TENURE, FINANCIAL EXIGENCY, AND THE FUTURE OF AMERICAN LAW SCHOOLS

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I. INTRODUCTION

Law school applications continue to decline,[1] and commentators suggest that law schools across the spectrum will be affected by the decrease in the number of students seeking law degrees.[2] Some schools will accept students with lower credentials,[3] others will shrink their class sizes,[4] and still others will do both. Those schools reducing class size may try to make up for the decreased revenue in a number of ways ranging from increasing tuition[5] or private fundraising to reducing costs by reducing salaries, stipends, or a variety of other expenses.[6] Some will

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1. Todd E. Pettys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1258 (2012) ("[L]aw schools are receiving dramatically fewer applications for admission.").

2. *Id.*

3. Jay Sterling Silver, *The Case Against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISCOURSE 50, 54 (2012) ("As applications fall, so do entering credentials.").

4. David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 305 (2010) ("[M]any law schools are entering an era in which their student bodies . . . must shrink . . . .").

5. *But see* Steven R. Smith, *Financing the Future of Legal Education: "Not What It Used to Be,"* 2012 MICH. ST. L. REV. 579, 611 (2012) ("These schools could find themselves scrambling (at least for a while unsuccessfully) for students. They would probably be unable to increase tuition and be boxed in by high costs that will be difficult to reduce.").

6. *Id.* at 615 ("In addition to faculty size and compensation, some student services, general administrative costs, some practice skills, and fringe benefits would be likely

reduce the number of faculty and staff through buyouts,[7] whereas others will implement a reduction in force (RIF).[8] A background consideration in deciding whether to offer a buyout, institute a RIF, or instead implement some combination of the two involves the conditions under which tenure may be revoked due to financial exigency.[9]

This Article discusses various cases in which tenured professors challenged their dismissals due to financial exigency, outlining some of the considerations that come into play when courts consider whether to uphold such employment terminations. The Article then applies the existing jurisprudence to the law school context, discussing some of the complications that are likely to arise and noting that some of the anticipated cases will likely involve underexplored territory and will have important implications for the ways that universities are run as a whole.

II. LOSS OF TENURE DUE TO FINANCIAL CONCERNS

While law schools have closed in the past,[10] there is little to no case law involving a law professor challenging his or her dismissal because of the school's financial circumstances.[11] That said, there are numerous cases involving such challenges by professors in other disciplines, and those cases provide some guidance for how such cases will likely be handled when the foreseeable cases involving law professors work their way through the courts.

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targets of cuts."). *See also* Michael W. Klein, *Declaring an End to "Financial Exigency"? Changes In Higher Education Law, Labor, and Finance, 1971-2011*, 38 J.C. & U.L. 221, 274 (2012) ("Additionally, institutions must consider cost-saving alternatives to reducing their faculty ranks, including freezing or reducing salaries, travel, capital spending, supplies, or equipment.").

7. *Cf.* Rose v. Whittier Coll., No. B226983, 2011 WL 5223146 (Cal. Ct. App. Nov. 3, 2011) (discussing legality of buyout offer made to tenured faculty at Whittier Law School).

8. *See* Barnhizer, *supra* note 4, at 305 ("[M]any law schools are entering an era in which their . . . faculties must shrink . . . .").

9. *See* Klein, *supra* note 6, at 270 ("Tenure has an important economic influence on institutional decisions regarding layoffs.").

10. *See, e.g., Jack Conway Opens Investigations on Some For-Profit Colleges*, THE COURIER-J., Dec. 15, 2010, *available at* 2010 WLNR 24854019 (discussing "the now-defunct American Justice School of Law"); Katherine S. Broderick, *The Nation's Urban Land-Grant Law School: Ensuring Justice in the 21st Century*, 40 U. TOL. L. REV. 305, 305 (2009) ("In 1986, . . . Antioch University decided to close the law school and several other programs for financial reasons . . . .").

11. One of the few cases discussing related issues was decided in 2011. *See Rose*, 2011 WL 5223146, at *1 (suggesting that Whittier Law School could not "abrogate the contracts of tenured law professors based on financial exigency").

A. What Protections Does Tenure Provide?

As an initial matter, it is important to distinguish between public and private schools. Tenure creates a property interest protected under the United States Constitution if the tenure grantor is a state entity.[12] Because state action is required to trigger the relevant constitutional guarantees,[13] the Constitution as a general matter does not afford protection to tenure violations at a private institution.[14] Instead, those rights will be protected as a matter of contract[15] or, perhaps, protected by anti-discrimination laws.[16]

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12. *See* Johnson v. Bd. of Regents of Univ. of Wis. Sys., 377 F. Supp. 227, 235 (W.D. Wis. 1974) ("[O]nce the entity creating the position has afforded it the attribute of permanence or 'tenure,' then the due process clause of the Fifth or Fourteenth Amendment determines the minimal procedural protection which must attend termination or lay-off."), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

13. Hu v. Am. Bar Ass'n, 568 F. Supp. 2d 959, 962 (N.D. Ill. 2008) ("It is well-established, however, that the protections of the Fourteenth Amendment do not extend to private conduct." (citing Wade v. Byles, 83 F.3d 902, 904-05 (7th Cir. 1996)), *aff'd*, 334 F. App'x 17 (7th Cir. 2009).

14. *See* Selosse v. Fund. Educ. Ana G. Mendez, 22 P.R. Offic. Trans. 498, 511 (P.R. 1988) ("It is true that court intervention usually seeks to guarantee the due process of law which protects a professor's property interest in tenure at a State educational institution." (citing Cabán v. U.P.R., 120 D.P.R. 167 (1987); Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents v. Roth, 408 U.S. 564 (1972); Shelton v. Tucker, 364 U.S. 479 (1960))).

15. Breiner-Sanders v. Georgetown Univ., 118 F. Supp. 2d 1, 6-7 (D.D.C. 1999) (distinguishing "the public university cases, where the rights involved tend to be due process rights, from private university cases . . . which more often involve contract disputes"). *See also* Steven G. Olswang et al., *Retrenchment*, 30 J.C. & U.L. 47, 48 (2003) ("[T]he fundamental source of authority, and the first place to look, is the institution's own rules and regulations. An institution's policies frame the relationships among the faculty, staff, students, and institution. . . . [S]ome or all such policies constitute, or at least supplement, the contract between the institution and its faculty."); *id.* at 49 ("[T]enure can mean whatever the parties—limited by the relevant institutional policies and statutes—define it to mean."); James L. Petersen, Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417, 418 (1976) ("At private institutions the tenure relationship is governed by the terms of the employment contract.").

16. *See* Jiminez v. Mary Washington Coll., 57 F.3d 369, 372 (4th Cir. 1995) ("Anthony Jiminez (Jiminez), a black professor from Trinidad, West Indies, instituted suit pursuant to Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C.A. § 2000e-2000e-17 (West 1994), and 42 U.S.C.A. §§ 1981, 1983 (West 1994), against Mary Washington College and Philip Hall (Hall), Vice President of Mary Washington College (collectively MWC), for alleged employment discrimination based on race and national origin."); Linn v. Andover-Newton Theological Sch., 638 F. Supp. 1114, 1114 (D. Mass. 1986) ("Dr. Edmund H. Linn, a tenured faculty member of defendant Andover-Newton Theological School, was fired at the age of 62, after 31 years of service. He, thereafter, brought this suit, claiming that his employment was terminated in violation of the Age

Budget shortfalls arise for a number of reasons, for example, miscalculations about the number of students who will matriculate.[17] Many of the cases involving public institutions arose after the state legislature had reduced funding to the university as a whole, and cuts were made to various programs to stay within the overall budget.[18]

Consider *Levitt v. Board of Trustees of the Nebraska State Colleges*,[19] which involved a challenge to a decision to terminate the employment of James Levitt and Darrell Wininger at Peru State College because of financial exigency.[20] Each was tenured[21] and each worked at the college for over twenty years.[22] The Nebraska legislature's decision to reduce the school's funding caused financial difficulties.[23] Once it became clear that cuts would have to be made, the acting president met with certain deans to "prepare[] a list of 16 criteria on which faculty members could be evaluated."[24] The plaintiffs, among others, lost their jobs in light of the application of those criteria.[25] The issues at hand were whether the firing of the plaintiffs violated their constitutional rights and whether their firing had foreclosed their future employment opportunities.[26]

Discrimination in Employment Act (ADEA) and in breach of plaintiff's employment contract with defendant.").

17. *See* Bignall v. N. Idaho Coll., 538 F.2d 243, 249 (9th Cir. 1976) (discussing miscalculation of student enrollment resulting in budget shortfall).

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

19. *Id.*

20. *Id.* at 947 ("On June 18, 1973, Dr. Smith informed Mr. Levitt and Dr. Wininger that their employment would terminate at the close of the 1972-73 academic year because of financial exigency.").

21. *Id.* at 952 (discussing their "tenure rights").

22. *Id.* at 946 ("Plaintiff James D. Levitt is an Associate Professor of English and Speech, and his employment there began in 1948. Plaintiff Darrell Wininger is a professor of Business Education and his employment at Peru State College began in 1952.")

23. *Id.* at 947 ("'In early 1973 the Legislature of the State of Nebraska adopted a budget which necessitated a reduction in the number of faculty members of Peru State College.'" (quoting Judge Urbom's opinion on a motion for a preliminary injunction)).

24. *Levitt*, 376 F. Supp. at 949.

25. *Id.* at 949-50 ("Dr. Smith testified that he made his recommendation for termination of the plaintiffs, and other faculty members, who were released because of the reduced budget, on the basis of the 'objective evaluation' of all of the faculty members and the overall educational program.").

26. *Id.* at 949 ("The issues presented by the record in this case are: (1) Whether the plaintiffs have a constitutional right to continued employment at Peru State College notwithstanding lack of funds due to failure of the Nebraska Legislature to fully fund the budget request of Peru State College. (2) Whether any actions of the defendants relating to the discharge of the plaintiffs foreclosed future employment opportunities of the Plaintiffs.").

It was difficult to tell whether tenure was given its due because of how the court framed the issues. Consider the latter issue—whether the plaintiffs' loss of their positions foreclosed their becoming employed elsewhere. When an individual's job is terminated because of financial concerns, there is no necessary implication that the individual's job performance was deficient.[27] In *Levitt*, "the defendants were most careful to avoid characterizing any of the individuals selected for termination as incompetent individuals"[28] and indeed had attempted to help one of the defendants find alternative employment.[29] Assistance would presumably have been afforded to the other plaintiff had it been requested.[30]

Suppose that the plaintiffs' job prospects were in fact severely diminished by the defendants' actions, notwithstanding defendants' best efforts to refrain from casting aspersions on the plaintiffs' abilities. Even so, that would not establish that a constitutional right had been violated.[31] Thus, even if RIFed individuals (especially when older) are very unlikely to find another position in an extremely competitive market,[32] that fact alone would not suffice to establish a constitutional violation.[33]

Did the firing violate the plaintiffs' constitutional rights? Regrettably, too little was included in the opinion to make that determination. Certainly, the court was correct that the plaintiffs did not have a constitutional right to continued employment in perpetuity[34]

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27. *See id.* at 952 ("The terminations of the plaintiffs were not conducted so as in any manner to damage their professional reputations or foreclose their rights to future employability." (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972))).

28. *Id.* at 950.

29. *Id.* at 950-51 ("In fact, Smith's continued belief in the competency of the plaintiffs is underscored by his efforts in attempting to find other employment for plaintiff Wininger.").

30. *Levitt*, 376 F. Supp. at 951 ("[T]he testimony reflects that plaintiff Levitt sought neither assistance nor recommendations from Smith in finding a new job.").

31. *Id.* ("The plaintiffs have suggested that termination or non-retention in and of itself will create difficulties in subsequent academic careers. Even assuming that such may be correct, the plaintiffs have not shown any loss of Constitutional rights or liberties.").

32. *See id.* (recognizing that "termination or non-retention in and of itself [may] create difficulties [for the plaintiffs] in subsequent academic careers"). *See also* Erica Worth, Note, *In Defense of Targeted ERIPS: Understanding the Interaction of Life-Cycle Employment and Early Retirement Incentive Plans*, 74 TEX. L. REV. 411, 430 n.110 (1995) (stating that "laid-off, older workers have such difficulty finding other jobs").

33. *Levitt*, 376 F. Supp. at 951.

34. *See* Olswang et al., *supra* note 15, at 49 ("[T]enure is not an invariable, unconditional guarantee of lifetime employment.").

regardless of the college's financial condition.[35] Yet, tenure not affording that guarantee does not mean that it has little or no value. The fact that one's having tenure at one institution does not somehow guarantee that one will be able to secure employment at a different institution says little about whether the plaintiffs' tenure was afforded sufficient weight in the process resulting in the loss of their jobs. That question is more readily answered by considering the terminations themselves.

The *Levitt* court found that the system employed to determine whose positions would be terminated was "fair and reasonable."[36] In a situation "where lack of funds necessitated releasing a sizeable number of the faculty, . . . it was peculiarly within the province of the school administration to determine which teachers should be released, and which retained."[37] A court should not second-guess which of two tenured faculty's positions should be terminated when there are insufficient funds to pay both salaries, absent some evidence of proscribed discrimination or arbitrary and capricious behavior.[38] Yet, the wisdom of that point does not warrant the very deferential approach suggested by the court:

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives it is not the province of a court to interfere and substitute its judgment for that of the administrative body.[39]

Here, the court suggested that university judgment, absent evidence of improper motive, should receive deference.[40] While such a policy makes sense in some cases, it is too deferential in others, and the court offers no qualification with respect to when such a deferential policy should not be used.

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35. *Levitt*, 376 F. Supp. at 952 ("Plaintiffs tenure rights do not guarantee them continued rights to public employment." (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972))).

36. *Id.* at 950.

37. *Id.*

38. *Id.*

39. *Id.* (citing Best v. City of Omaha, 293 N.W. 116 (Neb. 1940); Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970)).

40. *Id.*

Suppose that there are two professors, one of whom is tenured while the other is an adjunct hired on an as-needed basis.[41] They are teaching multiple sections of the same courses. A university bearing no ill will towards a tenured professor might nonetheless desire to eliminate her position and continue to use the adjunct, if only because doing so would afford the university greater flexibility with respect to future staffing. If the school should be accorded deference when eliminating the tenured position because that decision was sincere and lacking in ill will, then the individual's tenure may afford that individual very little, if any, advantage.[42]

It is unclear whether the *Levitt* court deferred to the university's decision to terminate a tenured professor's position while continuing to use adjuncts to teach some of the courses because the decision did not discuss whose jobs were eliminated and whose were retained.[43] So one cannot assess whether the court gave the property interests associated with tenure their due.[44] Thus, it may be that tenure was indeed respected, but the university's programmatic needs required closing certain programs, which meant that the tenured professors in those programs could not be retained.[45] If that is in fact what occurred, then the court may have reached the correct result, even though overstating the deference due when there is financial need and no showing of "ill will, fraud, collusion or other such motives."[46]

In *Johnson v. Board of Regents of University of Wisconsin System*,[47] the district court addressed the advantages afforded by tenure. The court suggested that

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41. Klein, *supra* note 6, at 271 ("The term 'adjunct' implies a short-term or casual relationship with the institution. Adjunct faculty may be full-time or part-time and are not on a tenure track; they are typically paid by the hour or by the course.").

42. *Cf.* McConnell v. Howard Univ., 818 F.2d 58, 67 (D.C. Cir. 1987) ("Such a reading . . . renders tenure a virtual nullity. Faculty members like Dr. McConnell would have no real *substantive* right to continued employment, but only certain *procedural* rights that must be followed before their appointment may be terminated.").

43. *See Levitt*, 376 F. Supp. 945.

44. *See* John Andrew Gray, *Higher Education Litigation: Financial Exigency*, 14 U.S.F. L. REV. 375, 377 (1979-80) ("State institutions that enact a tenure system are engaged in 'state action' and have created a 'property interest' subject to federal constitutional restraints under the fourteenth amendment.").

45. *Levitt*, 376 F. Supp. at 950 ("[U]pon being faced with a shortage of funds, the Board decided it must maintain the most necessary programs at Peru College and this necessitated deciding which faculty members were necessary to maintain those programs.").

46. *Id.*

47. 377 F. Supp. 227 (W.D. Wis. 1974).

> so far as the Fourteenth Amendment is concerned, a tenured teacher in a state institution is protected—substantively, so to speak—only from termination or lay-off for a constitutionally impermissible reason (such as earlier exercise of First Amendment freedom of expression, or race or religion), and from termination or lay-off which is wholly arbitrary or unreasonable. The Fourteenth Amendment requires only those procedures which are necessary to provide the tenured teacher a fair opportunity to claim this "substantive" protection.[48]

For example, Fourteenth Amendment due process requirements would be satisfied if "each plaintiff [was afforded] the opportunity to make a showing that reduced student enrollments and fiscal exigency were not in fact the precipitating causes for the decisions to lay-off tenured teachers in this department"[49] and if "each plaintiff [was afforded] the opportunity to make a showing that the ultimate decision to lay off each of them, as compared with another [sic] tenured members of their respective departments, was arbitrary and unreasonable."[50]

On first reading, the *Johnson* approach seems very deferential as well, since it merely requires that the professor be afforded an opportunity to establish that (1) there was no financial need for the cuts or (2) that her firing was unreasonable, notwithstanding the actual need for cuts.[51] Yet, this approach is less deferential than it first appears.

It is of course true that being tenured does not immunize an individual from the possibility of a job termination when not terminating that person's position would require that a different tenured person lose her job.[52] By the same token, tenure cannot be understood to preclude a university's termination of any tenured positions when such an interpretation might have dire financial implications for the university as a whole.[53] Further, the *Johnson* court quite reasonably suggested that

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48. *Id.* at 239.

49. *Id.* at 242.

50. *Id.*

51. *Id.* at 240.

52. *Id.* at 238-39 (explaining that in an example where a university decided that out of ten tenured teaching positions, three must be laid off, the Fourteenth Amendment only requires a procedure set "to provide the tenured teacher a fair opportunity to claim this substantive protection").

53. *Johnson*, 377 F. Supp. at 235 (stating that state courts may decide, as a matter of law, that plaintiffs' tenure "property right" includes "the right to continue in their positions permanently during efficiency and good behavior, . . . unless student enrollment factors or fiscal factors or both warrant involuntary cessation of their compensation and their functions").

although it would be wise to seek input from the faculty regarding how cuts should be spread across campus, e.g., between a college of business and a college of arts and sciences or, perhaps, between a history department and an English department,[54] the Constitution does not impose such an obligation.[55]

Once it has been determined that a particular department must cut a certain number of faculty, a separate issue involves the criterion to be used to determine which faculty positions in particular should be terminated.[56] The Constitution does not require a particular method, e.g., "inverse order of seniority"[57] versus "comparative records of performance,"[58] although "constitutional due process does require a fair opportunity to make a showing"[59] in light of the relevant criterion.[60] Thus, once the university chooses a particular method, a dismissed tenured professor must have the opportunity to show that the university should not have terminated her position in particular in light of the adopted criteria.[61]

The *Johnson* court's requirement that each plaintiff be afforded an opportunity to show that their lay-off "was arbitrary and unreasonable"[62] did indeed impose a significant burden on the plaintiffs, since that would be a difficult standard to meet. Yet, the *Johnson* court's position was not nearly as deferential as the *Levitt* court's, precisely because the *Johnson* court did not require a showing of arbitrariness or unreasonableness with respect to *any* challenged retention but only with respect to those of other "tenured members of their respective departments."[63] The *Johnson* court nowhere suggested that a similarly deferential approach would be employed even if the comparison were between retaining a tenured professor on the one hand and terminating that position while making use

54. *Id.* at 238 ("In terms of sound university administration, I can see good reason to afford all tenured teachers an opportunity to be heard at this penultimate stage before the decisions are taken, and perhaps an opportunity to participate in taking the decisions.").

55. *Id.* ("But I am not persuaded that the Fourteenth Amendment requires that a tenured teacher be afforded the opportunity to express the opinion that the college of letters and science or the history department should bear a greater or lesser share in the fiscal sacrifice.").

56. *Id.* at 238 (stating that the "ultimate stage" is deciding which tenured teachers should be laid off).

57. *Id.* at 239.

58. *Id.*

59. *Johnson*, 377 F. Supp. at 239.

60. *Id.* at 238.

61. *Id.* at 239.

62. *Id.* at 242.

63. *Id.*

of adjuncts on the other, whereas the *Levitt* approach, if broadly construed, might require such deference.[64]

Even if courts disagree about the degree of increased flexibility afforded to a university in a state of financial exigency, they agree that a university making a bona fide exigency declaration is permitted to terminate the employment of tenured professors when using the requisite procedural safeguards.[65] But that added flexibility makes it imperative that courts examine whether a bona fide state of exigency exists.[66] Else, "'financial exigency' can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher, but without according him his important procedural rights."[67]

B. Establishing Financial Exigency

What must be shown to establish exigency? That issue received some attention in *American Association of University Professors v. Bloomfield College*.[68] Bloomfield College had an "operating deficit, i.e., the amount by which current liabilities exceed current assets, [of] $368,000"[69] and its "endowment fund was $945,000, reflecting a 21% [d]ecline from the previous year."[70] To make matters worse, the "[i]nterest on loans rose from 8% to 11%, higher borrowing costs result[ing] from the college's loss of status as a prime lending risk."[71] "[I]ts bank [would] . . . determine its lending status on a week-to-week basis and [would] advance no funds other than those necessary to meet payrolls."[72] Because of all of "these circumstances a freeze ha[d] been placed upon all expenses other than payroll."[73] Finally, there was a

64. *See supra* notes 41-42 and accompanying text.

65. *See* Pace v. Hymas, 726 P.2d 693 (Idaho 1986) (holding that the university has the burden of proving that a bona fide financial exigency existed as defined in the university handbook); Browzin v. Catholic Univ. of Am., 527 F.2d 843 (D.C. Cir. 1975) (noting that the parties stipulated that the university's handbook states that termination may be based on financial exigencies).

66. *See Pace*, 726 P.2d at 696 (upholding the trial court's finding that "the defendants had failed to prove a '*demonstrably bona fide* financial exigency'").

67. *Browzin*, 527 F.2d at 847.

68. 322 A.2d 846 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

69. *Id.* at 850.

70. *Id.*

71. *Id.* at 851.

72. *Id.*

73. *Id.*

projection that "enrollment and tuition income [would] continue to decline."[74]

Certainly, the financial picture of the college was hardly rosy.[75] However, when analyzing whether the conditions for exigency had been met, the district court also considered that the college owned the Knoll Golf Club, "a property of 322 acres, having two golf courses, two clubhouses, a swimming pool and a few residences."[76] While the property had been purchased with a bank loan and had a mortgage on it,[77] its sale would net the university one and a half to four million dollars.[78]

The college did not want to sell the property, however, instead preferring to terminate the contracts of several tenured faculty. The *Bloomfield College* court was hesitant to second-guess the trustees' judgment,[79] but the court nonetheless reasoned that tenure "should be vigilantly protected by a court of equity except where, under agreed standards stringent to the point suggested by phrases such as 'financial exigency,' 'drastic retrenchment,' 'extraordinary circumstances' and 'demonstrably bona fide,' the survival of the college is imperiled."[80] But a showing of financial difficulty would not alone suffice.[81] In addition, "the good faith of the administration in seeking the severance of tenured personnel . . . [must] clearly [be] demonstrated as a measure reasonably calculated to preserve [the college's] existence as an academic institution."[82]

The court's self-described task was to determine whether the challenged action "followed from the board's demonstrably bona fide belief, under honestly formulated standards, in the existence of a financial exigency and extraordinary attendant circumstances."[83] If so,

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74. *Bloomfield Coll.*, 322 A.2d at 851.

75. *Id.* at 852 ("Without question, the economic health of the college is poor.").

76. *Id.* at 851.

77. *Id.* ("The purchase price was $3,325,000, and was paid for by $900,000 cash, a bank loan of $300,000 and a mortgage of $2,125,000.").

78. *See id.* at 857 ("[T]he yield from a sale of The Knoll has been conservatively estimated at between 1 1/2 and 4 million dollars.").

79. *Id.* at 854 ("[A]lthough it may be appropriate to inspect the available resources and alternatives open to the college, this does not imply authority on the part of the court to substitute its judgment for that of the trustees, to weigh the wisdom of their action, to modify wayward or imprudent judgments in their formulation of educational or financial policy, or to decide whether the survival of the institution remains 'possible' by the choice of other courses of action.").

80. *Bloomfield Coll.*, 322 A.2d at 854.

81. *Id.*

82. *Id.*

83. *Id.* at 855.

then the court had to find in addition that it was necessary to "terminat[e] tenured faculty members as a means of relieving the exigent condition."[84] The court found that the trustees had exceeded their authority.[85] That finding was based on a number of factors, including the following: (1) the entire faculty had their tenure revoked;[86] (2) twelve new faculty members were hired after thirteen were discharged;[87] (3) the problem was one of liquidity, which the college had long faced and thus the school's problems did not seem to qualify as exigent;[88] and (4) the college had not adopted other methods that would have reduced costs but would not have involved revocation of tenure.[89]

The New Jersey appellate court reviewing the *Bloomfield College* decision affirmed,[90] but it qualified the analysis in a number of respects. For example, the court explained that longstanding financial difficulty does not undermine a finding of exigency[91] and, in addition, found that financial exigency was established in the case at hand.[92] The court

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84. *Id.*

85. *Id.* at 856 ("[T]he actions of Bloomfield College with respect to the tenured status of its faculty members . . . overflowed the limits of its authority as defined by its own Policies, and therefore failed to constitute a legally valid interruption in the individual plaintiffs' continuity of service.").

86. *See Bloomfield Coll.*, 322 A.2d at 856 ("[T]he entire remaining faculty, including tenured personnel, [had been placed] on one-year terminal contracts[, which] . . . could not have been inspired by financial exigency, and can only be interpreted as a calculated repudiation of a contractual duty without any semblance of legal justification.").

87. *See id.*

88. *Id.* at 857 ("The financial problem is one of liquidity, which, as the evidence demonstrates, has plagued the college for many years. . . . [I]t is difficult to say how, by any reasonable definition, the circumstances can now be pronounced exigent."). *Cf.* Olswang et al., *supra* note 15, at 60 ("Financial exigency, a term of art in the world of higher education, is generally understood to signify a financial emergency, based on an operating budget deficit that requires *immediate* action to reduce the institution's expenditures.").

89. *Bloomfield Coll.*, 322 A.2d at 858 (noting the defendants' "careful eschewal of other obvious remedial measures such as across-the-board salary reductions for all faculty members and reduction of faculty size by nonrenewal of contracts with teachers on probationary status, rather than termination of those who had earned tenured status by years of competent service").

90. Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 346 A.2d 615, 618 (N.J. Sup. Ct. App. Div. 1975)

91. *See id.* at 617 ("[T]he mere fact that this financial strain existed for some period of time does not negate the reality that a 'financial exigency' was a fact of life for the college administration within the meaning of the underlying contract.").

92. *Id.* ("[T]here is insufficient credible evidence to contradict the existence of 'extraordinary circumstances because of financial exigency' in view of the admitted absence of liquidity and cash flow."). This does not mean that courts will always defer regarding whether a financial exigency exists. *See* Pace v. Hymas, 726 P.2d 693, 696 (Idaho 1986) ("The two issues properly before this Court are, therefore, whether the

explained that the district court's "interpretation of 'exigency' . . . is too narrow a concept of the term in relation to the subject matter involved [and that a] more reasonable construction might be encompassed within the phrase 'state of urgency.'"[93]

Here, the court was talking about what would qualify as a state of exigency. A separate issue involves the challenging financial conditions, if any, that would permit a university to terminate tenured faculty *without* declaring a state of exigency.[94] A declaration of financial exigency might have adverse consequences itself,[95] e.g., might lead to a further decline in student enrollment because the prospective students would not have

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district court erred in placing the burden of proof upon the defendants with respect to proving a demonstrably *bona fide* financial exigency, and whether there is substantial and competent evidence to sustain the district court's finding that no financial exigency existed at the time Pace was fired. Addressing these issues in that order, we hold that the district court did not err."); Johnston-Taylor v. Gannon, 907 F.2d 1577, 1582 (6th Cir. 1990) (remanding the case because, inter alia, it was necessary to make "a determination of whether exigency in fact existed"). On remand, the court found that the college faced financial exigency. *See* Johnston-Taylor v. Gannon, No. 91-2398, 1992 WL 214523, at *2 (6th Cir. Sept. 2, 1992) (noting the district court's finding). The Sixth Circuit affirmed. *See id.* at *3.

93. *Bloomfield Coll.*, 346 A.2d at 617. *See also* Gray, *supra* note 44, at 381 ("[T]he courts have not used a 'survival' standard in determining whether a financial exigency exists."); Klein, *supra* note 6, at 231 (discussing the appellate court's explanation that "a more reasonable construction of 'financial exigency' is the phrase 'state of urgency'"); Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discount Center*, 63 U. DET. L. REV. 609, 635 (1986) (discussing the court's "state of urgency" criterion).

94. *See News Misunderstands Tenure*, DETROIT NEWS, Aug. 9, 2012, at B2, *available at* 2012 WLNR 17276067 ("The actual goal of the administration proposal is not to devise a way to more efficiently remove a few deadbeat professors. No, they want a means to layoff large numbers of faculty members without going through the embarrassment of declaring financial exigency or discontinuing programs."). *See* James B. Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty*, 4 J.C. & U.L. 187, 187 (1976-77). If exigency is defined as a term referring "to a situation in which the financial problems facing an institution are so serious that they may constitute adequate grounds for dismissal of tenured faculty," then one will have precluded the possibility that challenging financial conditions might exist that, although not constituting exigency, nonetheless permit laying off tenured faculty. *Id.*

95. *See* Klein, *supra* note 6, at 267 ("To borrow funds, colleges and universities typically sell debt securities. . . . A lower bond rating resulting from a declaration of financial exigency could lead an institution to be perceived as economically weakened for decades. 'Declaration of financial exigency is seen as a declaration of bankruptcy,' which could diminish the benefits of a declaration of financial exigency." (citing Roger Benjamin & Steve Carroll, *The Implications of the Changed Environment for Governance in Higher Education*, *in* THE RESPONSIVE UNIVERSITY: RECONSTRUCTING FOR HIGH PERFORMANCE 92, 108 (William G. Tierney ed., 1998))).

adequate confidence in the university's long-term health.[96] Perhaps fearing the negative consequences associated with making such a declaration, Clark Atlanta University laid off tenured faculty without declaring financial exigency, citing enrollment concerns.[97] The university was able to adopt this tactic because of a provision within the Faculty Handbook granting discretion to the administration to reduce faculty size when there was an "enrollment emergency."[98]

The *Bloomfield College* appellate court noted that the trial court's suggestion that capital assets could have been sold to avert financial difficulties, even if accurate, was not a decision for the court to make[99] but, instead, belonged to the trustees.[100] Further, "the mere fact that this financial strain existed for some period of time does not negate the reality that a 'financial exigency' was a fact of life for the college administration within the meaning of the underlying contract."[101]

After clarifying the evidence needed to establish financial exigency, the *Bloomfield College* appellate court nonetheless accepted the trial court's judgment that financial exigency was not the actual cause of the

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96. *See id.* at 276 ("[Universities] have other options to help balance their budgets without causing them to appear to be 'severely stressed' and ultimately 'suffer competitive declines in reputation.' And not being able to compete for students—and their tuition dollars—would toll a real death knell." (citing Edith Behr, *Announcement: Moody's: Public Universities May Declare Financial Exigency to Trim Faculty, Reduce Operating Costs,* MOODY'S INVESTORS SERVICE (Mar. 7, 2011))). *But see id.* ("The stigma of declaring a financial exigency may be lifting, with at least one bond-rating agency suggesting the positive aspects of such declarations.").

97. *Id.* at 250.

98. *Id.*

99. Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 346 A.2d 615, 617 (N.J. Sup. Ct. App. Div. 1975) ("[H]e engaged in an extensive analysis to demonstrate the potential ability of the institution to emerge from its dilemma by disposing of the Knoll property. . . . Whether such a plan of action to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution.").

100. *Id.* ("The trial judge recognized that the exercise of the business judgment whether to retain or sell this valuable capital asset was exclusively for the board of trustees of the college and not for the substituted judgment of the court."). *But see* Pace v. Hymas, 726 P.2d 693, 695-96 (Idaho 1986) ("The district court found that alternatives other than a reduction in personnel were not considered by the State Board of Education when it declared the financial exigency. The Board of Education was not informed of and 'did not consider the dollar savings possible by freezing or reducing the increases in such budget areas as salary, travel, capital outlay, supplies, or equipment.' R., Vol. 5, p. 321. The Board of Education also was never informed of the $383,500 surplus which existed at the end of fiscal year 1981 in deciding to declare the financial exigency.").

101. *Bloomfield Coll.*, 346 A.2d at 617.

termination of the tenured faculty's positions.[102] The court reasoned that the "key factual issue before the court was whether that financial exigency was the [b]ona fide cause for the decision to terminate the services of [thirteen] members of the faculty and to eliminate the tenure of remaining members of the faculty,"[103] and accepted the trial court's finding that "defendants failed to establish 'by a preponderance of the evidence that their purported action was in good faith related to a condition of financial exigency within the institution.'"[104]

The appellate decision might seem masterful because it accomplished two things. On the one hand, it affirmed that the college abused its discretion when it took advantage of challenging circumstances to effect a wholesale abrogation of its prior agreements with those to whom it had already granted tenure.[105] At the same time, the court reined in a trial court that had been quite willing to substitute its

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102. *Id.* at 618 ("The trial judge made full factual findings on this issue of [b]ona fide causation and arrived at the conclusion that defendants failed to establish 'by a preponderance of the evidence that their purported action was in good faith related to a condition of financial exigency within the institution.'"). Sometimes, the Board's failure to declare a state of financial exigency may itself have legal implications. *See* Gray v. Loyola Univ. of Chi., 652 N.E.2d 1306, 1309 (Ill. App. Ct. 1995) (remanding the case for further consideration after noting that the "manual sets out a procedure for the ultimate limitation or termination of tenure if the Board of Directors of Mundelein declares a state of financial exigency [but] [t]he Board never made such a declaration."). *But see* Bd. of Cmty. Coll. Trs. for Balt. Cnty.–Essex Cmty. Coll. v. Adams, 701 A.2d 1113, 1140 (Md. Ct. Spec. App. 1997) ("The trial judge apparently equated the formal declaration of a 'financial exigency' with a necessary step in the existence of a financial crisis sufficient to justify the termination of any tenured faculty. As we perceive the law, that is incorrect.").

103. *Bloomfield Coll.*, 346 A.2d at 617.

104. *Id.* at 618. *See also* Olswang et al., *supra* note 15, at 60 ("A valid financial exigency exists whenever the institutional board declares so, provided that the financial crisis is *bona fide* and not merely a pretext to accomplish another goal, such as the elimination of tenure."); Petersen, *supra* note 15, at 420 (noting that when a tenured individual has lost her position because of financial exigency, the court will have to consider "(1) whether a financial exigency exists and (2) whether the dismissal represented a good faith effort to alleviate that exigency").

105. Michael A. Olivas, *Governing Badly: Theory and Practice of Bad Ideas in College Decision Making*, 87 IND. L.J. 951, 966 (2012) (noting the trial judge's finding that Bloomfield College had offered a "crude plan to eliminate faculty as a transparent and cynical ploy that did not even save money"). *See also* Matthew W. Finkin, *Collective Bargaining Comes to the Campus. By Robert K. Carr and Daniel K. Van Eyck*, 123 U. PA. L. REV. 217, 223 (1974) (book review) ("[The Bloomfield College] board of trustees abolished the college's tenure system, placed the entire faculty on one year's notice of termination, and actually terminated more than a dozen faculty many of whom had been previously awarded tenure.").

own judgment[106] for that of the trustees with respect to whether particular property was a prudent long-term investment.[107]

One factor militating in favor of deference to the trustees' decision regarding the disposition of the property at issue was that monies from a restricted gift were used to acquire that property.[108] Those funds could only be used for capital expenditures.[109] While such a limitation on the funds may not preclude the sale of the property as long as the donated funds were used for other capital projects and only the profits were used for other expenses,[110] a separate issue might be whether such a decision could affect the kinds of conditions that may be imposed by donors on future gifts to the school[111] or, perhaps, the willingness of donors to donate to the school at all.[112]

Administrators are, and should be, given much discretion with respect to which steps are appropriate during a financial emergency.[113]

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106. *See* Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 322 A.2d 846, 851 (N.J. Sup. Ct. Ch. Div. 1974) ("Although the college does not carry The Knoll as a liability, the income received therefrom does not exceed what is necessary to meet carrying charges. It is required, however, to make substantial cash advances during the year to sustain the operation, and these, of course, are additional burdens upon its already strained cash position."). *See also id.* at 852 ("Negotiations preliminary to necessary zoning applications are taking place, but even assuming zoning approval is obtained (a prospect which is by no means assured) . . . .").

107. *Bloomfield Coll.*, 346 A.2d at 617 ("Whether such a plan of action to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution."). *See also* Gray, *supra* note 44, at 381 ("[D]etermining whether a financial exigency exists also entails questions of how much deference a court may or must give to the discretionary judgment of a college's board of trustees.").

108. *See Bloomfield Coll.*, 322 A.2d at 851 ("The $900,000 was provided as a gift to the college by the Presbyterian Church out of monies raised as part of its Fifty Million Dollar Fund, a fund-raising project conducted by the church. These monies are dedicated to purposes of educational capital development and cannot be used for any other purpose.").

109. *See id.*

110. *Cf.* Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 996 (2010) ("[T]he basic legal rule requires compliance with donor intent.").

111. *See id.* at 1028 ("A donor upset about a charity's failure to follow the donor's intent with respect to a gift may respond by imposing more stringent restrictions on subsequent gifts.").

112. *See* Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1580 (2008) (discussing "the necessity of according a certain amount of deference to the intent of . . . donors so as not to chill future . . . donations").

113. *See* T. Michael Bolger & David D. Wilmoth, *Dismissal of Tenured Faculty Members for Reasons of Financial Exigency*, 65 MARQ. L. REV. 347, 354 (1982)

However, courts must not give trustees completely unfettered discretion. Consider one possible interpretation of the *Bloomfield College* appellate decision—a court's determination of whether a bona fide financial exigency exists must be made solely in terms of operating funds[114] and should not include consideration of the university's capital assets.[115] Such a policy might induce the university to make strategic capital investments, thereby allowing the school to meet the exigency conditions necessary in order to implement a reduction in the number of tenured faculty.

Suppose that the university used tuition dollars to purchase an investment property, even though doing so left inadequate funds to meet operating expenses. If such a decision were immune from review, the universities could easily avoid their responsibilities, notwithstanding the existing contractual obligations and detrimental reliance of the professors on the university's promise of continued employment.[116]

Certainly, there are pragmatic reasons for universities to avoid adopting policies that would necessitate a declaration of financial exigency.[117] Not only might such a declaration be a public relations disaster,[118] but the most productive employees might be deterred from remaining at the university or from accepting positions in the future.[119] In any event, the issue posed is whether courts should be permitted to consider capital asset expenditures when deciding whether there has been a bona fide declaration of exigency. Immunizing such investment would permit strategic manipulation of assets so that universities could

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("[U]niversity administrators are permitted a great deal of discretion in determining what measures are required to meet the financial exigency and which appointments are to be terminated.").

114. *See* Petersen, *supra* note 15, at 423 (reading *Bloomfield College* to "reject any suggestion that capital assets must be invaded to resolve cash flow problems"). Other courts have endorsed such an approach. *See* Krotkoff v. Goucher Coll., 585 F.2d 675, 681 (4th Cir. 1978) ("[T]he existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets.").

115. Olswang et al., *supra* note 15, at 60 ("If current or projected expenditures exceed operating revenues (without regard to endowment or capital accounts), a financial exigency could well exist.").

116. *See supra* note 114-15 and accompanying text.

117. *See* Klein, *supra* note 6, at 276; *Manage This Crisis Well*, BATON ROUGE ADVOC., Nov. 6, 2011, at B6, *available at* 2011 WLNR 22987100.

118. *See* Klein, *supra* note 6, at 276 (discussing the "stigma of declaring a financial exigency").

119. *See Manage This Crisis Well*, *supra* note 117, at B6 ("Exigency usually is considered a blemish that could scare away current and potential employees and students.").

eliminate tenured positions,[120] although permitting courts to consider such investments might result in some courts too readily substituting their own judgments for those of the trustees.[121]

In *Bignall v. North Idaho College*,[122] North Idaho College informed Bliss Bignall that she would not be teaching the following fall. She claimed that the college selected her for non-renewal because of her husband's efforts on behalf of minority students at the college.[123] Because she was "de facto tenured,"[124] she was entitled to notice and a hearing to determine whether her job termination was justified.[125]

When Bignall asked why the college was not renewing her contract, the college merely told her that "two people must go and she was one of them."[126] It was only later that the school had asserted "exigent financial circumstances,"[127]although the college met its burden at trial of establishing financial difficulty.[128]

One of the confusing issues the court failed to explore was that the college hired new faculty based on projections that there would be increases in enrollment.[129] Enrollment had fallen rather than increased, so the college was now overstaffed,[130] and Bignall "made virtually no effort to rebut the need to reduce the faculty."[131] The Ninth Circuit explained that "[n]ew academic faculty had been hired, but all were taken on prior to Mrs. Bignall's non-retention,"[132] implying that as long as the new

120. *Cf.* Emily Hohenwarter, *Cutting Classes*, GAMBIT WKLY., July 10, 2007, at 23, *available at* 2007 WLNR 14498293 ("Critics point to the university's purchase of a $13.19 million condominium complex in November 2005 and the continued construction of a $7.5 million baseball stadium as evidence of Tulane's solid financial footing after the storm. And, although Tulane's financial exigency status remains in effect, Tulane's endowment is creeping toward $1 billion for the first time in university history.").

121. *See supra* notes 79-89 and accompanying text (discussing the trial court's substitution of its own judgment for that of the trustees in *Bloomfield College*).

122. 538 F.2d 243, 243 (9th Cir. 1976).

123. *Id.* at 245.

124. *Id.*

125. *Id.* at 246.

126. *Id.* at 247.

127. *Id.*

128. *Bignall*, 538 F.2d at 249 ("[T]he College bore the burden of proving that there was a financial exigency . . . . [O]n the facts in this case we do not think the district court was clearly erroneous in holding that the College met its burden of proof . . . .").

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

faculty were hired in good faith, no other issue was implicated in the school's retention.[133]

Bignall noted that "the College retained less senior faculty,"[134] claiming that this was one of the "specific indicia of discrimination."[135] But the point was not merely that less senior faculty had been retained,[136] e.g., someone who had also earned tenure, albeit later than Bignall. Rather, the point was that the school let go of Bignall when it retained others who were not tenured.[137] Indeed, the court did not even specify whether those retained were on the tenure track.[138]

Perhaps the university had not retained Bignall for cause.

> [V]arious administrators, including the two heads of the two departments in which Mrs. Bignall taught, all testified that she was the least well qualified academically; that because she directed her instruction to the most gifted among her students, she alienated the less bright so that students regularly transferred out of her classes or tried to avoid her courses.[139]

But if the school dismissed Bignall for cause, then the court should have accorded her the due process protections accorded to tenured faculty

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133. A much different issue would have been raised had new faculty been hired in a different department. *See* Milbouer v. Keppler, 644 F. Supp. 201, 205 (D. Idaho 1986) (upholding contract termination of tenured professor while noting that "these new faculty members were hired to fill vacancies in programs that were still a viable part of the University's curriculum. None of the new faculty members were hired to replace faculty that were laid off as a result of the budget crisis").

134. *Bignall*, 538 F.2d at 250.

135. *Id.*

136. Of course, that might be important depending upon the agreement between the parties. *See* Univ. of D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 163 F.3d 616, 618-19 (D.C. Cir. 1998) ("Although the CBA [Collective Bargaining Agreement] permits UDC to conduct a RIF [Reduction in Force] when such action is compelled by a fiscal emergency, it affords important protections for the faculty in the event of a RIF. First, the agreement provides that senior members of the faculty must be retained ahead of junior members.").

137. For example, an individual might be denied tenure for budgetary reasons. *See* Causey v. Bd. of Trs. of Cmty. Coll. Dist. V, 638 P.2d 98, 100 (Wash. Ct. App. 1981) ("Even if we assume arguendo that declining enrollment was the only criterion the board used in denying Causey tenure, we cannot conclude that the trial court erred in upholding the denial of tenure."). *Cf.* Colburn v. Trs. of Ind. Univ., 973 F.2d 581, 590 (7th Cir. 1992) ("[C]ourts have regularly refused to find that a probationary faculty member has a property interest in receiving tenure . . . .").

138. *Cf.* Klein v. Bd. of Higher Educ., 434 F. Supp. 1113, 1115 (S.D.N.Y. 1977) ("Within a given department, nontenured personnel were to be discontinued first, and then certificated personnel, and then tenured personnel.").

139. *Bignall*, 538 F.2d at 250.

dismissed for cause. Basically, the *Bignall* court pretended to respect tenure while simply undermining it.

C. What Follows from a Bona Fide Declaration of Exigency?

In *Browzin v. Catholic University of America*,[140] the D.C. Circuit discussed the conditions under which a college could fire a tenured professor when the school established financial exigency. Catholic University hired Boris Browzin as a professor in the School of Engineering and Architecture.[141] The School of Engineering and Architecture faced "a severe budget reduction,"[142] and it released both tenured and untenured faculty.[143]

The *Browzin* court explained that the central purpose of tenure is to prevent "arbitrary or retaliatory dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting."[144] The court further explained that the tenure system "is designed to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits. . . . [and] to foster our society's interest in the unfettered progress of research and learning by protecting the profession's freedom of inquiry and instruction."[145]

Tenure affords these protections by limiting the conditions under which a school can eliminate tenured positions.[146] As a general matter, tenured professors can lose their positions for cause, for example, for sexually harassing students,[147] or because of financial exigency.[148] Yet, the fact of financial exigency does not guarantee that schools will respect the purposes behind tenure and that schools will not terminate faculty positions for inappropriate reasons.[149] "But the obvious danger remains

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140. 527 F.2d 843 (D.C. Cir. 1975).

141. *See id.* at 844.

142. *Id.*

143. *Id.* at 845 ("The administration also took steps to cut back on the faculty, releasing some faculty members who were nontenured, and a few, including Browzin, who had achieved tenure.").

144. *Id.* at 846.

145. *Id.*

146. *See* Gray, *supra* note 44, at 377.

147. Murphy v. Duquesne Univ. of Holy Ghost, 745 A.2d 1228 (Pa. Super. Ct. 1999) (upholding dismissal for law professor's inappropriate behavior with a student).

148. *Browzin*, 527 F.2d at 847.

149. *Cf.* Gray, *supra* note 44, at 401 ("Because of the importance of tenure as a safeguard of academic freedom, it is not enough that there be a financially exigent situation. The courts uniformly insist that the dismissals be *bona fide*, that is, motivated and caused solely and exclusively by considerations of financial exigency.").

that 'financial exigency' can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher but without according him his important procedural rights."[150]

One check to make sure that universities are acting in good faith is to require that they place tenured individuals in "suitable positions" that are available.[151] Because tenured individuals dismissed due to financial exigency are not being dismissed for cause, the university would have retained them if finances had not been problematic.[152] But if that is so, then dismissed professors rather than new hires should be filling those positions that are suitable and open.[153] One certainly would not expect a university suffering from financial embarrassment to go on a hiring spree—"[s]ituations which make drastic retrenchment . . . necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumstances."[154]

In *Browzin*, Catholic University decided to discontinue "certain areas in which the University had no great strength and could not hope to achieve strength under the new budgetary limitations."[155] Browzin taught in some of those identified areas,[156] and the school sought to terminate his position because it planned to discontinue those course offerings.[157] Under the existing contract, the university was obligated—to a tenured professor whose position the school eliminated—"to make every effort to find him another suitable position in the institution."[158]

Two separate issues were presented. One was whether the university acted in good faith when it closed down a program area and then terminated someone's teaching position in that area.[159] The second issue

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150. *Browzin*, 527 F.2d at 847. *See also* Petersen, *supra* note 15, at 417 ("The authority to terminate tenured faculty because of economic hardships aids the college administrator in maintaining fiscal stability but also offers a possible pretext for dismissal stemming from conduct which would otherwise be protected by the institution's tenure provisions.").

151. *Browzin*, 527 F.2d at 847 ("The 'suitable position' requirement would stand as a partial check against such abuses. An institution truly motivated only by financial considerations would not hesitate to place the tenured professor in another suitable position if one can be found, even if this means displacing a nontenured instructor.").

152. *See id.*

153. *See id.*

154. *Id.*

155. *Id.* at 845.

156. *Id.*

157. *Browzin*, 527 F.2d at 845.

158. *Id.* at 849.

159. *Id.* at 848 (stating that the university discontinued courses due to "bona fide financial difficulties").

was whether the university acted in good faith in trying to find a position within the university for the individual whose position the school terminated.[160] This latter duty on the part of the university could arise because of a contractual obligation to help the person find another job within the university (if possible)[161] or because the individual's tenure was not tied to a particular department.[162]

The *Browzin* court explained that it would be difficult for a plaintiff to know whether the university had indeed fulfilled its obligation to consider whether the individual was suitable for other employment within the university—the "University here was plainly in a far better position to know what efforts were or were not undertaken to find for Browzin another post within the University,"[163] and "[o]rdinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party."[164] Thus, an individual can sometimes teach within another division of the university, for example, because she has additional training in a different field,[165] and the university may have a contractual obligation to fill an open position with someone dismissed from another department, if that person would indeed be suitable.[166]

Whether a university has fulfilled its obligation to mitigate the harm caused by a termination is itself subject to a separate inquiry.[167] For example, in *Texas Faculty Association v. University of Texas at Dallas*,[168] the Fifth Circuit suggested that each of the tenured individuals who had been fired "was entitled to a meaningful opportunity to demonstrate that, even if his or her program was to be discontinued and

160. *Id.* at 848-49.

161. *Id.* at 849.

162. *See* Tex. Faculty Ass'n v. Univ. of Tex. at Dall., 946 F.2d 379, 386 (5th Cir. 1991) ("[T]he faculty in this case were tenured to the University of Texas at Dallas, not to the School of Natural Sciences and Mathematics or the School of Human Development.").

163. *Browzin*, 527 F.2d at 849.

164. *Id.*

165. *See* Jimenez v. Almodovar, 650 F.2d 363, 366 (1st Cir. 1981) (discussing the offers made to tenured individuals whereby they still might be able to teach in the university). *See also* Bd. of Cmty. Coll. Trs. for Balt. Cnty.-Essex Cmty. Coll. v. Adams, 701 A.2d 1113, 1127-28 (Md. Ct. Spec. App. 1997) ("Appellees argued that they should have been transferred to other departments. That, in part, may be addressed, if appropriate to do so, on remand.").

166. *See Adams*, 701 A.2d at 1127-28.

167. *Tex. Faculty Ass'n*, 946 F.2d at 386 ("Unless the procedures afforded appellants meaningfully considered whether each appellant should be retained at UTD in *some* teaching capacity, then the risk that a given faculty member could be terminated erroneously seems to us patent.").

168. 946 F.2d 379.

the number of faculty positions associated with that program eliminated, he or she should nevertheless be retained to teach in a field in which he or she is qualified."[169] Arguably, Catholic University did not fulfill its obligation to try to determine whether there was suitable employment for Browzin in a different part of the university.[170]

As a general matter, it may be difficult in a particular case for the trier of fact to determine whether a university had met its burden of trying to place an individual elsewhere within the university.[171] In such cases, there would likely be conflicting testimony about whether the plaintiff was suitable for an appointment in another department because teaching and publication expectations might be different across disciplines.[172] The trier of fact's task would be much easier if, for example, a university hired someone else to teach the very courses that the terminated professor taught, although some difficulties would remain if the new hire taught some courses that the dismissed professor had taught and other courses that the dismissed professor had not taught.

In *Browzin*, the university had committed itself to certain hiring limitations in those cases in which it had fired a tenured professor due to exigency—"the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it."[173] A mere year and a half after Browzin left, the school hired another professor to teach water resources, even though "Browzin had competence in two of the branches of water resources, namely hydrology and hydraulics, which relate specifically to design of structures meant to control the flow or retention of water."[174]

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169. *Id.* at 387. *See also* Hahn v. Univ. of D.C., 789 A.2d 1252, 1260 (D.C. 2002) ("[Plaintiff] may be entitled to a position if the University were to find that his tenure was granted 'at large' and that he was qualified for another position within the College of Professional Studies.").

170. *Cf.* Olivas, *supra* note 105, at 969 ("Catholic University made no good faith effort to relocate Browzin elsewhere within the university . . . .").

171. In this case, the plaintiff had the burden of showing that the university failed to make sufficient efforts to place him elsewhere, *see* Browzin v. Catholic Univ. of Am., 527 F.2d 843, 849-50 (D.C. Cir. 1975), even though the university would typically be thought to have the burden, *see id.* at 849.

172. *See* Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 954 (2007) ("Particularly in the sciences, the publication pattern consists of a large number of very short articles. While presumably university committees become familiar with the expectations of different disciplines (and also the law school's promotion and tenure representative will explain the guidelines in the legal academy), it may be wise to ask if any different set of standards is applied on your campus.").

173. *Browzin*, 527 F.2d at 845.

174. *Id.* at 850.

The hired individual had an additional competence in planning, which was an area that the university wanted to emphasize both because that area might attract more students[175] and because it might secure more grants.[176] The trial court concluded that the other professor "had not been hired to fill Browzin's place"[177] because of the new focus on planning, a finding that was not "clearly erroneous" and thus could not be reversed.[178]

Some commentators claim that Browzin's lack of specialization in planning was not a sufficient reason to justify hiring someone else to teach the hydrology courses.[179] Perhaps that is so, although the trial court accepted the university's claim that Browzin's inability to teach the planning course made him unqualified to fill the position for which another was hired, and the D.C. Circuit Court could not have reversed that decision without holding that the district court had abused its discretion in deferring to the university.[180] It is thus at the very least questionable to suggest that the circuit court was "snookered"[181]—the circuit court had not simply deferred to the university's claims but instead had affirmed the district court's judgment, which could only be reversed under the clearly erroneous standard.[182]

Suppose that Catholic University was indeed justified in reducing the size of this particular program within the School of Engineering and Architecture[183] and the number of tenured positions therein.[184] It would have been particularly unhelpful for the court to note that the university could have devoted its next hire in the relevant program to someone who did planning.[185] Given the state of exigency,[186] the university might well have been precluded financially from having Browzin remain teaching

175. *Id.*
176. *Id.* at 851.
177. *Id.*
178. *Id.*
179. *See* Olivas, *supra* note 105, at 969.
180. *Browzin*, 527 F.2d at 851.
181. *See Olivas*, *supra* note 105, at 968.
182. *Browzin*, 527 F.2d at 851.
183. *See* Olivas, *supra* note 105, at 967 (discussing "Catholic University of America's (CUA) large School of Engineering and Architecture" in which Professor Browzin taught).
184. *Cf.* Olswang et al., *supra* note 15, at 51 ("[P]rogram reduction will allow an institution to reallocate and reduce expenditures within a program (or across multiple programs) while preserving the essential aspects of a course of study. Usually, the reduction will require the nonrenewal or termination of one or more faculty positions in the affected academic program if resources are to be saved.").
185. *See* Olivas, *supra* note 105, at 969 ("Why didn't CUA just make the next hire one that included planning as a field, if it is one or was one at that time?").
186. *See id.* (noting that it was "stipulated that a genuine exigency occurred").

and, in addition, hiring an additional person to cover programmatic needs.[187]

Pointing out that the university might have been precluded financially from retaining Browzin and hiring another person does not end the analysis with respect to whether it treated Browzin unfairly.[188] Perhaps Browzin could have gained competence in planning,[189] or perhaps the court should have precluded the university from developing the planning aspect of its curriculum, given its existing contractual obligations.[190] The point here is that the trial court had options to afford Browzin more protection without, at the same time, ignoring the state of exigency declared by the university.[191]

Whether or not Browzin's treatment in fact involved flagrant abuse by Catholic University,[192] the case at the very least illustrates how a university *might* use a bona fide declaration of exigency[193] to achieve ends that it could not otherwise achieve.[194] The existing potential for abuse is all the greater because a declaration of exigency need not involve the university as a whole but only a department or school, as was made clear in *Scheuer v. Creighton University*.[195]

Edwin Scheuer was tenured in the Creighton University School of Pharmacy.[196] The pharmacy school faced financial difficulty,[197] although the university as a whole did not.[198] It took various steps to reduce

187. *See id.* at 968 (indicating that the university terminated Browzin's position and abandoned the program of instruction).

188. *See id.* at 968-69 (suggesting that the university acted poorly in regard to Browzin's termination).

189. *Id.*

190. *See id.* at 969 (noting that the trial court's decision was "sad," ending one person's career "because of a one-course revision").

191. *See* Olivas, *supra* note 105, at 968-69 (raising many questions that the trial court should have raised).

192. *See id.* at 967 ("I also confess that Browzin v. Catholic University of America flabbergasts me each time I teach it in my Higher Education Law class.").

193. *See id.* at 969 (noting that it was "stipulated that a genuine exigency occurred").

194. *See id.* (stating how AAUP rewrote its policy to give additional procedural safeguards to the program discontinuance process and to separate it from its parent—that is, financial exigency).

195. 260 N.W.2d 595 (Neb. 1977).

196. *Id.* at 595.

197. The school had a deficit for each fiscal year between 1971 and 1976. *See id.* at 596.

198. *Id.* at 597 ("It is undisputed that Creighton University as a whole was not in a real state of financial exigency.").

costs,[199] although "[t]hese steps were not sufficient."[200] The pharmacy school decided that it needed to cut four faculty members.[201] It chose to cut the plaintiff "because the only course he taught was medicinal chemistry[,] which could also be taught by a tenured faculty member who had seniority over him and who also could teach biochemistry which the plaintiff had stated he could not teach."[202] The *Scheuer* court rejected that the university had "to continue programs running up large deficits so long as the institution as a whole had financial resources available to it,"[203] holding that "the term 'financial exigency' as used in the contract of employment herein may be limited to a financial exigency in a department or college."[204] Because "the School of Pharmacy was faced with a financial exigency for the fiscal year 1976-1977"[205] and because "the process used to select plaintiff for termination was not only fair and reasonable but tended to maintain the most viable and best

199. *Id.* at 596 ("Cuts were made first in the area of nonsalary costs, such as equipment, traveling, and office supplies. A freeze was placed on faculty salaries. Steps were taken to terminate certain nonfaculty positions.").

200. *Id.*

201. *Scheuer*, 260 N.W.2d at 596.

202. *Id. See also* Jimenez v. Almodovar, 650 F.2d 363, 365 (1st Cir. 1981) ("Each of the two teaching positions of the Physical Education Department which were not eliminated was held by a professor senior to the three recipients of the aforesaid letter."); Krotkoff v. Goucher Coll., 585 F.2d 675, 678 (4th Cir. 1978) (affirming lower court's decision upholding the termination of one tenured professor in the German department and retaining a different tenured professor because the latter "had more experience teaching the elementary language courses that would be offered in a service program and because she was also qualified to teach French"). By the same token, however, a university might seek someone whose specialty was in German literature and thus the ability to teach the basic language courses would not have met the university's needs. *See* Spuler v. Pickar, 958 F.2d 103, 105 (5th Cir. 1992) ("Although the basic language acquisition courses could be taught by any German Department faculty member, specialized knowledge—which Spuler lacked—was needed to teach the literature classes.") In *Spuler*, an individual was denied tenure for financial reasons. *See id.* at 105. However, he was not considered when a different position in the same department opened up because a tenured member of the department resigned. *See id.* See Olivas, *supra* note 105, at 970, for a critical discussion of the opinion.

203. *Scheuer*, 260 N.W.2d at 600.

204. *Id.* at 601. *See also* Rose v. Elmhurst Coll., 379 N.E.2d 791, 794 (Ill. App. Ct. 1978) (affirming a tenured professor's dismissal because the "uncontradicted evidence indicates that the college's curtailment of the department of religion as well as other departments was a direct consequence of declining enrollment"). *See also* Bolger & Wilmoth, *supra* note 113, at 354 ("Financially exigent conditions . . . need not threaten the survival of the institution nor affect the institution as a whole.").

205. *Scheuer*, 260 N.W.2d at 601.

overall program for the School of Pharmacy within the financial limits of that college,"[206] the court affirmed the plaintiff's termination.[207]

In *Scheuer*, the school terminated plaintiff's position because another person, also tenured and with greater seniority, could perform those duties.[208] Suppose, however, that the person who provided the best fit for a department was not tenured. Could such a person be retained while the tenured person was let go?

Brenna v. Southern Colorado State College[209] explored that very question. Lyle Brenna was a tenured professor at the college.[210] Because of "bona fide budgetary exigencies,"[211] the college reduced the size of the faculty and asked the head of Brenna's academic department "to recommend which faculty member 'his department would best get along without.'"[212] The department head selected the plaintiff over a nontenured faculty member because "the college had lost its accreditation in [his] primary area of training and expertise[,] . . . . [and] the nontenured professor would give the department increased versatility and allow for greater flexibility in making teaching assignments in the courses still to be offered."[213] There was no claim that the termination decision was made in bad faith or was pretextual.[214]

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206. *Id.* at 600. A different issue would have been raised if there was an appearance of impropriety or unfairness in the selection or application of the criteria. *See* Johnston-Taylor v. Gannon, 907 F.2d 1577, 1582 (6th Cir. 1990) (remanding the case due to plaintiffs' assertion "that because Dean Kintzer selected only three of the fourteen criteria recommended in the memo, their layoffs lacked a rational basis," and stating that "[b]ecause the professors' contentions must be taken as true, we find that they have presented a material issue as to whether there was a rational basis"). However, on remand, the court found that the use of those three criteria "was rationally based and permissible." Johnston-Taylor v. Gannon, No. 91-2398, 1992 WL 214523, at *2 (6th Cir. Sept. 2, 1992). *Cf.* Se. Cmty. Coll. v. Krieger, 535 N.W.2d 140, 144 (Iowa Ct. App. 1995) ("[A] valid claim of lack of impartiality must result from a showing of actual, rather than potential, bias." (citing Larsen v. Oakland Cmty. Sch. Dist., 416 N.W.2d 89, 95 (Iowa Ct. App. 1987))).

207. *Scheuer*, 260 N.W.2d at 601. *See also* Olivas, *supra* note 105, at 966 ("The court thus held that Scheuer, a tenured School of Pharmacy faculty member, could be dismissed under the theory that financial exigency need not be necessary in the entire institution for its principles to apply—as long as there was due process available and institutional bona fides.").

208. *Scheuer*, 260 N.W.2d at 596.

209. 589 F.2d 475 (10th Cir. 1978).

210. *Id.* at 476.

211. *Id.*

212. *Id.*

213. *Id. See also* Bolger & Wilmoth, *supra* note 113, at 357 (noting that the "plaintiff, who was tenured, was terminated even though there was an untenured member in the department," but then explaining that "one reason [that] the plaintiff was terminated was

The Tenth Circuit Court reasoned that "the federal Constitution does not require that wherever possible tenured faculty be retained over nontenured faculty"[215] and that "not every breach of contract by a state constitutes deprivation of a property interest in violation of the Due Process Clause entitling the person aggrieved to relief under 42 U.S.C. § 1983."[216] As long as the state college adopted a reasonable selection process that was not "arbitrary, capricious, or without a rational basis," federal guarantees would have been respected.[217]

A separate question was whether the school's tenure policy required that "at least as among faculty members in the same department, there is an implied condition that nontenured faculty must be terminated before tenured if there is work which the tenured faculty member is capable of performing."[218] The Tenth Circuit reasoned that it did not have to "resolve this issue, which essentially is a matter of simple contract law for state court interpretation."[219]

Yet, the way that "simple" contract law is interpreted can have important implications. Consider *Brady v. Board of Trustees of Nebraska State Colleges*.[220] Robert Brady was "a tenured associate professor of history at Wayne State College."[221] The school fired three professors in the history department, including Brady, because of a reduction in appropriations by the Nebraska legislature.[222] The court noted, "When Brady was terminated, one untenured member was retained in the history department and another untenured person, the former president of the college, was added to the history faculty at a salary higher than other

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that the college had lost its accreditation in the plaintiff's primary area of training and expertise").

214. *Brenna*, 589 F.2d at 476.

215. *Id.* at 476-77.

216. *Id.* at 477.

217. *Id.* (citing Martin v. Harrah Indep. Sch. Dist., 579 F.2d 1192, 1198 (10th Cir. 1978), *rev'd*, 99 U.S. 1062 (1979); Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 3-4 (7th Cir. 1974)).

218. *Id.*

219. *Id. See also* Levitt v. Univ. of Tex. at El Paso, 759 F.2d 1224, 1230 (5th Cir. 1985) ("There is not a violation of due process every time a university or other government entity violates its own rules. Such action may constitute a breach of contract or violation of state law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation." (citing Garrett v. Mathews, 625 F.2d 658, 660 (5th Cir.1980))).

220. 242 N.W.2d 616 (Neb. 1976).

221. *Id.* at 617.

222. *Id.* at 619 ("The legislative appropriation for the college in the spring of 1973 provided for approximately 80 full-time equivalent faculty members where there had been approximately 99 full-time equivalent faculty members in the 1972-73 year.").

members of the history department."[223] Because "[o]thers, including an untenured person, taught [Brady's] former courses,"[224] the court concluded that "Brady's position was not eliminated but Brady was."[225] It was "uncontested that Brady was a good teacher and that no termination for cause could be justified,"[226] so the court held that "[t]he termination was ineffective to terminate his teaching contract."[227]

After finding that the school wrongly fired Brady, a tenured individual, the court addressed damages. Notwithstanding tenure, the court "[found] no practical justification for an indefinite extension."[228] Because the parties did not enter into an agreement on how much salary Brady would receive the following year, the court reasoned that "the measure of damages is the amount of his salary for the last effective year of his contract, $10,400, less the amount which he earned, or with reasonable diligence could have earned, from other employment during the 1973-74 contract renewal period."[229] Thus, the *Brady* court treated a wrongfully fired tenured individual in the same way as it would have treated someone with a one-year contract whom a school wrongfully fired.[230] But an individual who has tenure should not be treated as if his reasonable expectation of continuation is worth nothing in the assessment of damages.[231]

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Brady*, 242 N.W.2d at 619.

227. *Id.* at 620.

228. *Id.* at 621.

229. *Id.*

230. *Cf.* Harry F. Tepker, Jr, *Good Cause and Just Expectations: Academic Tenure in Oklahoma's Public Colleges and Universities*, 46 OKLA. L. REV. 205, 213 (1993). Tepker stated,

> Based on evidence of the college's past experience, the trial court should project the anticipated level of compensation for similarly situated professors for each of the years until the date when plaintiff probably would have retired. Next, a trial court should project plaintiff's anticipated earnings based on the assumption that plaintiff would make good faith efforts to mitigate damages by securing another job in his chosen profession. Third, for each year, the court should subtract anticipated earnings of plaintiff in mitigation from the anticipated salary he would have received at the defendant institution. Next, for each year, the court should reduce the difference to its worth as of the date of the filing of the complaint. Finally, the trial court should award plaintiff the sum of these properly mitigated and reduced figures.

Id.

231. *See* Bobby L. Dexter, *Tenure Buyouts: Employment Death Taxes and the Curious Obesity of "Wages,"* 70 U. PITT. L. REV. 343, 385 (2009) ("[L]ess than a full year of salary . . . cannot realistically be considered future years of salary reduced to present value."). *Cf.* Univ. of Balt. v. Iz, 716 A.2d 1107, 1114 (Md. Ct. Spec. App. 1998)

The existing jurisprudence offers some broad outlines of the ways that a declaration of financial exigency can afford universities greater flexibility when there has been a sharp reduction in available revenue.[232] When a university faces a bona fide financial emergency, courts have been rather deferential with respect to university staffing decisions.[233] Further, when individual departments or schools faced declining enrollments, courts have been deferential with respect to the necessary steps to be taken, even if the department or school eliminated the tenured professors' positions to help improve the respective department's or school's bottom lines.[234] Yet, courts have not squarely faced some of the difficulties that will arise because of declining interest in law school matriculation, although it seems safe to assume that such issues will be presented in the not-too-distant future.[235]

D. The Coming Law School Crisis

About a decade ago, the number of students applying to law school was at an all-time high.[236] Recently, however, there has been "a significant decline in law school applications."[237] It is of course true that the decrease in student numbers will affect different schools differently, with different commentators offering different theories about which schools are particularly at risk of being forced to make significant changes.[238] At least one issue is the degree to which the existence of

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(discussing the jury hearing testimony about "the present value of the future lost income that [the plaintiff] sought as compensatory damages"); *id.* ("[T]he jury awarded Dr. Iz $425,000.00 in damages for the breach of contract."). The appellate court reversed, not because the amount was excessive, but because it was not wrong for collegiality (or the lack thereof) to have been considered in the tenure decision. *See id.* at 1122 ("We are persuaded that collegiality is a valid consideration for tenure review.").

232. *See supra* notes 192-95, 205-07 and accompanying text.

233. *See* Levitt v. Univ. of Tex. at El Paso, 759 F.2d 1224, 1230 (5th Cir. 1985).

234. *Id.*

235. *See, e.g.*, Pam Bailey, Commentary, *Nation's Law Schools Are Facing an Enrollment Crisis*, MONT. LAW., Mar. 2013, at 4, *available at* 38-MAR MTLAW 4.

236. Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 18 (2005) ("[L]aw school applications, LSAT takers, and enrollments are at an all-time high in 2004 . . . .").

237. Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools that Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, 15 J. CONSUMER & COM. L. 97, 104 (2012).

238. *See* David R. Barnhizer, *The Purposes and Methods of American Legal Education*, 36 J. LEGAL PROF. 1, 45 (2011).

> The effects of falling applications, fewer employment opportunities in the legal marketplace, declining budgets for states and universities, increasing costs for law schools created by the higher personnel costs of aging faculty and altered

tenure will cause schools to modify what they wish to do.[239] Some may be forced to close or, at least, reduce the number of faculty.[240]

Law schools may be public or private[241] and stand-alone or part of a large university.[242] A declaration of financial exigency will have different implications for these different kinds of institutions. For example, suppose that a stand-alone law school faces severely declining enrollments. The stand-alone law school does not have a university standing behind it to help reduce costs associated with the library[243] or the provision of other services.[244] Further, if there is a budget shortfall, there is no university standing behind the stand-alone to make up the slack.[245] Insofar as a stand-alone law school is in a bona fide state of

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> accreditation standards by the ABA relative to faculty productivity, scholarship, and measurement of success at educating law students is going to transform legal education.

Id. See also Smith, *supra* note 5, at 611 (discussing those schools that seem especially at risk).

239. Barnhizer, *supra* note 238.

240. Patrick Thornton, *Why Are Numbers Down at Law Schools?*, MINN. LAW. (Feb. 8, 2013), *available at* 2013 WLNR 3782947 ("Some industry experts predict numerous law schools will close and other schools will lay off faculty and staff to stay in the black."); Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 216 (2012) ("It is becoming obvious that a good number of the law schools that now exist in America will need to close in the coming years, while quite a few others will need to become a good deal smaller."); Bailey, *supra* note 235 ("There is a nationwide crisis at the law schools in our Country. Enrollment is down dramatically and there is no indication that this will change in the near future. . . . How this will impact law schools is also obvious—faculty layoffs and closures.").

241. *See generally* James E. Moliterno, *Crisis Regulation*, 2012 MICH. ST. L. REV. 307, 337 (2012) (comparing law student debts of graduates of public versus private law schools).

242. Adam Babich, *Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469, 470 n.4 (2011) ("Some law schools, of course, are stand-alone entities while others are units within universities.").

243. *See* Sara Robbins & Gregory E. Koster, *The New York Joint International Law Program Experience*, 85 L. LIBR. J. 783, 784 (1993) ("Without the support of a college or university library, they are pressed to stretch their collection budgets to cover the full range of law-related materials: political science, economics, philosophy, etc.").

244. *See* Johanna K.P. Dennis, *The Renaissance Road: Redesigning the Legal Writing Instructional Model*, 38 S.U. L. REV. 111, 141 (2010).

> At some law schools, beyond any in-school writing center or specialist, due to being part of a university, the law school can take advantage of a writing center run by an English department that provides English language and grammar support. However, stand-alone law schools or law schools off-site from their main institutions do not typically have this luxury.

Id.

245. *Cf.* Thomas M. Haney, *The First 100 Years: The Centennial History of Loyola University Chicago School of Law*, 41 LOY. U. CHI. L.J. 651, 686 (2010) (discussing a period during which Loyola University Chicago School of Law "had run at a deficit,

exigency, the school will have several options. It may try to reduce staff and administrative appointments, reduce the number of contract faculty, and, perhaps, deny tenure to individuals who might otherwise have been awarded tenure.[246] If those measures do not suffice, the school may also cut tenured faculty.[247]

Suppose that a law school and university are connected. First, as *Scheuer* illustrates, a school can declare exigency with respect to a particular unit, even if the university as a whole is doing quite well.[248] That said, a law school's declaration of exigency will require that it make a number of difficult decisions. As *Brady* illustrates, a school will likely not be able to dismiss a tenured professor in favor of a non-tenured professor to teach the same courses, although a separate question involves the kinds of damages that might be awarded when a law school nonetheless decides to fire a tenured professor in such circumstances.[249]

It is often suggested that law schools help fund other university divisions,[250] although universities differ with respect to the degree to

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which the University had to bear"); Richard A. Matasar, *Defining Our Responsibilities: Being An Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 118 (2008) (noting that the university-based law school program has certain advantages—the university can provide "a cushion to the school if it faces hard times or a subsidy to the school if it fits the university's strategic goals"; Debra Cassens Weiss, *S&P Revises Outlook for Albany Law School, Citing Enrollment Drop*, ABA J. (Apr. 16, 2013, 5:20 AM), http://www.abajournal.com/news/article/sp_revises_outlook_for_albany_law_school_citing_enrollment_drop/ ("Albany Law School is one of five stand-alone law schools rated by S&P . . . ."); *id.* (S&P has revised Albany Law School's outlook from BBB/positive to BBB/stable."); *id.* ("The only stand-alone law school with a downgraded rating was the Thomas Jefferson School of Law in San Diego, given a downgraded BB/negative rating in June 2012.").

246. Olswang et al., *supra* note 15, at 55 ("When institutions face enrollment downturns, financial problems, or internal pressure to reallocate resources, the administration's first response will likely be to deny tenure, eliminate administrative appointments, or decline to renew annual or tenure-track appointments.").

247. *Id.* ("Tenure terminations are generally used as a final consequence of program reductions.").

248. *See supra* notes 195-208 and accompanying text.

249. *See supra* notes 220-30 and accompanying text.

250. Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 686 (2012) ("Law schools have been complaining, rightly I think, that the central universities of which many are a part treat them as cash cows, forcing law students to pay inflated tuition rates to subsidize the rest of the universities' sundry programs."); Silver, *supra* note 3, at 53 ("It is no secret that law schools are cash cows for financially strapped universities."); Jarrod T. Green, *A Play on Legal Education*, 4 PHOENIX L. REV. 331, 351 (2010) (footnotes omitted) ("Law schools are highly profitable, so universities use them to subsidize other departments: the law program as venerable cash cow.").

which they do this.[251] Further, there are sharp disagreements about how much a particular law school should be paying the university in overhead[252] and, indeed, whether the law school is subsidizing the rest of the university or vice versa.[253]

Suppose, however, that a university has been using law school revenues to help support other university programs. One possible university reaction to the declining numbers of matriculating law students is to reduce university cross-subsidization, notwithstanding that such an approach might undercut the university's ability to offer the desired curricula in its various divisions.[254] However, some thorny issues might still remain even with a reduction in cross-subsidization.

Consider the following hypothetical. For several years, University of Plenty Law School has been paying the university two million dollars *in addition to* the reasonably calculated overhead that should go to the university for services rendered, use of the building, etc.[255] Recently, in recognition of the recent downturn in law school admissions, the university reduced the amount the law school must pay to one million

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251. Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 536 (2007) ("[S]chools differ in the extent to which law school revenues are used to subsidize other university programs.").

252. *See generally* Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 20 (2006) ("The reality is that many private universities run their law schools as a profit center, drawing a relatively high percentage of law school gross revenues as 'overhead.'").

253. *See* Allan W. Vestal, *"A River to My People . . ." Notes from My Fifth Year as Dean*, 37 U. TOL. L. REV. 179, 187 (2005) ("The central budget office generated a study that showed the law school being the recipient of a subsidy from the University to the tune of $1,000,000 per annum. We produced a similar evaluation that demonstrated that the law school actually subsidizes the University.").

254. Smith, *supra* note 5, at 619 ("Universities will be reluctant to give up the indirect costs they charge law schools, but at some point there may be no choice but to reduce them somewhat.").

255. *Cf.* Kenneth Lasson, *Compelling Orthodoxy: Myth and Mystique in the Marketing of Legal Education*, 10 U. N.H. L. REV. 273, 292 (2012) ("Like business schools and some high-profile athletic programs, legal education is a common cash cow . . . often used to subsidize other fields in universities that can't pay their own way."). The University of Baltimore Law School was allegedly subsidizing other university programs. *See* David Groshoff, *Creatively Financed Legal Education in a Marketized Environment: How Faculty Leveraged Buyouts Can Maximize Law Schools' Stakeholder Values*, 17 FORDHAM J. CORP. & FIN. L. 387, 394 n.23 (2012).

> The *outgoing* Dean of the University of Baltimore School of Law stated that '[a]s of academic year 2010-11, the University retained approximately 45% of the revenue generated by law tuition, fees and state subsidy. Using any reasonable calculation of the direct and indirect University costs, the University was still diverting millions of dollars in law school revenue to non-law University functions.

Id.

dollars *over* the reasonably calculated overhead. Unfortunately, because of the greatly increased competition for law students, the law school's entering class is smaller than anticipated. The law school is unable to meet its payroll and pay the overhead plus the one million dollar subsidy.

The law school takes a variety of steps to reduce costs, e.g., cuts stipends, reduces travel expenses, etc., but it still has a deficit. The question at hand is whether the inability to stay within budget would be grounds for declaring exigency if the law school's deficit is less than one million dollars, i.e., is less than the required subsidy.

In many of the cases discussed in this article, the unit or university as a whole was in the red for several years rather than just one.[256] Yet, if that was a recognized requirement before the school could declare exigency, one would only need to modify the hypothetical so that the University of Plenty Law School had been running a deficit for several years because of the requirement that it pay one million dollars in addition to the reasonable overhead charge. Notwithstanding the ease with which the hypothetical might be modified, there is no requirement that deficits be multi-year to establish financial exigency. Indeed, some of the cases discussed in this article do not involve a multi-year deficit, but, instead, a projected deficit in a particular year, e.g., because of a reduction in allocated resources from the legislature.[257]

In this hypothetical, the University of Plenty is not itself in financial exigency. If it was or if the law school was, for example, over budget by one and a half million dollars, then a declaration of exigency is a possibility, although a separate question would be whether the university

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256. *See* Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 322 A.2d 846, 857 (N.J. Super. Ct. Ch. Div. 1974) ("The financial problem is one of liquidity, which, as the evidence demonstrates, has plagued the college for many years."); Scheuer v. Creighton Univ., 260 N.W.2d 595, 601 (Neb. 1977) ("The evidence is fairly conclusive [that] the School of Pharmacy was faced with a financial exigency for the fiscal year 1976-1977. It had been operating with a deficit for the past 5 years.").

257. *See* Levitt v. Bd. of Trs. of Neb. State Coll., 376 F. Supp. 945, 947 (D. Neb. 1974) ("In early 1973 the Legislature of the State of Nebraska adopted a budget which necessitated a reduction in the number of faculty members of Peru State College.). *See also id.* ("On June 18, 1973, Dr. Smith informed Mr. Levitt and Dr. Wininger that their employment would terminate at the close of the 1972-73 academic year because of financial exigency."); Johnson v. Bd. of Regents of Univ. of Wis. Sys., 377 F. Supp. 227, 230-31 (W.D. Wis. 1974).

> The 1973-1975 University System biennial budget approved by state government confronted units of the System with serious budget contraction. . . . As a result of the respective decisions by the respective chancellors, each of the plaintiffs received a written notice on about May 15, 1973, from the chancellor of his or her campus stating that his or her position could not be funded effective June 30, 1974 . . . .

Johnson, 377 F. Supp. 277, 230-31.

wanted to do so.[258] Rather, what is at issue in this hypothetical is whether the university's telling the law school to pay the subsidy would provide the needed justification for the law school to be able to make a bona fide declaration of exigency in order to override the obligations to tenured professors.[259] If indeed courts are going to examine whether an exigency declaration is bona fide, they will need some method to determine appropriate overhead amounts.[260] Otherwise, there would be no way to assess whether a school made a bona fide declaration of exigency in cases in which the law school alleged that it was being forced to pay "too much."[261]

Suppose that the reason a different division of a university had been able to avoid a declaration of exigency was because of the cross-subsidization from the law school. While *Scheuer* established that a university division could be in exigent circumstances even if the university as a whole is not,[262] the court did not discuss whether a declaration of exigency in one department would permit a university to revoke the tenure of professors in a different department in the university's attempt to put itself on a firmer financial footing.[263]

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258. *See supra* notes 95-96 and accompanying text (discussing some of the possible costs of declaring exigency).

259. Klein, *supra* note 6, at 232 (noting the importance of establishing a bona fide financial emergency); Bolger & Wilmoth, *supra* note 113, at 348-49 ("[I]n order to preserve the financial integrity of educational institutions and at the same time promote academic freedom, courts must carefully balance the need of the institution to cope effectively with a bona fide financial crisis against the tenured faculty member's contractual or constitutional right to continued employment.").

260. *Cf.* Steven R. Smith, *The Dean and the Budget: Not "Just a Bunch of Damn Numbers,"* 33 U. TOL. L. REV. 203, 209 (2001) ("My sense . . . is that as a general principle, where total overhead and indirect expenses exceed 15% to 20% of total revenue (net of the law school's fair share of undesignated revenue), problems develop in the budget of the law school that affect the academic programs of the law school.").

261. *Cf. id.*

262. *See supra* notes 195-208 and accompanying text.

263. A different issue is presented if the university as a whole declares financial exigency. In that event, the court might well afford the university discretion with respect to the cuts, which might mean that departments not themselves in financial exigency might find their allocations reduced or, perhaps, obliterated entirely. *See* Hohenwarter, *supra* note 120.

> Critics of the plan also say that if Tulane were in a financial crisis, it would seem to make sense to eliminate programs and people that cost the most money. They claim that some cut departments, like mechanical engineering, weren't leaking money. That department, they say, had consistently turned a profit during the years before Katrina, its enrollment was up, and its endowment had increased by $600,000 from July 2001 to July 2005. The mechanical engineering department took its case to the Tulane Board of Administrators, which decided not to overturn the decision to end the program.

As a general matter, university administrators should be afforded deference with respect to how the burdens posed by declining revenues should be spread across departments and schools,[264] although such decisions should be made in light of faculty input.[265] While a university might decide to adopt an "each tub on its own bottom" model so that each unit would have to stay within budget,[266] such a model is of course not required.[267]

Yet, at issue here is not whether deference should be given to university administrators as a general matter, but whether the financial exigency of one department or school affords the university the discretion to terminate tenured faculty positions in other departments or schools. An affirmative answer would give universities great flexibility with respect to whether to honor their contractual obligations—exigency in the School of Arts would enable the university to fire tenured faculty in the School of Engineering.[268] A negative answer would permit a university to fire a tenured faculty for budgetary reasons only if (1) the university as a whole declared financial exigency or, perhaps, faced an

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Id.

264. *See* Clair Finnegan, *Law School Enrollment Dropoff Causes Departmental Budget Cuts*, TOWER (Apr. 14, 2013), http://www.cuatower.com/news/2013/04/14/law-school-enrollment-dropoff-causes-departmental-budget-cuts/ ("Catholic University will cut operational expenditures by 20 percent under a proposal by the Provost, a move that is the result of a decline in revenue from law school enrollment."); Paul Campos, *Catholic University of America to Slash Overall Budget by 20%; Plunging Law Schools Apps to Blame*, LAW., GUNS, & MONEY, Apr. 15, 2013, *available at* 2013 WLNR 9178659 ("Now comes word that the university as a whole will cut operating expenses by 20% (!) because the cash cow that was its law school is being ground up into hamburger . . . .").

265. *See supra* note 54 and accompanying text.

266. Martin Michaelson, Book Review, *The University as Hedgehog or Fox: A Review of Morton & Phyllis Keller's Making Harvard Modern: The Rise of America's University*, 30 J.C. & U.L. 215, 221 (2003) (discussing "'[e]very tub on its own bottom,' Harvard's euphemism for the fiscal autonomy and self-reliance expected of each of its schools"); Jay Conison, *Financial Management of the Law School: Costs, Resources, and Competition*, 34 U. TOL. L. REV. 37, 38 (2002) ("[S]ome law schools are responsible for their own financial well-being to such a degree that they are characterized—albeit tritely—as 'tubs on their own bottom.'"); Vicki Loise & Ashley J. Stevens, *The Bayh-Dole Act Turns 30*, 45 LES NOUVELLES 185, 188 (2010) ("'Every tub must stand on its own bottom' is an ancient proverb that is famously associated with Harvard's philosophy of financial management."); Eli M. Noan, *Electronics and the Future of Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 51, 56 (2008) (discussing "a trend towards semi-autonomous units in a matrix organization of a university, each of them a soft-money tub on its own bottom").

267. Matasar, *supra* note 245, at 118 ("Whether through paying a tax to their parent university, sharing in its logo and name, or adhering to its policies, the university-based [law] program is rarely a true tub on its own bottom.").

268. *Cf. supra* note 98 and accompanying text.

"enrollment emergency,"[269] or (2) the department or school with whom the tenured faculty was associated was itself facing financial difficulties.[270]

Suppose that a law school was in a bona fide state of exigency. What criterion should a school use to determine which tenured faculty should be fired? That would be a matter of contract,[271] although certain difficulties might exist depending upon the criteria used.

For example, suppose that as a matter of contract a law school could terminate tenured faculty positions in light of subject matter needs so that it could retain non-tenured faculty to teach in certain needed areas and fire tenured faculty who taught in areas where even more senior faculty taught.[272] Such a practice would make sense if the tenured individual was unable or unwilling to teach in the needed area, although a university could fire a tenured professor for cause for refusing to teach needed courses.[273] The difficulty that might arise would be in a case in which the fired tenured faculty member had been willing to teach in the necessary area and the university retained the non-tenured person instead. In many cases, the tenured faculty member may have been quite able to teach in the new area (although possibly not as well as the experienced non-tenured professor);[274] thus, it is not clear that a university could fire the tenured faculty member in such a scenario.

The possibility that the fired tenured faculty member could successfully challenge the claim that she could not teach the courses at issue might induce a dean to use a different method of deciding whose positions should be terminated, e.g., "inverse order of seniority"[275] rather

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269. *See supra* note 98 and accompanying text.

270. *See supra* notes 203-07 and accompanying text.

271. *See supra* note 15 and accompanying text.

272. *See* Scheuer v. Creighton Univ., 260 N.W.2d 595, 596 (Neb. 1977) ("Plaintiff was chosen because the only course he taught was medicinal chemistry which could also be taught by a tenured faculty member who had seniority over him and who also could teach biochemistry which plaintiff had stated he could not teach.").

273. *See* Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558 (6th Cir. 2012) (upholding dismissal of tenured professor who refused to teach constitutional law rather than the requested criminal law course).

274. *Cf.* Marcia Gelpe, *Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors*, 25 WM. MITCHELL L. REV. 193, 207-08 (1999).

> Full-time faculty are encouraged to switch teaching areas from time to time in order to meet needs created by the loss of faculty who have retired or moved to other institutions. In addition, faculty members often ask to teach in a new area, and it is customary for deans to try to accommodate these requests.

Id.

275. Johnson v. Bd. of Regents of Univ. of Wis. Sys., 377 F. Supp. 227, 239 (W.D. Wis. 1974).

than "comparative records of performance."[276] While the former criterion would not be required, the dean might believe that such a method would be less likely to lead to litigation,[277] if only because the underlying facts (start date) would be less prone to competing assessments.[278]

One additional point might be noted. Given the downturn in the number of students applying to law school and the low probability that numbers will rebound soon,[279] law schools, and universities more generally, may be much more reluctant to hire tenure-track professors and much more likely to hire adjuncts.[280] Whether or not those who currently have tenure will be protected from universities seeking to remove tenure because of exigencies, it seems likely that there will be fewer and fewer individuals with tenure, and thus fewer and fewer people afforded protection in their attempts to advance knowledge in teaching and research.[281]

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276. *Id.*

277. *Cf.* Andrew S. Murphy, Note, *Redeeming a Lost Generation: "The Year of Law School Litigation" and the Future of the Law School Transparency Movement*, 88 IND. L.J. 773, 807 (2013) ("[L]aw school administrators would obviously like to avoid having their schools literally put on trial . . . .").

278. *See Johnson*, 377 F. Supp. at 239.

279. David Donovan, *More Schools, Fewer Students: As Applications Decline, Law Schools in S.C. Wonder What the Future Holds*, S.C. LAW. WKLY., May 11, 2012, *available at* 2012 WLNR 12467424.

> "There's no reason to believe that the decline in law school applications is at an end. I don't see what will turn this around in the short term. If the decline continues, some schools will go out of business," said Brian Tamahana, professor of law at Washington University of St. Louis and author of the upcoming book "Failing Law Schools."

Id.

280. *See* Klein, *supra* note 6, at 272.

> Colleges and universities are hiring more contingent faculty for two primary reasons. Institutions are looking to reduce personnel costs, and they need more flexibility in staffing. At the same time, this trend raises concerns about the effect on student learning and success; inequities among faculty; and the whittling away of tenure, shared governance, and academic freedom.

Id. (footnotes omitted). *See also* Jordan Weissman, *The Ever-Shrinking Role of Tenured College Professors (in 1 Chart)*, ATLANTIC (Apr. 10, 2013), http://www.theatlantic.com/business/archive/2013/04/the-ever-shrinking-role-of-tenured-college-professors-in-1-chart/274849/ ("Since 1975, tenure and tenure-track professors have gone from roughly 45 percent of all teaching staff to less than a quarter. Meanwhile, part-time faculty are now more than 40 percent of college instructors, as shown by the line soaring towards the top of the graph.").

281. *See* Weissman, *supra* note 280.

III. CONCLUSION

The recent downturn in the number of students attending law school looks likely to continue.[282] Law schools have already responded by reducing class sizes,[283] and they may well be forced either to lay off faculty or to close entirely. The ways that universities generally, and law schools in particular, react to these challenging times will depend in part on background law.

While there is a dearth of cases involving layoffs of tenured law faculty due to financial exigency, there are several cases involving tenured faculty who have lost their jobs because of challenging economic circumstances.[284] As a general matter, when a university is in a bona fide state of financial exigency, it will be given great deference with respect to the measures that must be taken to correct that problem.[285] So too, when a university division or department is in an urgent financial situation, much deference will be given with respect to the steps taken within that division or department to gain financial solvency.[286]

Tenure protections in these kinds of cases are a matter of contract,[287] and the faculty handbook coupled with university policies and practices will spell out the economic conditions under which tenured faculty positions can be terminated and the criteria that can be used.[288] Usually, tenured faculty positions will be terminated as a matter of last resort.[289]

Some of the anticipated cases involving layoffs of tenured law faculty will not force courts to address unresolved areas of law. If a stand-alone law school is in a state of financial exigency and the choice is which tenured faculty members must lose their positions, great deference will be given to the school as long as a reasonable criterion is

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282. *See* Pettys, supra note 1, at 1258.

283. Joyce Gannon, *Law Schools Take Fewer Students as Job Market Remains Glum*, PITTSBURGH POST-GAZETTE (Sept. 15, 2013, 12:00 AM), http://www.post-gazette.com/education/2013/09/15/Law-schools-take-fewer-students-as-job-market-remains-glum/stories/201309150153.

284. *See supra* Part II.

285. *See* Krotkoff v. Goucher Coll., 585 F.2d 675, 678 (4th Cir. 1978).

286. Johnson v. Bd. of Regents of Univ. of Wis. Sys., 377 F. Supp. 227, 237 (W.D. Wis. 1974).

287. *See* Breiner-Sanders v. Georgetown Univ., 118 F. Supp. 2d 1 (D.D.C. 1999).

288. *See* Am. Ass'n of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 346 A.2d 615, 617 (N.J. Sup. Ct. App. Div. 1975); *see* Klein, *supra* note 6, at 250; *see supra* note 15 and accompanying text (discussing examples of tenure rights on the basis of private agreements).

289. *See* B. Robert Kreiser, *A Response to AASCU's Position on Financial Exigency*, ACADEME, May-June 1985.

applied in a nonarbitrary way.[290] However, other kinds of cases will be more complicated. First, because some universities have used law school revenues to cross-subsidize other departments,[291] there may be some question as to whether the law school itself is in a state of financial exigency if a plaintiff alleges that the university is requiring a significant subsidy over reasonable overhead costs.[292] It is an open question whether courts will be willing to second-guess university charges to determine whether a bona fide declaration of exigency has been made. If a court finds that neither the law school nor the university faces a bona fide state of financial urgency, then the economic conditions traditionally necessary for triggering the ability to fire tenured faculty may not exist.[293] An additional issue that may arise is whether a different division's financially urgent situation will permit the university to fire tenured faculty more generally.[294]

Assuming that the requisite economic conditions exist, tenured law school faculty may be fired.[295] A thornier issue will be presented when a tenured faculty member challenges her being fired when someone untenured was retained, because it may be more difficult in some areas of law to establish that the tenured faculty member could not have taught the subject matter at issue.[296]

Whether or not law schools close or even fire tenured faculty, they will likely follow the example already set in colleges and universities more generally and hire fewer tenured or tenure-track faculty.[297] Law schools choosing to have more classes taught by adjuncts will be afforded more flexibility at the expense of undermining what tenure is designed to protect—academic freedom in teaching and research.[298] While the undermining of teaching and research protections will not be

290. *See supra* note 35 and accompanying text.

291. *See supra* note 250 and accompanying text (discussing how law schools are treated as "cash cows" by the universities); *see supra* note 253 and accompanying text (discussing how the law school subsidized the university).

292. *See* Groshoff, *supra* note 255 and text accompanying note 255 (discussing the subsidy paid by the University of Baltimore Law School).

293. *Cf.* Krotkoff v. Goucher Coll., 585 F.2d 675, 678 (4th Cir. 1978) (holding that a college can dismiss a tenured professor if there is a bona fide financial exigency); Johnson v. Bd. of Regents of Univ. of Wis. Sys., 377 F. Supp. 227, 237 (W.D. Wis. 1974) (holding that a department can dismiss a tenured professor if there is a bona fide financial exigency).

294. *See supra* notes 262-63 and accompanying text.

295. *See Krotkoff*, 585 F.2d at 678; *Johnson*, 377 F. Supp. at 237.

296. *See supra* notes 272-74 and accompanying text.

297. *See supra* note 280 and accompanying text.

298. *See supra* note 280 and accompanying text; *see* Gray, *supra* note 44, at 491 and text accompanying note 491.

stopped in the foreseeable future, it may at least be slowed if courts take seriously that financial urgency may itself be questioned and that challenging economic conditions cannot be viewed as giving either universities or law schools carte blanche to ignore their voluntarily incurred obligations. In their haste to achieve flexibility, universities and law schools cannot be permitted to throw out the baby along with the bath water. Flexibility is desirable and important,[299] but it is not an end in itself and cannot be permitted to undermine the academic protections that so greatly enhance academic teaching and research.

299. *See* Office of the Provost, *Report of the Committee to Consider a More Flexible Tenure Probationary Period*, U. MICH., http://www.provost.umich.edu/reports/flexible_tenure/work_of_the_committee.html (last visited Mar. 7, 2014).