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## The First Thing We Do, 47 J. Marshall L. Rev. 1275 (2014)

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# THE FIRST THING WE DO

JORGE R. ROIG<sup>1</sup>

The first thing we do when we are born is learn. We learn to breathe in air, and we learn to, quite literally, see the world around us in a new light. We also begin immediately to teach. We tell our parents when we are hungry, wet or cold. And we show them, in most cases, how to love like they have never loved before. We receive and analyze the stimuli from, and send out our own stimuli to, the environment. We immediately engage in a conversation with our surroundings. Our learning process and our subsequent pursuit of education are, therefore, primordial and natural. Education is the first thing we do.

In spite of this, there is currently a concerted effort to dumb down America. This dumbing down is not the result of “technology” or of “the incorrigible youth.” Dr. David Stovall – recipient of the Local Hero Award at the 2013 LatCrit Biennial Conference, Associate Professor at the University of Illinois at Chicago, volunteer high school social studies teacher and community activist – succinctly and poignantly explained the current multilateral attack on education: “This is not a conspiracy theory; it is public policy.”<sup>2</sup>

Recently, the American Bar Association’s Council of the Section on Legal Education and Admissions to the Bar proposed that tenure for law professors be eliminated as a requirement for accreditation of law schools.<sup>3</sup> Deans, law school administrators, judges and practicing attorneys in favor of eliminating this requirement argued that (1) no one outside of academia understands why tenure exists, (2) professors are the only

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<sup>2</sup> 2013 Biennial LatCrit Conference, *Resistance Rising: Theorizing and Building Cross-Sector Movements*, Chi., Ill. (Oct. 3–6, 2013). The current and future changes in the legal education landscape were also the subject of a plenary session at the LatCrit Conference. *Id.* This essay is inspired by both Dr. Stovall’s address and the plenary session presentations and ensuing discussion.

<sup>3</sup> Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, NAT’L L.J. (Aug. 12, 2013, 12:00 AM), available at <http://www.nationallawjournal.com/id=1202614832071/ABA+Panel+Favors+Dropping+Law+School+Tenure+Requirement%3Fmcode=0&curindex=0&curpage=ALL#>.

professionals in our economy who benefit from tenure and (3) law schools have become too expensive because of the costs associated with tenure.<sup>4</sup>

So, let us think about the first argument for a second. They claim no one outside academia understands why tenure exists. And yet, the literature is rife with analyses of the benefits and potential problems of tenure.<sup>5</sup>

Ours is a society that used to pride itself on not just allowing, but on affirmatively seeking, the promotion of a free and open discourse of ideas.<sup>6</sup> Indeed, it is difficult to convey this idea with more force and eloquence than Justice Brandeis did almost a century ago:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>7</sup>

Some suggest that the unprecedented technological progress our country experienced over the past couple of centuries is closely associated with this atmosphere of free exploration and development of knowledge.<sup>8</sup> And, as explicitly recognized over and

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<sup>4</sup> *Id.*

<sup>5</sup> See Michael S. McPherson & Morton Owen Schapiro, *Tenure Issues in Higher Education*, 13 J. ECON. PERSP. 85, 86–87 (1999) (briefly reviewing the tenure literature); Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 327 n.20 (1990) (reflecting on the array of literary sources in support of tenure spanning 1970 to 1990).

<sup>6</sup> See, e.g., U.S. CONST. amend. I (emphasis added) (“Congress shall pass *no law* . . . abridging the freedom of speech, or of the press.”).

<sup>7</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). See also *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).

<sup>8</sup> See, e.g., Jeffrey D. Sachs & John W. McArthur, *Technological*

over again by the United States Supreme Court, a central part of that atmosphere is academic freedom.<sup>9</sup> “Although the case for academic freedom goes beyond economic considerations, protecting academic freedom may in fact have valuable economic benefits, through encouraging a climate of discovery and criticism that promotes individual and social learning.”<sup>10</sup> As articulated by the Supreme Court, “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>11</sup>

Allowing teachers, researchers, scholars and thinkers of our society the freedom to think new thoughts, state uncomfortable truths and criticize entrenched powers that favor stagnation, has played an essential role in guaranteeing our society’s progress. Do we want to go back to the age when Galileo Galilei’s rediscovery of scientific fact was silenced?<sup>12</sup> Or, should we seek to recreate and rejuvenate a social order that inscribed the freedom to think, speak, believe and associate in the very first provision of its Bill of Rights?<sup>13</sup> In this sense, “many spirited defenses of the tenure system have been made on the grounds of protecting the rights of faculty to pursue their research and teaching and to support their political goals outside the institution.”<sup>14</sup> “The job security provided to academics by tenure is designed to serve principally as a ‘guarantor of academic freedom.’”<sup>15</sup>

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*Advancement and Long-Term Economic Growth in Asia, in* TECHNOLOGY AND THE NEW ECONOMY 157, 170–72 (Chong-En Bai & Chi-Wa Yuen eds., 2002) (“First, innovation is science based. This implies a great deal of importance for higher education as a fundamental feature of a national innovation strategy. Critically, higher education does not take place anywhere in the world without a major investment by government. Second, innovation is an increasing returns to scale process . . . This is also why we have universities – because it is helpful for scientists to talk to each other so that they can develop good ideas with the help of the person next door. . . . Society benefits through the widespread diffusion of ideas. To this end knowledge-based economies aim at the free and broad distribution of basic scientific knowledge, new mathematical theorems, and the like.”).

<sup>9</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”).

<sup>10</sup> McPherson & Schapiro, *supra* note 5, at 93–94.

<sup>11</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>12</sup> See Kevin W. Saunders, *When Enduring Value Turns to Dogma*, 58 WAYNE L. REV. 1149, 1150–57 (2013) (citing JEROME J. LANGFORD, *GALILEO, SCIENCE, AND THE CHURCH* (3d ed. 1992) (discussing the importance of consistently valuing freedom of expression even when it contradicts societal values – as illustrated in the context of Galileo’s trials before the Catholic Church)).

<sup>13</sup> U.S. CONST. AMEND. I.

<sup>14</sup> McPherson & Schapiro, *supra* note 5, at 86.

<sup>15</sup> Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 79 (2006) (quoting James J. Fishman,

But tenure is not *just* about academic freedom for educators.<sup>16</sup> It is also about providing students with an environment conducive to learning. Tenure allows for the development of long-term relationships between students and their professors, professors and their educational institution and, consequently, students and their institution.

Election to tenure represents virtual lifetime membership in a community. As a member of an academic commonwealth, one is bound with fellow citizens whom the faculty member admires, loathes, or fears, but who are linked within a joint enterprise. Academic tenure encourages commitment, discipline, collegiality and compassion to the institution, and to one's colleagues as well. Tenure contributes to institutional stability by creating a permanent group of academic citizens without the distraction of ongoing reviews that might be destructive to collegiality and commitment.<sup>17</sup>

These bonds of community encourage a peaceful atmosphere where calmer minds can collaborate for the production of knowledge. Indeed, "[t]o be effective, a university must be a community to which people belong and about which they care."<sup>18</sup>

In this sense, it has long been argued that the institution of tenure counteracts the negative effects of risk aversion in professors and allows researchers to take risks they would not otherwise tolerate.<sup>19</sup>

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*Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 175 (2000)). See also Brown & Kurland *supra* note 5, at 328–31 (reinforcing the concept that it is difficult to terminate professors with tenure on the basis of "views expressed in the classroom, in scholarly writing, or in public arenas").

<sup>16</sup> See, e.g., Aloysius Siow, *Tenure and Other Unusual Personnel Practices in Academia*, 14 J.L. ECON. & ORG. 152, 153 (1998) ("Tenure plays many roles. It alleviates problems caused by obsolescence and specialization by providing a contractual insurance function").

<sup>17</sup> Fishman, *supra* note 15, at 179–80 (citing HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 182 (1990); ARVAL A. MORRIS, *DISMISSAL OF TENURED HIGHER EDUCATION FACULTY: LEGAL IMPLICATIONS OF THE ELIMINATION OF MANDATORY RETIREMENT* 86 (1992)).

<sup>18</sup> Fishman, *supra* note 15, at 180 (citing Howard R. Bowen & Jack H. Schuster, *American Professors: A National Resource Imperiled* 236–37 (1986)).

<sup>19</sup> See, e.g., Smith Freeman, *Wage Trends as Performance Reveals Productive Potential: A Model and Application to Academic Early Retirement*, 8 BELL J. ECON. 419, at 419, 425 (1977) (discussing the issue of risk aversion in academia); Charles M. Kahn & Takatoshi Ito, *Why Is There Tenure* (Ctr. for Econ. Research, Dept. of Econ., Univ. of Minn., Discussion Paper No. 228, 1986), available at <http://www.econ.umn.edu/library/mnpapers/1986-228.pdf> (arguing that tenure allows researchers to take risks); Fishman, *supra* note 15, at 182–83 ("Job security not only allows the faculty member to pursue the controversial, but also to investigate matters that present a high probability of failure . . . . Tenure allows someone to take that risk and fail without negative employment consequences. As with the federal judiciary, job security permits the exercise of independent judgment without fear of repercussions"). See also Milton Harris & Yoram Weiss, *Job Matching with Finite Horizon and Risk*

Tenure is a means by which professors can protect themselves, at least partially, from the uncertainties that inevitably emerge when management decisions are made by a continually changing group of workers (professors) who may shift their political alignments. In short, tenure is a form of job protection professors have from their colleagues and the special problems created with an academic democracy.<sup>20</sup>

Accordingly, alleviating the tensions of risk-taking on risk-averse individuals should lead to a more peaceful and relaxed environment.

For similar reasons, tenure is also about guaranteeing a vital revenue stream for nonprofit higher education. The long-term relationships and linkages created between the individuals who participate in higher education and the institutions that nurture and support them also promote financial support from successful graduates to their alma maters. This, in turn, helps secure long-term sustainability, funding and lower cost of the entire educational endeavor.<sup>21</sup>

Tenure is also important with respect to its role in preserving the specialized work performed by academics<sup>22</sup> – particularly in the context that “faculty have expert knowledge about their own field that is not readily available to administrators.”<sup>23</sup> In the academy, then, it is particularly crucial that the faculty themselves, as experts in their specific fields of study, make hiring decisions.<sup>24</sup> It has long been argued that, given this reality,

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*Aversion*, 92 J. Pol. Econ. 758, 758-73 (1984) (exploring job-matching models and the effects, particularly on productivity, of introducing employees with a “finite horizon” and “risk aversion”).

<sup>20</sup> Richard B. McKenzie, In Defense of Academic Tenure, 152 J. INST'L & THEORETICAL ECON. 325, 326-27 (1996).

<sup>21</sup> See, e.g., Dennis B. Arnett, Steve D. German & Shelby D. Hunt, *The Identity Salience Model of Relationship Marketing Success: The Case of Nonprofit Marketing*, 67 J. MKTG 89 (2003) (arguing that developing long-term relationships with key stakeholders is an important strategy in the context of nonprofit higher education marketing); Robert A. Baade & Jeffrey O. Sundberg, *What Determines Alumni Generosity?*, 15 ECON. EDUC. REV. 75 (1996) (comparing the scale and determinants of UK versus US alumni giving); Fred Mael & Blake E. Ashforth, *Alumni and Their Alma Mater: A Partial Test of the Reformulated Model of Organizational Identification*, 13 J. ORG'L BEHAV. 103 (1992); Larry L. Leslie and Garey Ramey, *Donor Behavior and Voluntary Support for Higher Education Institutions*, 59 J. HIGHER EDUC. 115 (1988).

<sup>22</sup> See MICHAEL S. MCPHERSON & GORDON C. WINSTON, THE ECONOMICS OF ACADEMIC TENURE: A RELATIONAL PERSPECTIVE, PAYING THE PIPER: PRODUCTIVITY, INCENTIVES, AND FINANCING IN U.S. HIGHER EDUCATION 109-34 (1993); Siow, *supra* note 16, at 155-58 (discussing the complementary roles of tenure and specialization in universities).

<sup>23</sup> McPherson & Schapiro, *supra* note 5, at 95. See also McKenzie, *supra* note 19; Siow, *supra* note 16, at 158-63 (discussing how tenure comes into play with respect to “sound hiring, promotion, and pay decisions”).

<sup>24</sup> McPherson & Schapiro, *supra* note 5, at 94-95. See also McKenzie, *supra*

“tenure is necessary because without it incumbents would never be willing to hire people who might turn out to be better than themselves.”<sup>25</sup>

The second argument, made in support of abolishing the tenure requirement, claims that educators are the only professionals in our economy who benefit from tenure.<sup>26</sup> And, that this is a bad thing.<sup>27</sup> First, it must be noted that judges, deans and law firm partners who make this argument also enjoy tenure or more robust contractual, economic, social and political guarantees of continued employment and wealth.<sup>28</sup> Secondly, what is the problem with educators receiving “special treatment”? Individuals charged with providing our society with education *should* be given special consideration. Educators and researchers have one of the most important jobs in society. Indeed, one would be hard-pressed to find another human endeavor that has a more direct and multiplicative influence over our short and long-term capacity as a community than the production and distribution of knowledge at all levels. No one can affect as much social change as an educator. Education, we are all fond of saying, is the silver bullet. So, yes, educators are special. And they deserve special protection from those who do not want their yachts rocked.

It is also worthwhile to mention the important role that educators, as “faculty members,” play in the governance of institutions of higher education. In this sense, it has been argued that tenure is a key element in the large role of organizational governance that attempts to make faculty members bear more of the residual profits and losses from their own actions and the actions of administrators and trustees. By making faculty

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note 19; Greg Mankiw, *Levitt on Tenure*, GREG MANKIW'S BLOG (Mar. 6, 2007), <http://gregmankiw.blogspot.com/2007/03/levitt-on-tenure.html> (suggesting that the removal of tenure would result in decreasing the faculty's hiring power, i.e. giving more power to the deans).

<sup>25</sup> H. Lorne Carmichael, *Incentives in Academics: Why Is There Tenure?*, 96 J. POL. ECON. 453, 454 (1988). See also McPherson & Schapiro, *supra* note 5, at 94–95.

<sup>26</sup> Sloan, *supra* note 2.

<sup>27</sup> *Id.*

<sup>28</sup> Federal judges enjoy life tenure and irreducible compensation, pursuant to constitutional mandate. See U.S. CONST. ART. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”). See also *Wimmer v. Cook*, 774 F.2d 68, 70–77 (4th Cir. 1985) (discussing the role and authority of magistrate judges as set forth under the Magistrate Act); Fishman, *supra* note 15, at 163 (“The most analogous group in society to tenured professors are federal judges, who receive life-time appointments to assure their independence, so they will reach decisions on the basis of legal principle irrespective of the power of the litigants or the pressures of other branches of government.”). Law firm partners, for their part, enjoy the job security that only ownership and control of the employer enterprise can provide.

members residual university claimants to these actions, it provides them with an incentive to participate in certain aspects of decision making where their expertise is valuable, to make decisions that are in the long-run best interests of the university, and to actively and effectively monitor the decisions made by university administrators. Tenure is necessary not to protect academic freedom in the traditional sense but part of a broader system of organizational governance where faculty members are required to play a role in both evaluating and monitoring university administrators and trustees.<sup>29</sup>

“Faculty are managers because of their absolute authority in academic matters. The absence of tenure would ultimately diminish faculty powers of governance, and lead to a more traditional employer-employee relationship.”<sup>30</sup> In fact, “the United States Supreme Court [has] recognized the special nature of the employment relationship and the faculty’s role in university governance.”<sup>31</sup>

But, what about the costs? The final argument claims that law schools have become too expensive because of the high costs attributed to tenure. Recent research, however, shows that it is the disproportionate increase in administrators, and the costs associated with this increase, that has inflated costs in higher education. In the twenty years between 1985 and 2005, the number of faculty increased roughly in the same proportion (50%) as the number of students enrolled in higher education institutions (56%), the number of degree-granting institutions (50%) and the number of degrees granted (47%).<sup>32</sup> Furthermore, according to the same recent study, “only about 30 percent [sic] of the professoriate *is tenured or even on the tenure track*.”<sup>33</sup> In contrast, the number of administrators employed by those same institutions grew almost twice as fast (85%), and the administrators’ staff grew at close to five times the rate of faculty growth (240%).<sup>34</sup> This growth does not respond to the much-

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<sup>29</sup> William O. Brown Jr., *University Governance and Academic Tenure: A Property Rights Explanation*, 153 J. INST’L & THEORETICAL ECON. 441, 442–43 (1997).

<sup>30</sup> Fishman, *supra* note 15, at 180 (citing N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 686 (1980); N.Y. Univ., 332 N.L.R.B. 111 (2000); Bos. Med. Ctr. Corp., 330 N.L.R.B. 30 (1999); Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369, 383 (1997); Courtney Leatherman, *Union Movement at Private Colleges Awakens After a 20-Year Slumber*, CHRON. HIGHER EDUC., Jan. 21, 2000, at A16).

<sup>31</sup> *Id.* (citing *Yeshiva*, 444 U.S. at 686).

<sup>32</sup> BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* (2011).

<sup>33</sup> Peter Lamal, *Book Review, The Fall of the Faculty: The Rise of the All-Administrative University and Why It Matters* by Benjamin Ginsberg, 84 J. HIGHER EDUC. 146, 147 (2013) (citing Ginsberg, *supra* note 33, at 158) (emphasis added).

<sup>34</sup> GINSBERG, *supra* note 33.



maligned bureaucracy of the public sector. Instead, this trend is disproportionately stronger in the private sector, as compared to public institutions of higher education. While administrative and managerial staff grew at a modest rate (66%) in public institutions, it grew more than twice as fast (135%) in private universities.<sup>35</sup>

Indeed, this corporatization of our education system raises an important question: for the purpose of valuing faculty members, and only for this purpose, are we to disregard the neoliberal worship of investment in human capital?<sup>36</sup> How exactly should we calculate the return on society's investment in the salaries of Dr. Francis Crick and Dr. James D. Watson? Was it bad business to welcome Dr. Albert Einstein (and countless other intellectual giants) to the United States when they fled war and persecution in Europe? When did our supposed meritocracy go from rewarding intelligence and academic discipline to shunning it?

In this sense, we should remember that it has long been recognized that "[o]ne of the most important roles of the university in society is the encouragement of research that would not otherwise take place in the private sector."<sup>37</sup> The job security provided to researchers by tenure also helps encourage "the production of scientific and technical knowledge that cannot be appropriated as well as knowledge that would never be of value to firms in the private sector." Such knowledge is immensely valuable to society at large because it constitutes a priceless public good, creates positive externalities, and has considerable long-term worth.<sup>38</sup>

But, let us assume for a second that a reduction of law school costs trumps the enormous value created through the production of knowledge. How exactly is the elimination of tenure supposed to alleviate the problem of costs? Indeed, as neoliberal economists have been quick to point out, professors have lower salaries than similarly qualified individuals in other jobs because tenure, itself, serves as an alternative, non-monetary form of compensation.<sup>39</sup> Consequently, eliminating tenure would actually result in

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<sup>35</sup> *Id.*

<sup>36</sup> MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–1979 219–33 (Michel Senellart et al. eds., Graham Burchell trans., Palgrave Macmillan 2008).

<sup>37</sup> Carmichael, *supra* note 25, at 455.

<sup>38</sup> Carmichael, *supra* note 25, at 455. *See also* McPherson & Schapiro, *supra* note 5, at 94 ("For example, the time period over which strategic decisions about research in the sciences 'pay off' is often very extended. In particular, certain critical perspectives developed in the humanities and social sciences may provoke strong objections from society in the short run, but prove to be of long-run value. Administrators (and funders of universities) may have a shorter time horizon than tenured faculty, and hence a shorter time horizon than may be optimal.").

<sup>39</sup> Mankiw, *supra* note 23.

increased salaries for professors and higher costs for law schools.<sup>40</sup> Furthermore, tenure helps educational institutions compete for the best and the brightest minds against corporate for-profit entities that can often offer much higher salaries to those same individuals.<sup>41</sup> Tenure provides universities with the opportunity to “pay[] lower wages and less fringe benefits than they might otherwise pay for the caliber of professors they [are trying to] hire.”<sup>42</sup> In the absence of tenure, the demands of the market would actually require schools to spend more, not less, on professors’ salaries.<sup>43</sup> Or, the schools would be unable to compete for those top candidates, and would be forced to settle for mediocre educators.<sup>44</sup> But, perhaps that is precisely the point.

Now, let us speak candidly: tenure is not the problem. Tenure does not make professors unaccountable or immune from the consequences of their own incompetence.<sup>45</sup> Tenured professors can

<sup>40</sup> *Id.*

<sup>41</sup> See Fishman, *supra* note 15, at 181 (“Colleges and universities historically have not had the financial resources to pay faculty at rates competitive with private industry or the marketplace.”); Brown & Kurland *supra* note 5, at 333 (“Tenured stability is conventionally supported as a tradeoff for the lower salaries paid to faculty members, compared to other highly trained professionals.”).

<sup>42</sup> McKenzie, *supra* note 19, at 326.

<sup>43</sup> Ehrenberg, Pieper and Willis (1995) provide empirical evidence about the tradeoff between tenure and salary. Specifically, departments that offer low tenure probabilities for junior faculty pay higher salaries for senior faculty.” McPherson & Schapiro, *supra* note 5, at 87 n.2 (citing Ronald G. Ehrenberg, Paul J. Pieper, & Rachel A. Willis, *Would Reducing Tenure Probabilities Increase Faculty Salaries?* (Nat’l Bureau of Econ. Research, Working Paper No. 5150, 1995). See also Ronald G. Ehrenberg, Paul J. Pieper, & Rachel A. Willis, *Do Economics Departments with Lower Tenure Probabilities Pay Higher Faculty Salaries?*, 80 REV. ECON. & STAT. 503 (1998) (same); McKenzie, *supra* note 19, at 339 (“[I]f tenure were abolished across the board, it would tend to: Increase the pay of new, untenured faculty both during and after their normal probation period . . . .”); Brown & Kurland *supra* note 5, at 333 (“Without tenure, the uncertainty of employment would require higher salaries.”).

<sup>44</sup> See Fishman, *supra* note 15, at 181–82 (citing Bowen & Schuster, *supra* note 18, at 239–40; Bos. Med. Ctr. Corp., 330 N.L.R.B. 30 (1999); N.Y. Univ., 332 N.L.R.B. 111 (2000); Leatherman, *supra* note 31, at A16) (“Elimination of tenure would seriously reduce the attractiveness of higher education as a career. It may lower the caliber of people drawn to it, actually increase the cost of attracting talent, or lead to the strident unionism that has so changed the nature of public primary and secondary education.”); McKenzie, *supra* note 19, at 326.

<sup>45</sup> See William W. Van Alstyne, *Tenure: A Summary, Explanation, and “Defense,”* 57 AM. ASS’N U. PROFESSORS BULLETIN 328, 328 (1971) (“Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause.”).

be fired for not doing their job, just like anyone else.<sup>46</sup> Tenure only protects educators from arbitrary dismissals.<sup>47</sup> The entrenchment of lazy or incompetent professors in our educational institutions, when and where it may exist,<sup>48</sup> has little to do with the requirements of tenure. Instead, it has to do with the unwillingness of those who supervise the unproductive and the supervisors' failure to make these professors accountable.<sup>49</sup> If we were actually serious about lowering the costs of a legal education,

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<sup>46</sup> See, e.g., AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, 99 AM. ASS'N U. PROFESSORS BULLETIN 61, 63–65 (2013) (“Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may be effected by the institution only for adequate cause . . . . Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”). See also 1940 *Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AM. ASS'N U. PROFESSORS BULLETIN 1, 4 (Oct. 26, 2006, 12:49 PM), available at <http://www.aaup.org/file/principles-academic-freedom-tenure.pdf> (providing “termination for cause” procedural guidelines).

<sup>47</sup> *Id.*

<sup>48</sup> In this sense, “[a]necdotal evidence of inferior scholars and teachers shielded by tenure makes a powerful hostile argument, though not a valid one.” Brown & Kurland, *supra* note 5, at 355. In fact, the evidence for the conclusion that research or teaching productivity decreases after tenure is mixed and inconclusive at best. Compare James L. Bess, *Contract Systems, Bureaucracies, and Faculty Motivation: The Probable Effects of a No-Tenure Policy*, 69 J. HIGHER EDUC. 1 (1998) (no reduction in either research or teaching productivity after tenure), and ALBERT REES & SHARON P. SMITH, *FACULTY RETIREMENT IN THE ARTS AND SCIENCES* (Princeton Univ. Press 1991) (no evidence that retirement uncapping for tenured faculty will have a serious adverse effect on teaching effectiveness), with Sharon G. Levin and Paula E. Stephan, *Research Productivity Over the Life Cycle: Evidence for Academic Scientists*, 81 AM. ECON. REV. 114 (1991) (research productivity of scientists is, on average, reduced with age), and Daniel S. Hammermesh, *Aging and Productivity, Rationality and Matching: Evidence From Economists* (Nat'l Bureau of Econ. Research, Working Paper No. 4906, 1994) (research output of economists declines very sharply with age), reviewed by McPherson & Schapiro, *supra* note 5, at 86. “Overall, a National Research Council (1991) study concluded that the evidence did not justify continuing the exemption of tenured faculty from the federal policy of prohibiting mandatory retirement on the basis of age.” McPherson & Schapiro, *supra* note 5, at 86 (citing Nat'l Research Council, *Ending Mandatory Retirement for Tenured Faculty: The Consequences for Higher Education* (P. Brett Hammond & Harriet P. Morgan eds., 1991). “[A]n increase in the number of faculty over age 70 or, more generally, an increase in the average age of faculty does not necessarily affect institutional quality.” Nat'l Research Council, *supra*, at 66. See also Adams, *supra* note 15 (“[N]o conclusive evidence demonstrates that tenure adversely affects productivity or teaching effectiveness.”) (citing Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J.L. & EDUC. 551, 561–64 (1998)).

<sup>49</sup> See Fishman, *supra* note 15, at 161–62 (“[T]he catalyst to making tenure more flexible and effective lies not with the professorate relinquishing some of its rights, but with university administrators creating an environment of expectations and incentives for tenured faculty, developing the fortitude and procedures to make tenure work as it should, and encouraging faculty to exercise the responsibilities that accompany their status.”).

we would demand that deans fire some of the highest paid, and least productive, members of our faculties.<sup>50</sup> Tenure bars none of this.

This proposal – to eliminate the requirement of tenure – is not about lowering the costs of a legal education. Rather, it is just one step in a much larger plan. Law faculties are, and must continue to be, one of the primary storehouses of critical thought in our society. It is not mere happenstance that individuals such as Abraham Lincoln, Mohandas Gandhi and Robert F. Kennedy were lawyers. It is not just chance that the attorneys of the NAACP Legal Defense Fund and the American Civil Liberties Union have fought and won some of the greatest victories for civil rights in America. The attack on a well-educated populace starts with the lawyers as they are the civil society's first line of defense.

A lawyer is more than a legal technocrat. Lawyers are policymakers and public defenders. They are prosecutors and activists. And, the development of a critical and independent mind is no more important in any area of human action than in the law. There is a concerted effort to turn law schools into automaton

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<sup>50</sup> It should be noted at this point that senior members of a faculty can and do contribute to, and can be and are productive for, their institutions, their faculties and their students in myriad ways, not limited to scholarly production. For example, senior faculty members can serve as mentors (to junior faculty members, students and even alumni), excel as outstanding teachers, take on administrative tasks, engage in extensive service to the community, and maintain and convey the institutional memory that is both irreplaceable and indispensable for the institution to excel. Furthermore, "the reputation of a faculty member, built over a lifetime, may be more important to an institution's reputation and long-run effectiveness than that individual's current output." McPherson & Schapiro, *supra* note 5, at 86 (citing Rees & Smith, *supra* note 50). Additionally, a decrease in a senior faculty member's productivity can be addressed through mechanisms more sensible and efficient in the long term than dismissal. Such mechanisms run the gamut from appropriate and reasonable post-tenure review procedures, retirement plans, part-time positions and long-term budget planning, to the simple recognition that institutions owe a tangible reward to individuals who have committed their most productive years to the betterment and progress of those institutions, the communities they nurture and human knowledge in general. See generally Nat'l Research Council, *supra* note 50. To the extent that there may in reality be a problem of an excess of unproductive and undeserving tenured faculty members populating some faculties, it seems more likely that such situations would arise and should be dealt with on a case-by-case basis according to the particular realities and necessities of each individual institution. NAT'L RESEARCH COUNCIL, *supra*, at 105; McKenzie, *supra* note 19, at 340. In any case, the wholesale dismissal of senior faculty members, just like the wholesale eradication of tenure, would be a myopic, inefficient and ineffective way of dealing with a more nuanced problem. McKenzie, *supra* note 19, at 340. An appropriate transition between generations should and must be achieved in a structured and orderly fashion that takes into account the true value contributed by each individual throughout his or her career, as well as the need to pass the baton from one generation to the next in a spirit of mentorship and camaraderie.

production lines. “Practice-ready, skills-oriented legal education” (quite meritorious in itself) has become code for the manufacture of attorneys capable only of following their corporate clients’ instructions to the tee. The goal of this concerted effort is not a truly practice-ready and skilled attorney. The endgame is a mindless legal machine. And, that is not what a legal education is about.

The survival of critical thought is at stake. This is not just about law professors. This is but one salvo in a much larger war against independent minds. Cutting funding for scientific research is another. Just a few months ago, the Huffington Post reported on the deep spending cuts that sequestration has imposed on scientific research.<sup>51</sup> This is no coincidence.

In the present historical and social context, then, President Obama’s decision to wade into the debate over legal education to haphazardly contribute his opinion that law schools should shorten their curricula to two years was particularly disappointing.<sup>52</sup> He should know better. Instead, Mr. Obama, the legal academic, President of the United States, Nobel Peace Prize awardee and so-called “Leader of the Free World,” gave credence to the awesomely destructive demagoguery that claims that what we need in our society is less education. He became part of precisely that public policy which has as its main purpose the dumbing down of America, the cult of stupid.

“The first thing we do, let’s kill all the lawyers.”<sup>53</sup> Whether Shakespeare was trying to be funny when he made Dick the Butcher threaten the lives of lawyers is not the point. How much Shakespeare, the writer, whoever he or she might have been, loved or hated lawyers is irrelevant. We read great works because of the nuggets of truth they carry, oftentimes unknowingly, within them. The point is that the subversion of progress, denial of fact and stifling of thought are all the purposes of the ruling few, the powerful oligarchs, the profiteers of stagnation. And, their purposes are accomplished by choking dissent wherever it may lie, in force or in potential. So, “let’s kill all the lawyers,” they will say, first of all. And, once the instruments of legal resistance have been subdued, they will go after the students and the rest of their educators, so they are left blinded to injustice and betrayal – such

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<sup>51</sup> Sam Stein, *Sequestration Ushers in a Dark Age for Science in America*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/08/14/sequestration-cuts\\_n\\_3749432.html?ncid=edlinkusaolp00000009](http://www.huffingtonpost.com/2013/08/14/sequestration-cuts_n_3749432.html?ncid=edlinkusaolp00000009) (last updated: Sept. 26, 2013).

<sup>52</sup> Peter Lattman, *Obama Says Law School Should Be 2, Not 3, Years*, N.Y. TIMES, Aug. 24, 2013, at B3, available at [http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_r=3](http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_r=3).

<sup>53</sup> WILLIAM SHAKESPEARE, HENRY VI act 4, sc. 2.

is the way of Dick the Butcher and his motley crew. How long shall we abide this cannibalistic purge?