energy and enthusiasm for the required elements of the job;
- (10) effectively cultivates and exploits professional networks to acquire information, develop ideas, and solve problems;
- (11) is recognized by “thought leaders” in his/her field as making useful, ongoing contributions to that field (ideally through the production of scholarship and participation in symposia, but also through “public intellectual” activities, leadership in organizations such as the ABA or ALI, invitations to teach CLE courses, or otherwise);
- (12) has regularly produced high quality scholarship since the last performance evaluation;
- (13) has published work in target publications *at least twice* since the last performance evaluation;
- (14) has demonstrated *professional development* since the last performance evaluation either through the “deepening” or “broadening” of his/her scholarship (or both);
- (15) specifically teaches and tests for the skills necessary for effective lawyering performance;³⁰

30. Researchers at the University of California, Berkeley have identified 26 “effectiveness factors” that characterize a good lawyer, including organizing and managing work, developing relationships, researching the law, speaking, writing, and practical judgment. Linley Erin Hall, *What Makes for Good Lawyering?*, BOALT HALL TRANSCRIPT, Summer 2005, at 22, http://www.law.berkeley.edu/alumni/transcript/summer_05/22-27_feat_23_lsat_final.pdf.

- (16) uses an appropriate variety of assessment techniques;³¹
- (17) demonstrates innovation, originality and creativity in teaching;
- (18) demonstrates innovation, originality and creativity in scholarship;
- (19) engages in useful transmission of professional skills and values to junior colleagues (mentorship);
- (20) is a good ambassador to outside constituencies (colleagues on the main campus, alumni, donors, etc.);
- (21) plays a constructive role in institutional governance;
- (22) specifically contributes to the (unique) mission of the law school;
- (23) models ethical behavior in using and crediting the research of others; supervising research assistants; writing recommendation letters; maintaining confidentiality; dealing with students and colleagues generally;
- (24) exhibits the scouting virtues.³²

It is fair to say that many legal academics would find the foregoing list wholly inadequate to describe the behaviors they are looking for in their tenured faculty and others would find it overinclusive. That kind of disagreement is fine with me. The point is that faculties should think carefully about what behaviors they want to see rewarded and reach some consensus about what matters most.³³ Law schools should then set out to measure how well they are doing against these goals as a baseline for future improvement. They should further think hard about how to get where they want to go.³⁴

31. Good testing should address the full range of cognitive competencies: recall, application, analysis, synthesis, and evaluation. BENJAMIN BLOOM ET AL., *TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK I: COGNITIVE DOMAIN* (1956).

32. For this purpose, one may invoke the Boy Scout virtues from the Scout Law (trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent), the Girl Scout virtues (honest and fair, friendly and helpful, considerate and caring, courageous and strong, and responsible for what I say and do), or some combination thereof.

33. Participants in this symposium suggested that this effort might be impossible at some law schools. Obviously, a fractured faculty will have a more difficult time reaching consensus than one with a greater sense of shared values. Some faculties might indeed “implode” with the effort. Failure to make the effort, however, is unacceptable. Not every law school can be a “mini-me” of Yale or Stanford. Survival for many law schools will require pursuing a different, distinctive path.

34. Experts stress that this is not a one-time exercise. Revisitation of core values and performance metrics are essential. According to the leading writers in the field, a firm should re-evaluate its workforce metrics at least every five years. HUSELID ET AL., *supra* note 1, at 241.

B. The Horizontal Axis

Thinking about these (and other) objectives leads us to the question of quantification. Current post-tenure review protocols typically ask assessors to rate a faculty member's performance as "excellent," "satisfactory," or "in need of improvement."³⁵ Some schools break the scale down even further. VMI, for example, uses four categories—"exceptional," "commendable," "provisional," and "unacceptable."³⁶ Georgia State uses six.³⁷

The problem with creating a performance scale, of course, is definitional. How does one distinguish among the categories and, more importantly, how does one describe the distinction between each of them with clarity? The necessary line-drawing can take months or years of faculty discussion. (There are, of course, hundreds of resources suggesting ways to assess teaching quality on scales such as these and at least a handful of articles suggesting similar ways to assess the quality of legal scholarship.³⁸ Schools electing to use a scale approach will not lack for templates or theoretical support.)

Some schools have avoided some of the line-drawing problem by asking assessors merely to distinguish between performance that is "satisfactory" or "unsatisfactory" without any additional qualitative gradations.³⁹ Taking this approach may help sort out the "deadwood" from the majority of faculty members, but otherwise does little to improve the institution. If the purpose of post-tenure review is to

35. See, e.g., Kate Harrington, *The View from the Elephant's Tail: Creation and Implementation of Post-Tenure Review at the University of Massachusetts*, in EXPERIENCED VOICES, *supra* note 2, at 66, 71 (describing the process in the Massachusetts system).

36. Susan H. Barr, *Learning About Post-Tenure Review from Peer Institutions*, in EXPERIENCED VOICES, *supra* note 2, at 207, 208.

37. Ronald J. Henry, *Getting Out in Front: Cumulative Review and Development for Tenured Faculty*, in EXPERIENCED VOICES, *supra* note 2, at 167, 172. The categories are (1) excellent or very effective in all areas of instruction, scholarship, and service; (2) excellent or very effective in instruction and/or service with moderate scholarship productivity; (3) excellent or very effective in instruction and/or service with limited scholarship productivity; (4) not effective in instruction; (5) not effective and unwilling to accept a negative assessment; (6) decided to retire. *Id.*

38. See, e.g., Jayne W. Barnard, *Reflections on the British Research Assessment Exercise*, 48 J. LEGAL EDUC. 467 (1998) (suggesting several matrices for the evaluation of legal scholarship).

39. Betsy E. Brown, *Balancing Institutional Processes and State-Mandated Post-Tenure Review*, in EXPERIENCED VOICES, *supra* note 2, at 141, 144 (describing the system at Winthrop University in South Carolina).

strengthen the institution, then something more specific and prescriptive than this binary approach should be required.⁴⁰ But what?

What about a comparative model like the graduate school recommendation forms many of us fill out every year? Appendix IV contains one such form.

One way to conduct post-tenure review would be to ask peers, colleagues, and students to use such a form to “locate” each faculty member on a performance curve for each of the items on the “vertical axis.”

This “performance curve” format avoids the harder definitional questions of the “scale” approach but relies instead on the subjective observation of the rater(s). We can anticipate that this kind of comparative ranking would likely encounter strong resistance from faculty members, who are happy to rank their students but usually prefer not to be ranked themselves.⁴¹ And, there is legitimate reason to fear this type of ranking if it leads to the kind of “rank-and-yank” practices (the periodic defenestration of employees ranked in the bottom ten percent) that were lionized in the private sector in the 1990s.⁴² Avoiding identification of the bottom 10 or 20 percent would minimize this anxiety, however. Anxieties about the influence on ranking of prejudice, jealousy, and reliance on rumor or gossip will be much more difficult to dispel.⁴³

Still, it might be useful in a competitive environment for a faculty member to understand just where she stands among her colleagues. Just as fourth tier law schools now scramble to get into the third tier, and schools in the third tier into the second, etc., faculty members who are told they are in the bottom 30 or 40 percent of their faculty peers might just scramble to get themselves into the next higher category in time for

40. Debra P. Price et al., *Post-Tenure Review in Texas: An Evolving Response to the Legislature's Challenge*, in EXPERIENCED VOICES, *supra* note 2, at 194, 203 (“a simple checklist cannot aid faculty development. If a faculty member receives a “satisfactory” rating—as the vast majority will—there are no specific recommendations. Faculty members need feedback that is more substantive than a simple pass/fail grade.”).

41. Gail F. Latta & Daniel W. Wheeler, *The Context as Key to Developing and Implementing Post-Tenure Review: The University of Nebraska-Lincoln Experience*, in EXPERIENCED VOICES, *supra* note 2, at 111, 127 (noting that professors “expect their own accomplishments to be judged in relation to the stated performance standards, not in relation to other faculty members’ productivity and accomplishments.”).

42. See generally DICK GROTE, *FORCED RANKING: MAKING PERFORMANCE MANAGEMENT WORK* (2005).

43. The more raters who are brought to the system, the more likely these influences will be offset. See DAVENPORT, *supra* note 3, at 52 (“For an organization assessing the quality of an individual knowledge worker’s contributions, it’s important to solicit opinions from a wide variety of people, and to try to remove any sources of bias.”).

the next performance review. A well-structured post-tenure review process might give them an outline of where to focus their energies.

Some post-tenure review schemes eschew quantification altogether in favor of a narrative summary.⁴⁴ The benefit here is that the report is designed to identify both strengths and weaknesses and to prescribe (sometimes gently, sometimes with vigor) specific behavioral changes. It is, therefore, particularly demanding of peer reviewers (and/or deans) who must both diagnose and design corrective measures for deficiencies in ways that are time-consuming and disruptive to a faculty's sense of community.⁴⁵ The result is that these summaries are often so generalized or diplomatized as to be useless. (Many post-tenure review processes have gobbled up hundreds of faculty hours to deliver a message that could have been delivered by an attentive dean months before.)

Is there a useful model of this narrative approach in the business world that might be translated to an academic setting? We might turn to the experience of General Electric's former Chief Executive Officer, Jack Welch. Welch is legendary for the attention he paid to his middle- and senior managers and their trajectory within GE. At any given time, Welch monitored several hundred middle- and senior-level GE managers. He did not do this alone, of course. Welch's "book" on each manager was the product of multiple assessments from other managers, employees, and customers (a so-called 360-degree evaluation). The initial stages of the process were highly quantitative. Then, at the end of the year, each manager received a handwritten, two-page evaluation of his or her performance, with detailed notes and follow-up comments from the previous year's performance review.⁴⁶

The assessment process GE employed also involved rating managers on an A-B-C scale, with "A" representing the top 20 percent of performers,

44. See, e.g., Kelly S. Janousek & Wayne Dick, *The Benefits of Pilot Testing: Post-Tenure Review at California State University, Long Beach*, in EXPERIENCED VOICES, *supra* note 2, at 80 (describing a post-tenure review system that relies almost entirely on narrative summaries and recommendations by the faculty member and reviewers).

45. Faculty members are understandably reluctant to offer criticism or "performance feedback" to their colleagues, both because it is difficult and because it is "uncollegial." O'Meara, *supra* note 4, at 187-88. The need to retain at least the veneer of collegiality goes to the core of traditional academic values.

46. John A. Byrne, *How Jack Welch Runs GE*, BUS. WK., June 8, 1998, available at <http://www.businessweek.com/1998/23/b3581001.htm>. Samples of these handwritten evaluations are included in Welch's memoir. JACK WELCH WITH JOHN A. BYRNE, JACK: STRAIGHT FROM THE GUT app. C (2001).

“B” representing the next 70 percent, and “C” representing the bottom 10 percent.⁴⁷ “A” players, Welch claimed, were filled with passion, open to ideas from anywhere, committed to making things happen, and exhibited the “four E’s” of leadership—high energy levels, the ability to energize others, the “edge” to make difficult decisions, and the ability to consistently execute or deliver on his or her promises.⁴⁸ The same or similar characteristics would seem to apply to outstanding law professors.

What is remarkable about Welch’s approach is the degree to which he was personally involved in his subordinates’ performance evaluations, and the details of their performance with which he was familiar. Welch was said to spend fifty percent of his time observing, coaching, grooming, challenging, and evaluating his managers.⁴⁹ Think how much better law schools would be if capable deans or their designees were able to allocate their time (and motivate their employees) like Jack Welch.⁵⁰

In GE’s case, Welch set out to evaluate both quantitative performance (“based on how people deliver on certain goals”) and qualitative performance (“based on how they deliver on desired behaviors”).⁵¹ A recent book, *Thinking for a Living*, examines the specific challenges presented when trying to assess the quality of the work of professional experts (like law professors).⁵² Beginning with the acknowledgment that “knowledge worker outputs are difficult to define and measure,”⁵³ the author suggests that work of this type at least be evaluated in terms of “speed, cost, freedom from defects [and] customer satisfaction.” More importantly, he argues, the *quality* of knowledge work can only be evaluated subjectively by an appropriate peer group.⁵⁴ The peer review process, in

47. Displayed graphically, this array was known as the “vitality curve.” Welch recognized that the B’s were the “heart of the company and [were] critical to its operational success.” WELCH, *supra* note 46, at 159. He has since emphasized that “[the middle 70 percent] are enormously valuable to any company; you simply cannot function without their skills, energy, and commitment.” JACK WELCH WITH SUZY WELCH, WINNING 41 (2005) [hereinafter WINNING]. One of the biggest challenges in business is “keeping the middle 70 engaged and motivated.” *Id.*

48. Byrne, *supra* note 46.

49. *Id.* In his memoir, Welch said “[a]ppraisals to me were like breathing. . . . I was giving appraisals all the time—whether I handed out a stock option grant or gave a raise—or even when I’d bump into someone in the hallway. I always wanted everyone to know where they stood.” WELCH, *supra* note 46, at 388.

50. Experts who have been thinking about a more strategic use of post-tenure review acknowledge that any such process “would be more time consuming [than what is required today], especially for chairs and deans.” Bensimon, *supra* note 8, at 128.

51. WINNING, *supra* note 47, at 105.

52. DAVENPORT, *supra* note 3.

53. *Id.* at 47.

54. *Id.* at 49.

turn, must be supported by a “measurement and improvement culture” that includes adequate support for performance improvement (sometimes this means better equipment, more accommodating scheduling, or additional training). Support must be focused on improving individual performance, sometimes at significant cost.⁵⁵

The process, in short, is expensive and must be individualized. It should also be aimed at specific organizational objectives. It is not at all the same as what passes for post-tenure review in most law schools today.

VI. THREE POST-TENURE REVIEW STORIES

Assume a law school faculty has gone through a process of identifying the law school’s core values (or the “vertical axis”) for faculty performance. In my hypothetical case, Law School X has positioned itself to be a cutting-edge teaching institution emphasizing innovation, technology, group learning, and teamwork. Faculty interaction with students is especially valued, and plays a prominent role in the school’s advertising materials. Scholarship is a secondary value at Law School X and little weight is given to, say, prestige placements or theoretical works. Still, Law School X sees scholarship as a key element of its identity.

Assume further that a periodic post-tenure review process has been invoked, with self-assessment, appropriate peer review, and student input. Three faculty members are subject to post-tenure review this year. You probably know all three of these professors—Jo is an energetic leader and an able teacher, who needs to focus more on her scholarship (or move to a teaching-only role). Elliott is a committed scholar whose other roles interest him less than his scholarship, but still he consistently delivers what is needed. Marilyn appears to be burned out—she needs “minders” and deadlines and a firm follow-up structure. She needs to do more than serve responsibly on faculty committees.

Nobody in this group is a superstar (and let’s face it, there are very few people whom we would consistently rate in the top 20 percent of all or even most of the “vertical axis” items). And yet Jo and Elliott—in different ways—are each strong contributors to the law school’s overall mission.

At the conclusion of the process, the results for Jo, Elliott, and Marilyn might look something like the reports on the following three pages.

55. *Id.* at 111.

JO'S REPORT

	Bottom 30%	Middle 50%	Top 20%
Customer satisfaction with quality of instruction			
Constructive relationship with students outside of class			
Demonstrates innovation, originality and creativity in teaching			
Maintains energy and enthusiasm for all aspects of the job			
Has regularly produced high-quality scholarship			
Has "deepened" or "broadened" scholarly interests			
Plays a constructive role in institutional governance			
Is a good ambassador to outside constituencies			

Jo—you are an important contributor to our success. I value your enthusiasm for our mission and your willingness to work hard—both on the Curriculum Committee and on the Admissions Committee—to keep us moving forward. You really keep these committees on track.

I hope over the summer you will be able to finish your article on recent developments in debt collection law. I encourage you to work with Susan, who has agreed to help you as you go through your revisions. She is great at helping colleagues reach the finish line on articles, so don't be reluctant to seek her help. Since you will be teaching a new course next year, it will be important to have this project behind you. Let's touch base in July to make sure everything is going well.

ELLIOTT'S REPORT

	Bottom 30%	Middle 50%	Top 20%
Customer satisfaction with quality of instruction			
Constructive relationship with students outside of class			
Demonstrates innovation, originality and creativity in teaching			
Maintains energy and enthusiasm for all aspects of the job			
Has regularly produced high-quality scholarship			
Has "deepened" or "broadened" scholarly interests			
Plays a constructive role in institutional governance			
Is a good ambassador to outside constituencies			

Elliott—We all continue to be impressed with your output of publications. I am confident it will continue, and have allocated two additional research assistants to you next year—your current assistants praise your generosity in teaching them to research and clarify their ideas. Thank you!

Your teaching has consistently been at or above the mean of student evaluations in recent years, but I think it warrants some renewed attention. I will be reducing your teaching load by one course next semester so you can attend the University's Master Teachers' Program. I think the Program may give you some new ideas about using technology and enlisting more students in classroom discussion.

MARILYN'S REPORT

	Bottom 30%	Middle 50%	Top 20%
Customer satisfaction with quality of instruction			
Constructive relationship with students outside of class			
Demonstrates innovation, originality and creativity in teaching			
Maintains energy and enthusiasm for all aspects of the job			
Has regularly produced high-quality scholarship			
Has "deepened" or "broadened" scholarly interests			
Plays a constructive role in institutional governance			
Is a good ambassador to outside constituencies			

Marilyn—thank you for your efforts over the last two years on the Appointments Committee. I know this assignment consumed a great deal of your time, and the results—two great hires—will serve us for many years.

Unfortunately, your other work has suffered in recent years—your teaching seems flat and uninspired and you haven't published anything since 2001. You simply must address both these issues over the next year. I have asked Susan to spend some time with you to think about ways in which you can jump-start your writing. Also, I have asked Maureen to sit in on several of your classes this semester, and then meet with you to talk about how you might improve your student evaluations. Let's meet in two months to talk about your progress. You should know that improvement is imperative, but I stand ready to help where I can.

In Jo's Report, we see both a comparative measure of faculty performance and also a summary of her strengths and weaknesses. It satisfies Jack Welch's prescription to be "clear and simple [and] washed clean of time-consuming bureaucratic gobbledygook."⁵⁶ It also contains the two essential features of a meaningful performance evaluation—"what [the rater] thought the person did well, and how [the rater] thought they could improve."⁵⁷ Perhaps most importantly, it provides a specific resource—in this case, Susan—to help Jo improve on her performance. It also offers some follow-through and a time frame and a mechanism to ensure accountability.

In Elliott's Report, we see an example of a reward coupled with a plan for improvement designed to fulfill the law school's primary strategic objective—better teaching. Elliott's performance has always been adequate (or better) but he is still capable of growing and improving. Post-tenure review, in this case, encourages individual professional development. It also, and importantly, serves the law school's greatest needs.

Marilyn, of course, is a problem case. While she may be "professionally competent," she isn't doing much to help Law School X meet its strategic objectives. Whether a shaming sanction (regular oversight by her colleagues Susan and Maureen) or simply the recognition of her place among her peers will suffice to motivate Marilyn at this point in her career is unclear. Further intervention may be required.

The documents I have sketched out here—the end product of my proposed post-tenure review process—provide clarity and tie the reward structure to these professors' individual strengths and weaknesses. They also reinforce institutional values and priorities.

VII. FOUR QUESTIONS

We have now identified several models and formats for a workable law school post-tenure review program. I have suggested a format that includes a comparative ranking of attributes across the faculty and a Jack Welch-style exposition of a faculty member's strengths and weaknesses. The document memorializing the process identifies specific targets to be achieved in a specified period of time.

56. WINNING, *supra* note 47, at 104.

57. *Id.* at 105.

This proposal raises four questions: (1) what risks, if any, to academic freedom are posed by this model? (2) what consequences should flow from one's failure to satisfy the prescription(s) identified in the post-tenure review report? (3) what is the likelihood of providing meaningful compensation for those faculty members who successfully promote institutional objectives? and (4) who—in terms of job title and status—could possibly implement a post-tenure review scheme like the one proposed here?

The answers to these questions, in a nutshell, are as follows.

A. Academic Freedom

This proposal poses no risk to serious invocations of academic freedom.⁵⁸

That is, freedom of thought and expression in one's scholarly output (and related public intellectual fora) will not be the focus of the post-tenure review process. It is possible, of course, that an institution's identification of a statement of values may have an indirect impact on topic selection or scholarly approach to certain material. A law school that wants to position itself as a school that offers North American/South American perspectives on all legal matters, stressing cross-cultural differences and resulting solutions,⁵⁹ may discourage its professors from writing about strictly local matters like contract enforcement in New Jersey. A law school that wants to train sophisticated family law practitioners and children's rights advocates should have the right to expect that each of its professors contribute—through teaching and scholarship—to enriching that mission, rather than thinking exclusively about payment systems in China.

Within that framework, however, a scholar should be assured that her choice of topic, freedom to argue on any side of an issue, freedom to select the vehicle(s) for her expression (monographs, law review articles, *amicus* briefs, etc.), and freedom to be provocative in her advocacy, should remain inviolate. Academic freedom need not be absolute to be meaningful. Indeed, the notion that a law professor should feel free to pursue her intellectual whims without regard to the overall institutional

58. The most recent studies of post-tenure review have concluded that academic freedom is not threatened by the process. LICATA & MORREALE, *supra* note 4, at 54 (noting that rarely during the scores of interviews the investigators conducted “did individuals assert that post-tenure review was eroding core values such as academic freedom, professional autonomy, collegiality, and professionalism.”).

59. This hypothetical is loosely based on the curriculum at McGill University. See Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. LEGAL EDUC. 161 (2006).

mission (or source of her paycheck) is one of the great fallacies of academic life.⁶⁰

B. Consequences

Under this proposal, the consequences of failing to achieve improvement on specific “vertical axis” items will be “progressive.” They will include, in the first instance, an intense intervention in the form of coaching and retraining. Thereafter, a dean may escalate the intervention to include reassignment away from areas of weakness to areas of strength. In the most intractable cases, a dean may commence a disciplinary process aimed at the faculty member’s downgrade in status or even removal. That is, the possible outcomes of the post-tenure review process as I have imagined it are much like the possible outcomes of a less rigorous post-tenure review today. Additionally, as is the case today, only a very small handful of faculty members should find their careers at risk.

The bottom line, however, will be that teachers who fail to *improve* their teaching, scholars who fail to *improve* their publication record, and slackers who fail to *improve* their service contribution can no longer hope to slink around the building praying that nobody notices them or that generous notions of “professional competence” will see them through another post-tenure review cycle. If post-tenure review is to mean anything, then faculty members should be expected to recognize and adapt to their law school’s changing strategic objectives. And they all should be expected to take at least small steps to “get with the program.” This will be as true for the “middle seventy percent” of faculty performers as for those at the bottom of the “vitality curve.”

C. The Reward Structure

Under this proposal, compensation would be tied to performance and adherence to institutional values. Law school deans would structure their reward systems with institutional values in mind.⁶¹

60. I recognize that my view of academic freedom, and my approval of an institution’s right to circumscribe certain intellectual adventures, runs wholly contrary to the autonomous scholar ideal. See generally William G. Hollingsworth, *Controlling Post-Tenure Scholarship: A Brave New World Beckons?*, 41 J. LEGAL EDUC. 141 (1991) (defending even extreme notions of the autonomous scholar ideal).

61. Reward systems include more than straight compensation, of course. They include the entire array of compensation options—salary, travel grants, teaching assistants,

Let me be more specific. Professors who excel in doing what the law school does not value should not expect to be paid more than people who consistently deliver what the law school *does* value, even if they are superstars.⁶² In a world of limited resources, assessment and compensation should be tied, at least in part, to an institution's priorities.

Here's one example of a simple compensation formula. Using an A-B-C performance assessment system where "A" represents the top 20 percent and "C" represents the bottom 10 percent, "[t]he A's should be getting raises that are two to three times the size given to the B's. B's should get solid increases recognizing their contributions every year. C's must get nothing."⁶³

Indeed, some low performers may even be given a pay *reduction*. According to the leading writers on strategic assessment practices, "[w]e are increasingly observing the situation that when long-term, often highly compensated individuals underperform, the organization may actually reduce their salary in an attempt to send the appropriate pay-for-performance message and reinstate performance equity within the firm. This would be unheard of where an undifferentiated strategy is the norm."⁶⁴

My point is not that poor performers should be punished financially (although in some cases, that may make sense). The point is, rather, that significant contributors to a firm's strategic objectives should receive "disproportionate investment."⁶⁵

D. Implementation

Finally, we must confront the question of who could make a system like this work. Dan Rodriguez has pointed out that deans are unlikely

research assistants, sponsorship of events at which faculty members are featured players, course reductions, etc.

62. Of course, if these superstars are not recognized as they think they deserve, they will defect to a higher bidder. This defection will exacerbate the "free agency" model described by Clay Gillette. Clayton P. Gillette, *Law School Faculty as Free Agents*, 17 J. CONTEMP. LEGAL ISSUES 213 (2008).

63. WELCH, *supra* note 46, at 60.

64. HUSELID ET AL., *supra* note 1, at 57.

65. This term is used to describe the compensation strategy necessary to retain high performers in the business world. HUSELID ET AL., *supra* note 1, at 35. ("Managers need to disproportionately focus their efforts on the best employees in the firm's most important jobs.") According to the authors, "[m]anagers are paid to differentiate. In the case of workforce strategy, this takes the form of disproportionate investments in high-return positions and high-return individuals. The challenge is to think of these investments as strategic decisions and bring the same discipline and effort to investing in intangibles as to making tangible investment decisions." *Id.* at 48.

candidates for the task since their jobs are already complex and overfilled with managerial demands.⁶⁶ Clay Gillette suggests that deans are averse to confrontations with their faculty and are far more likely to indulge them than to insist on adherence to institutional norms.⁶⁷

Another option is the academic dean, who typically cycles back onto the faculty at the conclusion of his or her term on the job. Administering a serious post-tenure review system such as that proposed in this Article would make reintegration into the full-time faculty difficult. It also likely would exacerbate the problem of recruiting academic deans.

A third option is the professionalization of the performance assessment function outside of the law school hierarchy. Putting the post-tenure review process into the hands of a provost-type person might reduce friction among colleagues but would certainly reduce its legitimacy within the law school faculty.

In short, the question of where meaningful post-tenure review should reside is one requiring careful law school-specific thought. This may be a job that no one person can do well.

VIII. CONCLUSION

A decade ago, the chair of the Massachusetts Board of Higher Education told a business audience that university tenure was “an absolute scam” that allowed faculty to teach only twelve hours a week and conduct “meaningless research” that was “a lot of foolishness.”⁶⁸ He was not entirely wrong.

Tenure, however, need not lead to lazy, mediocre teachers or to retired-in-place scholars pumping out the eighth iteration of an idea they had in 1992. Post-tenure review, properly implemented, can foster an environment of continued improvement and institutional revitalization.

A system that works to this end must include the following features:

- (1) a serious process through which institutional values are identified;
- (2) a serious assessment process in which behaviors that *dis-serve* institutional values are identified and redirected;

66. Daniel B. Rodriguez, *The Market for Deans*, 17 J. CONTEMP. LEGAL ISSUES 121, 127 (2008).

67. Gillette, *supra* note 62.

68. Harrington, *supra* note 35, at 67.

- (3) a serious assessment process in which behaviors that *advance* institutional values are recognized and encouraged; and
- (4) a compensation system that disproportionately rewards those who make the strongest contributions to the institution's strategic objectives.

There is an alternative, of course, to meaningful post-tenure review—the elimination of tenure. Without exploring the issue here, it is important to note that even hostile state legislators, when confronted seriously with the issue, have retained academic tenure as an important public value.

The proposal in this Article balances the need for tenure with the need for adaptation. Law schools of the future must seek some equilibrium between these values.

APPENDIX I

Key to Performance Levels

E (Exceeds) Subject exceeds the applicable standard

P (Proficient) Meets the applicable standard

N (Needs Improvement) Partially meets the applicable standard

W (Warning of Failure) Does not meet the applicable standard

Personal Skills	Fall	Spring
Demonstrates citizenship skills (respect, honesty, responsibility)		
Shows physical self-control		
Shows verbal self-control		
Accepts suggestions for improvement		

Work Habits	Fall	Spring
Listens attentively to others		
Works for accuracy		
Researches effectively		
Meets deadlines		

Service	Fall	Spring
Volunteers for tasks		
Fulfills commitments		
Demonstrates good judgment		
Demonstrates good attitude		

Course #1	Fall	Spring
Effort		
Designs course effectively		
Uses technology effectively		
Designs exams to test a range of competencies		
Responds to student inquiries		
Innovates in order to engage students in the material		

Course #2	Fall	Spring
Effort		
Designs course effectively		
Uses technology effectively		
Designs exams to test a range of competencies		
Responds to student inquiries		
Innovates in order to engage students in the material		

Scholarship	Fall	Spring
Writes regularly		
Shares drafts with others		
Comments effectively on others' drafts		
Submits for publication		
Develops new ideas – shows originality		
Utilizes materials from other disciplines to enrich legal conclusions		

Source: Wareham, Massachusetts public schools

APPENDIX II

Part I: Appraisal of Job Skills

Teamwork:	Works effectively with others. Contributes to important discussions, encourages participation by others. Shares credit and opportunities when appropriate. Displays an appropriate balance between personal effort and team effort.									
INDIVIDUAL 1										
APPRAISER 1										
Analysis:										

Problem Solving:	Recognizes and analyzes problems, both in scholarly work and in administrative matters. Considers alternatives and recommends solutions.														
INDIVIDUAL :															
APPRaiser :															
Analysis:															

Accountability:	Displays professionalism in approach to work. Accepts responsibility for all areas of the job. Does not make excuses for errors. Does not blame others for mistakes.												
INDIVIDUAL :													
APPRaiser :													
Analysis:													

Motivation:	Displays drive and energy in accomplishing tasks. Handles several responsibilities concurrently and comfortably. Displays a contagious enthusiasm for the job and the law school. Displays a positive attitude in completing work assignments and interacting with others. Sees to it that tasks are done well.							
INDIVIDUAL :								
APPRAISER :								

APPENDIX II (CON'T)

Analysis:													

Job Knowledge:	Possess sufficient skill and knowledge to teach and conduct research effectively. Rebrates current problems to historical ones. Provides technical assistance to others. Is consulted by others on professional matters. Makes active efforts to stay up-to-date.														
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Analysis:															

Planning and organizing:	Plans and organizes work effectively. Identifies available resources required to complete projects. Sets appropriate deadlines and checkpoints and meets them. Develops both short- and long-term plans. Makes good judgments about time allocation and resources required.														
INDIVIDUAL :	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td> </tr> </table>														
APPRAISER :	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td> </tr> </table>														
Analysis:															

Communications:	Presents ideas effectively in formal and informal situations. Conveys thoughts clearly and concisely. Listens well and asks appropriate questions. Communicates well in writing.														
INDIVIDUAL :	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td> </tr> </table>														
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Analysis:															

Work Quality:	Uses time effectively and with a minimum of error. Does work thoroughly in a reasonable amount of time.														
INDIVIDUAL :	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td><td style="width: 10%; height: 20px;"></td> </tr> </table>														

APPENDIX II (CON'T)

	OCCASIONALLY	SOMETIMES	FREQUENTLY	USUALLY
APPRaiser 1				
Analysis:				

Adaptability/ Flexibility:	Meets changing conditions and situations in work responsibilities. Accepts constructive criticism and suggestions and uses them to improve his/her work. Deals with anger, frustration, and disappointment in a mature manner. Maintains objectivity in conflict situations. Seeks solutions acceptable to all.			
INDIVIDUAL 1				
	OCCASIONALLY	SOMETIMES	FREQUENTLY	USUALLY
APPRaiser 1				
Analysis:				

Attendance/ Punctuality:	Is present for work every day. Is fully ready to work at beginning of work schedule and continues until work day is done. Makes appropriate arrangements when adverse weather conditions or other problems might make it impossible to honor professional obligations.			
INDIVIDUAL 1				
	OCCASIONALLY	SOMETIMES	FREQUENTLY	USUALLY
APPRaiser 1				
Attendance Record:	Number of days absent in past twelve months: _____. Number of days late in past twelve months: _____. Personal attendance percentage: ____%. Organizational attendance percentage: ____%.			
Analysis:				

Part II: Major Achievements/Contributions

In the following section, list the individual's three (3) major achievements during the appraisal period. Consider the action the individual took to make the organization more effective/more profitable/more desirable:	
1.	

APPENDIX III

Cultural Competencies			
	needs work	meets expectations	exceeds expectations
Knowledge of other cultures and legal systems			
Ability to work with people with different backgrounds, beliefs			

Substantive Competencies			
	needs work	meets expectations	exceeds expectations
Knows specific subject matter area(s)			
Utilizes allied disciplines to expand understanding			
Utilizes appropriate repertoire of teaching techniques			
Recognizes and adapts to students' individual learning styles			

Source: DAVENPORT, THINKING FOR A LIVING

Personal Competencies			
	needs work	meets expectations	exceeds expectations
Self-Motivation			
Analytic ability			
Problem-solving ability			

Communications Competencies			
	needs work	meets expectations	exceeds expectations
Writing			
Listening			
Public Speaking			
Preparing work that is acceptable for publication			

Organizational Competencies			
	needs work	meets	exceeds
Leadership skills			
Supervisory skills			
Interpersonal skills			

APPENDIX IV

	Exceptional (Top 5%)	Outstanding (Top 15%)	Above Average (Top 1/3)	Average (Middle 1/3)	Below Average (Bottom 1/3)	Unable to Assess
Intellectual ability						
Analytical ability						
Judgment						
Maturity						
Motivation/ Initiative						
Integrity						
Ability to work with others						
Oral communi- cation						
Written communica- tion						
Managerial potential						

Source: Recommendation Form
 Emory University
 Goizueta Business School