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## The Regrettable Underenforcement of Incompetence as Cause To Dismiss Tenured Faculty

### Erratum

Note: This Early Winter issue replaces the normal Fall issue of the Indiana Law Journal.

# The Regrettable Underenforcement of Incompetence as Cause To Dismiss Tenured Faculty

DAVID M. RABBAN\*

## INTRODUCTION

Universities are extremely reluctant to dismiss tenured professors for incompetence. This reluctance compromises the convincing and broadly accepted justification for the protection of academic freedom through tenure set forth in the 1915 Declaration of Principles of the American Association of University Professors (AAUP).<sup>1</sup> After asserting that society benefits from the academic freedom of professors to express their professional views without fear of dismissal,<sup>2</sup> the 1915 Declaration maintained that the grant of permanent tenure following a probationary period of employment protects academic freedom.<sup>3</sup> Yet the 1915 Declaration also stressed that academic freedom does not extend to expression that fails to meet professional standards.<sup>4</sup> Nor, it added, does permanent tenure prevent dismissal for cause, which could include “professional incompetency”<sup>5</sup> as well as misconduct.<sup>6</sup> It reasoned that only fellow faculty members have the expertise to determine departures from professional standards.<sup>7</sup> It, therefore, insisted that a professor is entitled to a hearing by a committee of faculty peers before being dismissed<sup>8</sup> and that professors have an “obligation” to serve on these committees.<sup>9</sup>

Numerous concerns help explain the reluctance to seek dismissals for incompetence justified by the 1915 Declaration. The possibility of dismissal weakens the protection of tenure. Charges of incompetence could be pretexts for violating academic freedom and free speech, for unlawful or unfair discrimination, or for other impermissible motivations, including unpopularity. Even if not pretextual, charges of incompetence might be incorrect, and peer review committees might mistakenly sustain them. Charges against the truly incompetent could be misconstrued as an attack on academic freedom or as otherwise discriminatory or unjustified, thereby harming a university’s reputation. Dismissal proceedings are costly in money and time, and could be invalidated by procedural errors. Faculty committees might be

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1. Comm. on Academic Freedom & Academic Tenure, Am. Ass’n of Univ. Professors, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 BULL. AM. ASS’N U. PROFESSORS 15 (1915).

2. *Id.* at 25–26.

3. *Id.* at 40–41.

4. *Id.* at 33–34.

5. *Id.* at 42.

6. *See id.*

7. *Id.* at 34–35.

8. *Id.*

9. *Id.* at 34.

reluctant to recommend dismissal of a colleague even when clearly justified. Disagreements about the legitimacy or necessity of dismissal proceedings could cause conflicts that would undermine the collegiality on which universities depend.

I believe that these concerns, though understandable, do not justify inaction and are often overstated. I also offer suggestions to minimize them. Before initiating dismissal proceedings for incompetence, universities should offer opportunities for remediation and, even if they fail, consider lesser sanctions. University regulations should provide detailed definitions of incompetence, making clear that dismissal is an extraordinary remedy to be used only in extreme circumstances constituting gross deficiencies in quality or productivity. Examples of incompetence could include failure to convey course content in teaching and failure to publish over a lengthy period of time. The relatively few judicial decisions involving the dismissal of tenured faculty indicate that these suggestions are not legally necessary.<sup>10</sup> But providing more specific guidance than the law requires should remove some of the understandable hesitation about instituting dismissal proceedings even against the small, though not insignificant, number of professors broadly viewed by their colleagues as clearly incompetent.

The 1915 Declaration viewed tenure as a means to protect academic freedom, not as the shelter for incompetent professors that it has become through the extreme reluctance to use the very procedures it proposed to dismiss them. Proper enforcement of incompetence as cause for dismissal would restore tenure to its legitimate function, increase popular support for it, and improve faculty morale by enabling professors to perform their professional responsibilities in peer review.

#### I. THE 1915 DECLARATION

Peer review was the major innovation in the defense of academic freedom in the 1915 Declaration,<sup>11</sup> the founding document of the AAUP and still the most comprehensive and influential treatment of the subject in the United States. Just as academic freedom is necessary to protect the expert professional speech of professors,<sup>12</sup> the 1915 Declaration reasoned, peer review is necessary to determine if professors meet the professional standards that justify the protection of academic freedom.<sup>13</sup> According to the 1915 Declaration, the social function of professors is to convey, after lengthy and specialized training, the results of their research and analysis to students and to the general public.<sup>14</sup> To perform this function, professors must be free of any suspicion that their academic views are based on anything other than professional considerations.<sup>15</sup> They cannot be subject to pressure from those “who endow or manage universities” or from external sources.<sup>16</sup>

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10. See *infra* Part V.

11. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1284 (1988).

12. See Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 25–26.

13. *Id.* at 34–35.

14. *Id.* at 25.

15. *Id.*

16. *Id.*

The distinctive professional speech that justifies the protection of academic freedom, the 1915 Declaration emphasized, also defines the limits of academic freedom. It made clear that academic freedom “in no sense” allows individual professors to “be exempt from all restraints as to the matter or manner of their utterances.”<sup>17</sup> Maintaining that the right to engage in academic speech “entail[s] certain correlative obligations,”<sup>18</sup> it stressed that professors must meet scholarly standards and that “members of the academic profession” should have “the initial responsibility” for determining if departures from them have occurred.<sup>19</sup> Reiterating the same rationale it used to defend academic freedom, it reasoned that others “necessarily lack full competency to judge” and that “their intervention can never be exempt from the suspicion that it is dictated by other motives than zeal for the integrity of science.”<sup>20</sup> It recognized that professors had not previously “had the opportunity, or perhaps the disposition” to make these determinations and that for many professors this “obligation” would seem “unwelcome and burdensome.”<sup>21</sup> Professors might find it difficult to exercise “the capacity for impersonal judgment” and the “judicial severity” that might be required.<sup>22</sup> But if professors do not accept the responsibility to “purge” their “incompetent and . . . unworthy” colleagues, it warned, “the task will be performed by others” who, because they are not professors themselves, “lack certain essential qualifications for performing it, and whose action is sure to breed suspicions and recurrent controversies deeply injurious to the internal order and the public standing of universities.”<sup>23</sup> The “practical proposals” at the end of the 1915 Declaration included hearings before faculty peers before dismissal.<sup>24</sup> The proposals left the determination of legitimate grounds for dismissing a professor to individual universities but asserted that:

[I]f the charge is one of professional incompetency, a formal report upon his work should be first made in writing by the teachers of his own department and of cognate departments in the university, and, if the teacher concerned so desire[s], by a committee of his fellow-specialists from other institutions, appointed by some competent authority.<sup>25</sup>

In contemporary presentations to the Association of American Universities, John Dewey, the president of the AAUP, and Arthur Lovejoy, one of the prominent authors of the 1915 Declaration, stressed that peer review would benefit universities. Dewey declared that it would provide “a method for the dismissal of unworthy or incompetent teachers” while protecting the president and trustees

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17. *Id.* at 38.

18. *Id.* at 33.

19. *Id.* at 34.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 34–35.

24. *Id.* at 41–42.

25. *Id.* at 42.

“from suspicion and criticism.”<sup>26</sup> He believed that “the public would come to accept any dismissal which was approved by a representative body of the teacher’s colleague[s] after opportunity for a judicial hearing.”<sup>27</sup> As a result, it would be difficult for a dismissed professor to raise credible claims “of personal injustice, or vengeance, or infringement on academic freedom.”<sup>28</sup> Reinforcing Dewey’s point, Lovejoy observed that in the absence of peer review every dismissal, “whether justified or unjustified, is likely to be made the occasion for a hue and cry about the violation of the principle of academic freedom.”<sup>29</sup> Lovejoy also highlighted the importance of having “the proper grounds of dismissal reasonably well defined.”<sup>30</sup>

The 1940 Statement of Principles on Academic Freedom and Tenure (1940 Statement), jointly formulated by the AAUP and the Association of American Colleges (AAC) and subsequently endorsed by over 200 societies of academic disciplines or institutions, reiterated the assertion of the 1915 Declaration that incompetence as determined by peer review constitutes cause for terminating a tenured appointment.<sup>31</sup> The first sentence under the heading “Academic Tenure” provided that the appointments of tenured faculty members “should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.”<sup>32</sup> In describing the process of peer review to determine if adequate cause exists, the 1940 Statement asserted, in language similar to the 1915 Declaration, that in hearings involving “charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher’s own or from other institutions.”<sup>33</sup> A generation later, the Commission on Academic Tenure in Higher Education, jointly sponsored by the AAUP and the AAC in 1971,<sup>34</sup> reaffirmed incompetence as one of the adequate causes for dismissing a tenured faculty member.<sup>35</sup> It “believe[d] that ‘adequate cause’ in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual’s fulfillment of his institutional responsibilities.”<sup>36</sup>

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26. John Dewey, *Faculty Share in University Control*, in ASS’N OF AM. UNIVS., JOURNAL OF PROCEEDINGS AND ADDRESSES OF THE SEVENTEENTH ANNUAL CONFERENCE 27, 31 (1915).

27. *Id.*

28. *Id.*

29. Arthur Lovejoy, *Discussion of Faculty Share in University Control*, in JOURNAL OF PROCEEDINGS AND ADDRESSES OF THE SEVENTEENTH ANNUAL CONFERENCE, *supra* note 26, at 32, 37–38.

30. *Id.* at 37.

31. AM. ASS’N OF UNIV. PROFESSORS & ASS’N OF AM. COLLS., 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, *reprinted in* AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 3, 4 (10th ed. 2006).

32. *Id.*

33. *Id.*

34. COMM’N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE: A REPORT AND RECOMMENDATIONS ix (1973).

35. *Id.* at 75.

36. *Id.*

II. THE DIFFERING PERSPECTIVES OF VAN ALSTYNE AND BREWSTER  
ON DISMISSAL FOR CAUSE

During the hundred years since 1915, the AAUP has taken pains to emphasize that the possibility of dismissal for cause demonstrates that tenure is not a guarantee of lifetime employment. William Van Alstyne wrote a particularly effective statement of the AAUP position in the early 1970s when he was a professor at Duke Law School and chair of the AAUP's Committee A on Academic Freedom and Tenure.<sup>37</sup> He observed that universities are free to determine for themselves what constitutes cause for dismissal as long as cause does not violate academic freedom or civil liberties generally.<sup>38</sup> Cause can include "failure to meet a specified norm of performance or productivity, as well as . . . specified acts of affirmative misconduct."<sup>39</sup> The grant of tenure establishes "a rebuttable presumption of the individual's professional excellence" that shifts the burden of proving cause for dismissal to the university.<sup>40</sup> To establish cause, the university must convince a peer review committee to make three findings: (1) that the stated cause is the actual cause for dismissal rather than a pretext for an impermissible motivation, (2) that the stated cause exists in fact, and (3) that the demonstrated cause is serious enough to warrant termination rather than a lesser sanction.<sup>41</sup> It is important to emphasize that, from the 1915 Declaration to the present, the peer review committee has been given only the "initial responsibility" for assessing cause.<sup>42</sup> The AAUP's Recommended Institutional Regulations, adopted by most universities, elaborate this point by providing that if the peer review committee "concludes that adequate cause for dismissal has not been established by the evidence in the record," the president or the governing board can reject that conclusion and dismiss the faculty member as long as they state in writing their reasons for doing so and gave the peer review committee an opportunity to respond and reconsider.<sup>43</sup>

Soon after Van Alstyne wrote, Kingman Brewster, the president of Yale, challenged the AAUP's emphasis that tenure is not an absolute protection against dismissal. Brewster maintained that at most universities, and certainly at Yale, "tenure is for all normal purposes a guarantee of appointment until retirement age."<sup>44</sup> He acknowledged a very few occasions when "[p]hysical or mental incapacity, some chronic disability, some frightful act of moral turpitude, or persistent neglect of all university responsibilities" have led to negotiated terminations of tenured faculty.<sup>45</sup> Yet he observed that "even in extreme circumstances there is a deep reluctance to

37. William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP BULL. 328 (1971).

38. *Id.* at 328.

39. *Id.*

40. *Id.* at 329.

41. *Id.* at 328.

42. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 34.

43. COMM. A ON ACADEMIC FREEDOM & TENURE, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE, *reprinted in* POLICY DOCUMENTS & REPORTS, *supra* note 31, at 22, 27.

44. Kingman Brewster, Jr., *On Tenure*, 58 AAUP BULL. 381, 381 (1972).

45. *Id.*

compromise the expectations of tenure.”<sup>46</sup> “For both human and institutional reasons,” he added, “it is the practice to ride it out even in cases where performance has fallen way below reasonable expectations.”<sup>47</sup> Unfortunately, Brewster did not elaborate what he meant by “human and institutional reasons.” I assume by human reasons he meant the difficulty of taking such a drastic action against colleagues, often friends. And by institutional reasons he might have meant the costs of a dismissal proceeding in time and money and the danger that universities would be perceived, however unjustly, as jeopardizing the academic freedom protected by tenure.

Brewster enthusiastically supported tenure even though he viewed it as the practical equivalent of a lifetime appointment. He maintained that “[b]oldness would suffer if the research and scholarship of a mature faculty were to be subject to periodic scorekeeping, on pain of dismissal if they did not score well.”<sup>48</sup> Having proved their professional potential during the probationary period before receiving tenure, faculty “should not feel beholden to *anyone*,” especially university administrators, “for favor, let alone for survival.”<sup>49</sup> In “strong universities” like Yale, he observed, “assuring freedom from intellectual conformity coerced *within* the institution is even more of a concern than is the protection of freedom from external interference.”<sup>50</sup> He opposed post-tenure review, worrying that “[i]t would both dampen the willingness to take long-term intellectual risks and inhibit if not corrupt the free and spirited exchanges upon which the vitality of a community of scholars depends.”<sup>51</sup> The understanding that tenure is a lifetime commitment, he added, makes the decision to award tenure more rigorous. As he put it: “Realization that the commitment is for keeps helps to hold the standards high.”<sup>52</sup> He believed that “whatever gains might be made by reserving the right to a second guess would be more than offset by the laxity which would come to soften the first guess.”<sup>53</sup>

### III. THE FREQUENCY OF DISMISSAL FOR CAUSE

The AAUP is correct in theory in maintaining that tenure is not a guarantee of lifetime employment and that cause for dismissal can include incompetence as well as misconduct. But Brewster more accurately reflects practice in observing that tenured professors are rarely dismissed. Yet it is important to emphasize that rarely does not mean never.

I know of no accurate empirical data regarding the frequency of dismissals for cause in American universities. A 1994 article in the *Chronicle of Higher Education* claimed about fifty a year,<sup>54</sup> and a 2005 article in the *Wall Street Journal* claimed

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46. *Id.*

47. *Id.*

48. *Id.* at 382.

49. *Id.* (emphasis in original).

50. *Id.* (emphasis in original).

51. *Id.* at 383.

52. *Id.*

53. *Id.*

54. Carolyn J. Mooney, *Dismissals 'for Cause,'* CHRON. HIGHER EDUC. (D.C.), Dec. 7, 1994, at A17.

about fifty to seventy-five out of 280,000 tenured professors in the United States.<sup>55</sup> I checked with a staff member at the AAUP who, based on inquiries he and his colleagues receive about ongoing dismissal proceedings, estimates the numbers are somewhat higher.<sup>56</sup> And, as he points out, some dismissal proceedings certainly occur without anyone contacting the AAUP.<sup>57</sup> There are many other “involuntary departures” of tenured professors that do not reach the stage of a formal dismissal.<sup>58</sup> Even if the annual dismissals for cause number in the hundreds nationally, probably only a small proportion of them are based on charges of incompetence. As Walter Metzger, the leading historian of academic freedom and tenure, has observed, “it is the display of evil character, not the display of weak ability” that has prompted most dismissals for cause.<sup>59</sup> Charges of sexual misconduct, plagiarism, or falsification of data are far more likely than charges of incompetence.

I believe that the paucity of dismissal proceedings citing incompetence as cause has permitted the continued employment of an intolerably high number of tenured professors at American universities who do not meet the most minimal standards of competence in scholarship, teaching, or both. Writing in 1990, Henry Rosovsky, the dean at Harvard, expressed what he called the “totally unscientific conclusion” that less than two percent of the faculty at Harvard and other major research universities could legitimately be labelled “deadwood.”<sup>60</sup> Around the same date, Ralph Brown and Jordan Kurland, two AAUP activists, estimated that five percent of all faculty at American colleges and universities were “deadwood.”<sup>61</sup> In 2014, James J. White of the University of Michigan Law School, based on his observation of his own faculty and on what he called “bar stool” research on other faculties, estimated that five to ten percent of tenured faculty at institutions where research is required for tenure would fail any reasonable test of scholarship.<sup>62</sup> He also guessed that a “somewhat smaller” percentage would fail any reasonable test of teaching.<sup>63</sup> These estimates strike me as quite close to each other and are consistent with my observations at my own university and at universities where I have visited. Based on my personal experience, I am also struck by the widespread consensus within faculties about the identity of their colleagues who do not meet minimal standards of competence.

55. Joann S. Lublin, *Travel Expenses Prompt Yale to Force Out Institute Chief*, WALL ST. J., Jan. 10, 2005, at B1.

56. E-mail from David M. Rabban, Professor, Univ. of Tex. Sch. of Law, to Gregory Scholtz, Assoc. Sec’y & Dir., Dep’t of Academic Freedom, Tenure, & Governance, Am. Ass’n of Univ. Professors (July 10, 2015) (on file with the Indiana Law Journal) (confirming conversation with Gregory Scholtz (Dec. 2014)).

57. *Id.*

58. Telephone Conversation with Jordan E. Kurland, Assoc. Gen. Sec’y, Am. Ass’n of Univ. Professors (July 17, 2015).

59. Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS, *supra* note 34, at 93, 158.

60. HENRY ROSOVSKY, THE UNIVERSITY: AN OWNER’S MANUAL 210–11 (1990).

61. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 332 (1990).

62. James J. White, *Tenure, the Aberrant Consumer Contract*, 89 CHI.-KENT L. REV. 353, 367 (2014).

63. *Id.*

How much of a problem is a two to ten percent rate of incompetence among tenured faculty at American universities? Though low on a scale of zero to one hundred percent, I think it is a significant problem. Perhaps a similar rate of incompetence exists among physicians and airline pilots. I doubt most people, including professors, would consider that percentage sufficiently low to justify decisions by hospitals or airline companies to retain them. Should we care less about incompetent professors because life or death is not at stake? If we take our professional work of scholarship and teaching seriously, I think we should care a lot, even though the possible consequences of incompetence do not include death.

Kingman Brewster apparently thought that for cause dismissals against admittedly incompetent tenured faculty would unduly weaken the protection tenure affords academic freedom.<sup>64</sup> Because I agree that tenure is a vital safeguard for academic freedom, and that academic freedom is vital for the effective pursuit and dissemination of knowledge, I would tolerate a two to ten percent level of incompetence if I thought bringing dismissal charges would have this result. But I do not. Indeed, I think bringing such charges would strengthen the tenure system by conforming practice to the convincing theoretical justification for tenure and thereby provide more public support for academic freedom. It would also increase faculty morale currently burdened by the knowing acquiescence in institutionalizing incompetence.

#### IV. INSTITUTIONAL REGULATIONS

Institutional regulations regarding dismissal of tenured faculty vary widely. Some are quite vague. The rules of the University of Texas System simply state that termination “will be only for good cause shown”<sup>65</sup> without any elaboration of what constitutes “good cause.”<sup>66</sup> Some universities provide examples of “cause” without specifically mentioning “incompetence.” The rules at Wesleyan University state:

Sufficient cause must be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or scholars. . . . Examples of behavior that, in their most serious form, may directly and substantially detract from the professional capacities of faculty members in their roles as teachers and scholars are plagiarism, dishonest research, fiscal malfeasance, and physical abuse or other illegal workplace harassment of students, faculty, or staff.<sup>67</sup>

Some universities specify “incompetence” as cause for dismissal. Whereas Indiana University, Bloomington only uses the word “incompetence” itself,<sup>68</sup> Princeton and

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64. See Brewster, *supra* note 44, at 383.

65. BD. OF REGENTS, THE UNIV. OF TEX. SYS., RULES & REGULATIONS R. 31008 § 2(1) (2014).

66. See *id.*

67. WESLEYAN UNIV., PROCEDURES OF THE FACULTY COMM. ON RIGHTS & RESPONSIBILITIES § 301.

68. IND. UNIV., BLOOMINGTON, ACADEMIC GUIDE POLICY E-2 (2010).

Stanford universities have identical rules that require proof of “substantial and manifest incompetence.”<sup>69</sup>

Some universities have separate sections in their tenure rules, or even independent policy statements, that deal with dismissal for “substandard” or “incompetent” performance. The policy on “Faculty Tenure” at the University of Minnesota contains a section entitled “Special Peer Review In Cases Of Alleged Substandard Performance By Tenured Faculty.”<sup>70</sup> The previous section requires an annual review of every faculty member.<sup>71</sup> Under that provision, if the head of an academic unit and the elected peer merit review committee “both find a faculty member’s performance to be substantially below the goals and expectations adopted by that unit, they shall advise the faculty member in writing, including suggestions for improving performance, and establish a time period (of at least one year) within which improvement should be demonstrated.”<sup>72</sup> If at the end of this period “a tenured faculty member’s performance continues to be substantially below the goals and expectations of the unit and there has not been a sufficient improvement of performance,” the section on substandard performance provides, “the head of the academic unit and the elected peer merit review committee may jointly request the dean to initiate a special peer review of that faculty member.”<sup>73</sup> After a hearing, the special peer review panel may recommend various actions, including alteration in the allocation of the faculty member’s “expected effort among the teaching, research, service and governance functions,” or, if the faculty member’s performance is “so inadequate,” “limited reductions of salary” or “formal proceedings for termination.”<sup>74</sup>

The University of California has a separate, detailed policy statement entitled “Termination for Incompetent Performance.”<sup>75</sup> The introduction emphasizes that its standards and procedures balance two “conflicting imperatives”: the need for the university to “fulfill its central functions” without impairment “by the presence of incompetent faculty” and the “freedom and security protected by tenure.”<sup>76</sup> The policy recognizes that termination of tenured faculty for incompetence “is an extraordinary remedy designed to address gross performance deficiencies in extremely rare cases.”<sup>77</sup> Like the Minnesota policy, it observes that there are many ways short of dismissal to address substandard performance, including conferences with academic administrators, denial of merit increases, formal notification, and

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69. *Rules and Procedures of the Faculty of Princeton University and Other Provisions of Concern to the Faculty, Chapter IV: The Faculty*, PRINCETON UNIV., [http://www.princeton.edu/dof/policies/publ/fac/rules\\_toc/chapter4/#comp000045d572a9000000036b4af9](http://www.princeton.edu/dof/policies/publ/fac/rules_toc/chapter4/#comp000045d572a9000000036b4af9) [<http://perma.cc/YP4E-DQEQ>] (last updated Sept. 12, 2014); STANFORD UNIV., FACULTY HANDBOOK, § 4.4.F(1)(a) (2010).

70. UNIV. OF MINN., FACULTY TENURE POLICY § 7a.3 (2011).

71. *Id.* § 7a.2.

72. *Id.*

73. *Id.* § 7a.3.

74. *Id.*

75. UNIV. OF CAL., ACADEMIC PERSONNEL MANUAL APM - 075 (2000).

76. *Id.* at 1.

77. *Id.*

alteration of faculty responsibilities.<sup>78</sup> For faculty with excellent teaching records but inadequate research or creative activities, the policy permits an increase in teaching load or a mutually agreed transfer to a position as a lecturer.<sup>79</sup> A separate section addresses “Standards for Determination of Incompetent Performance.”<sup>80</sup> It defines incompetence in research or creative activity as not engaging in “bona fide” activity for “several years” and “no satisfactory evidence” of probable engagement “in the foreseeable future.”<sup>81</sup> Infrequency of publication and funding, it adds, is not “per se” evidence of incompetence.<sup>82</sup> Observing that scholarly norms differ among disciplines, it maintains that the faculty member’s “current research area” should provide the standard for evaluation.<sup>83</sup> It defines incompetence in teaching as “intellectual content” or “pedagogical skills” that are “so far below the professional standards of university-level instruction” that continued teaching would be “a disservice to students.”<sup>84</sup> In making these determinations, the policy encourages evaluations by current and former students and by faculty colleagues.<sup>85</sup> While recognizing that teaching and research are the main responsibilities of university faculty, the policy also states that university service, public service, and professional service should be “part of the assessment of an individual’s overall performance.”<sup>86</sup>

I believe that clear and detailed provisions defining incompetence as cause for revocation of tenure are more fair and effective than vaguer definitions of cause. I find many of the provisions in the Minnesota and California policies attractive. Remediation should be attempted before the initiation of dismissal proceedings.<sup>87</sup> For scholarship, remediation could include counseling about a research agenda and reviews of outlines and drafts by faculty colleagues. For teaching, remediation could include observation of classes taught by successful teachers and visits by those successful teachers to the classes of the person needing remediation followed by advice on how to improve. Some universities have programs designed to improve teacher performance that could be required.<sup>88</sup> Even when remediation fails, alternatives to dismissal might be preferable, such as reduction of salary or, for effective teachers who do not meet minimal levels of scholarly performance, assigning more courses than the norm for the department. While teaching and research are the main responsibilities of faculty, other service to the university, the profession, and the general public should be part of the overall assessment of

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78. *Id.* at 1–2.

79. *Id.* at 2.

80. *Id.* at 3.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 4.

86. *Id.*

87. See Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J.C. & U.L. 331, 347 (1995) (defining adequate cause to include, “where possible,” the failure of prior “remedial measures short of dismissal”).

88. The Center for Teaching and Learning at the University of Texas, Austin, is an example. See *Learning Sciences*, THE UNIV. OF TEX. AT AUSTIN, <http://learningsciences.utexas.edu/> [<http://perma.cc/VGD4-AK3S>].

competence. Evaluations of competence should be sensitive to the differences among universities as well as among disciplines. Just as the quantity of publications and the balance between articles and books vary among disciplines, the relative weight of research and teaching varies between liberal arts colleges and research universities and among particular institutions within each category.

In defining incompetent scholarship, I would prefer a standard of extremely few or no scholarly publications over a lengthy period of time, perhaps five to ten years, perhaps adjusted by field. I would be reluctant to allow dismissal of tenured faculty for extremely poor scholarship based on negative assessments of quality because that would pose too much risk of deterring risky or innovative scholarship that could unfairly be called poor by the conventional wisdom of professional peers. For scholarship, therefore, I would restrict the definition of incompetence to an extreme lack of productivity that is essentially nonperformance. Yet I think it is defensible to have a standard, as contemplated by the 1915 Declaration, permitting dismissal for scholarship that a respected and fairly chosen body of professional peers deemed substantially below any reasonable standard of minimal competence. For teaching, I would prefer a standard that requires a lengthy period of extremely low student evaluations or of numerous student complaints, followed by classroom evaluations by professional peers independently finding extraordinarily poor teaching.

#### V. CASE LAW

Largely because administrators are so reluctant to bring dismissal charges against tenured faculty members, particularly in situations involving incompetence, case law on this subject is very limited. Yet the few decisions clearly indicate that courts are inclined to uphold recommendations of a peer review committee that a tenured professor should be dismissed for incompetence, even if university regulations do not specify incompetence as cause for dismissal.

In two separate decisions, the Eighth Circuit upheld the findings of faculty hearing committees at the University of Minnesota that tenured professors were incompetent and should be dismissed.<sup>89</sup> The tenure code specified incompetence as cause.<sup>90</sup> The first decision cited long-standing complaints by students, colleagues, and department chairs about poor teaching, unexcused absences from classes, absences from faculty meetings, low student enrollment, and undocumented research, though it did not report the actual findings of the faculty hearing committee.<sup>91</sup> The second decision relied on findings by the faculty hearing committee that the professor was incompetent and had committed plagiarism, though it did not provide further details about the basis for these findings.<sup>92</sup> The dismissed professor in the first case was black and claimed that the University had unconstitutionally terminated his appointment based on his race.<sup>93</sup> To support this claim, he pointed out that he was the only black full professor ever terminated by the University and that a former

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89. *Agarwal v. Regents of Univ. of Minn.*, 788 F.2d 504 (8th Cir. 1986); *King v. Univ. of Minn.*, 774 F.2d 224 (8th Cir. 1985).

90. *Agarwal*, 788 F.2d at 507 n.3; *King*, 774 F.2d at 227 n.3.

91. *King*, 774 F.2d at 225–26.

92. *Agarwal*, 788 F.2d at 506.

93. *King*, 774 F.2d at 228.

chairman of his department, Afro-American and African Studies, had speculated that some white members of the faculty might not have been terminated had they performed as poorly as he.<sup>94</sup> He also cited statistics indicating the low percentage of black faculty members and students at the University and statements by a member of the faculty hearing committee, the dean of his college, and a regent that, in his opinion, revealed racial prejudice.<sup>95</sup> The dismissed professor in the second case was an East Indian Caucasian and a Hindu who claimed that the termination of his appointment constituted disparate and discriminatory treatment under Title VII because he was treated more harshly than similarly situated non-minority professors.<sup>96</sup>

In both cases, the court concluded that the record did not support these claims of discrimination. In describing the claims of the black faculty member, the court observed that, in the opinion of the former chair, he had “repeatedly failed to maintain a minimum level of performance” and that the percentage of blacks in the Minnesota population was roughly the same as the percentage of black faculty and students at the University of Minnesota.<sup>97</sup> Rejecting the claims of discrimination by the East Indian professor, the court acknowledged that some other professors “may have scored lower . . . on isolated items” in the student evaluations, but also pointed out that his scores “viewed as a whole placed him at or very near the bottom when compared with his peers.”<sup>98</sup> Nor did the court find any evidence to support his claim that the administration ignored allegations of plagiarism against other professors.<sup>99</sup>

To my knowledge, the most thorough judicial discussion of the recommendation of a faculty hearing committee to dismiss a tenured professor for incompetence occurred in a decision by an Indiana appellate court in a case that arose at Ball State University, an institution whose regulations did not specifically refer to incompetence. The committee found incompetence in both teaching and scholarship. As evidence of incompetence in teaching, the committee cited excessive time spent on irrelevant subjects, the failure to cover basic course material, and lack of adequate preparation and organization.<sup>100</sup> As evidence of incompetence in scholarship, the committee reported that the professor had not engaged in any research activities or published any scholarship during the prior ten years.<sup>101</sup> The committee also observed that the professor had rarely attended faculty meetings, had not participated in those he did attend, and had not served on a doctoral committee or any other university committee in over a decade.<sup>102</sup>

In rejecting the dismissed professor’s claim that the University had not relied on sufficiently ascertainable standards, the court concluded that it was “not feasible” to define incompetence.<sup>103</sup> It held that Ball State legitimately relied on the provision of

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94. *Id.* at 228 n.7.

95. *Id.*

96. *Agarwal*, 788 F.2d at 509.

97. *King*, 774 F.2d at 228 n.7.

98. *Agarwal*, 788 F.2d at 509.

99. *Id.*

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

101. *Id.* at 626.

102. *Id.*

103. *Id.* at 628.

the Indiana code allowing dismissal of faculty for violations of a university's "rules or standards of conduct"<sup>104</sup> and on references to proper standards of conduct in the faculty handbook.<sup>105</sup> To support its conclusion, the court referred to an earlier decision by the Seventh Circuit denying a professor's challenge to the lack of specificity in Ball State's regulations.<sup>106</sup> In the earlier case, the University based its charges on asserted violations of the AAUP's Statement on Professional Ethics, which it had adopted and published in its faculty handbook.<sup>107</sup> The faculty hearing committee found that the professor's sexual misconduct violated the language of the Statement prohibiting "exploitation of students" for a professor's "private advantage."<sup>108</sup> The professor claimed that the University denied him the "adequate notice" of prohibited activity required by the Fourteenth Amendment because the Statement did not explicitly refer to sexual misconduct.<sup>109</sup> The Seventh Circuit disagreed. "As is the case with other laws, codes and regulations governing conduct," the court asserted, "it is unreasonable to assume that the drafters of the Statement on Professional Ethics could and must specifically delineate each and every type of conduct (including deviant conduct) constituting a violation."<sup>110</sup> The court added that the professor's "academic peers" on the faculty hearing committee "were well-qualified to interpret" the Statement and, more generally, "to determine what is and is not acceptable faculty conduct within an academic setting."<sup>111</sup>

Reinforcing this reluctance to impose requirements of specificity on universities, the Third Circuit subsequently reasoned that a regulation at Rutgers University defining adequate cause as "failure to maintain standards of sound scholarship and competent teaching" encompassed findings of a faculty hearing panel that a professor had engaged in unethical conduct regarding visiting Chinese scholars.<sup>112</sup> The committee's findings included that the professor's "verbal abuse and intimidation of the scholars created a climate in which they felt compelled to perform domestic services" for him;<sup>113</sup> that he had "interrupted without sufficient cause" the laboratory class taught by a Chinese teaching assistant and had "treat[ed] her in an unprofessional, threatening and abusive manner within the hearing of . . . her students" and others;<sup>114</sup> that he hired postdoctoral Chinese scholars who did not have proper credentials;<sup>115</sup> and that he submitted a candidate's application for admission to the graduate program even though he knew it "contained a recommendation letter

104. *Id.* at 626 (quoting IND. CODE § 20-12-1-2(d) (1982) (repealed 2007) (current version at IND. CODE § 21-39-2-4(b) (2014))).

105. *Id.* at 626–27.

106. *Id.* at 627–28.

107. *Korf v. Ball State Univ.*, 726 F.2d 1222, 1224 (7th Cir. 1984).

108. *Id.* at 1228 (quoting AM. ASS'N OF UNIV. PROFESSORS COMM. ON PROF'L ETHICS, STATEMENT ON PROFESSIONAL ETHICS, *reprinted as amended in* POLICY DOCUMENTS & REPORTS, *supra* note 31, at 171, 171 (10th ed. 2006)).

109. *Id.* at 1226–27.

110. *Id.* at 1227.

111. *Id.* at 1228.

112. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1127 (3d Cir. 1992).

113. *Id.* at 1131.

114. *Id.* at 1129.

115. *Id.* at 1130.

of questionable integrity.”<sup>116</sup> The court concluded that the language of the university regulation, while “broad and general,” was not unconstitutionally vague.<sup>117</sup> The regulation did not “fail to specify *any* standard for dismissal but rather provide[d] a standard which encompasses a wide range of conduct.”<sup>118</sup> A reasonable professor, the court reasoned, would know that the regulation went beyond “actual teaching or research skills.”<sup>119</sup> The court also observed that the professor’s actions “sprang from his role as a faculty member” and undermined the conditions for maintaining “sound scholarship and competent teaching.”<sup>120</sup> In reaching this conclusion, the Third Circuit panel reversed the district court judge, who found that “sound scholarship and competent teaching” could not reasonably be construed to include the professor’s unethical conduct.<sup>121</sup> Distinguishing the dismissal for unethical conduct at Ball State, the district judge emphasized that the Ball State regulation specifically provided that a violation of the Statement of Professional Ethics could constitute cause for dismissal.<sup>122</sup> The Rutgers regulation on cause for dismissal, by contrast, did not incorporate or refer to its own Statement on Professional Ethics, which did not itself indicate that violations could lead to dismissal.<sup>123</sup> The judge regretted this omission but concluded that it prevented her from upholding the dismissal.<sup>124</sup>

More generally, courts have viewed the 1940 Statement and other “widely circulated and widely accepted”<sup>125</sup> statements by the AAUP as reflecting the norms and expectations of the academic profession that should inform the interpretation of contracts between professors and universities.<sup>126</sup> In a particularly striking example, the Fourth Circuit held that a college in a condition of financial exigency could terminate the appointment of a tenured professor even though the college’s regulations defined tenure as “the right to continued service unless good cause be shown for termination” and did not refer to financial exigency.<sup>127</sup> Emphasizing that the 1940 Statement contains the most widely accepted definition of tenure, the court pointed out that it included financial exigency as a basis for terminating a tenured appointment in the absence of adequate cause.<sup>128</sup> Because the 1940 Statement specifically refers to incompetence as an adequate cause for dismissal, it is likely that courts would similarly allow termination for this reason even if a university’s own policies did not. Yet detailed definitions of incompetence, even if not required by law, would provide helpful guidance to both faculty members and administrators about expectations after tenure. In addition to giving fair notice to professors who

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116. *Id.* at 1132.

117. *Id.* at 1137.

118. *Id.* (emphasis in original).

119. *Id.*

120. *Id.*

121. *San Filippo v. Bongiovanni*, 743 F. Supp. 327, 337–38 (D.N.J. 1990), *rev’d*, 961 F.2d 1125 (3d Cir. 1992).

122. *Id.* at 337.

123. *Id.*

124. *Id.* at 338.

125. *Browzin v. Catholic Univ. of America*, 527 F.2d 843, 847 n.8 (D.C. Cir. 1975).

126. *Id.* at 847–48 & n.8.

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

128. *Id.* at 678–80.

might be charged with incompetence, specificity would describe objective standards of evaluation that might make it easier for faculty hearing committees to exercise the “impersonal judgment” and “judicial severity”<sup>129</sup> demanded by the 1915 Declaration.

#### VI. RESPONDING TO POTENTIAL CONCERNS ABOUT INCREASED ENFORCEMENT

I want to close by responding to potential objections to my view that more dismissal proceedings should be brought against incompetent tenured professors. I believe that the standards I propose dramatically reduce concerns that charges of incompetence could be used as a pretext for illegal or improper actions, such as violations of academic freedom and employment discrimination. If incompetence is specifically limited to gross deficiencies in quality or productivity, if remediation must precede disciplinary proceedings, if lesser sanctions should be considered before dismissal, and if dismissal is described as a rare and extraordinary remedy, there would be few opportunities for pretextual abuse. These strict and specific standards should also avoid erroneous findings of incompetence. And if the danger of actual abuse and mistakes is substantially minimized, so is the danger that people will misconstrue legitimate proceedings as improper.

Dismissal proceedings are costly in money and time. Universities have substantial legal expenses, especially if a professor subsequently litigates a finding of cause for dismissal. For professors, service on a faculty hearing committee can be extremely time consuming.<sup>130</sup> Procedural errors can require reversals of findings made after lengthy hearings. But I feel that these costs are justified to insure the proper functioning of the tenure system and to improve public support of it. I also suspect that the financial cost of a dismissal proceeding is not great compared to the buyouts that many universities give as inducements for professors to retire. And though the cost in time for a faculty member to serve on a hearing committee is substantial, it is unlikely to happen more than once in a career. Service on a hearing committee can also bring the satisfaction of performing one’s professional responsibilities, just as service on a jury can bring the satisfaction of performing one’s civic responsibilities.

Under the standards I propose, I doubt there would be a huge number of dismissal proceedings. After a university has prevailed in one, I suspect that the mere threat of filing charges will induce other incompetent professors to resign. I also observe that the current institutional reluctance to take action against incompetent tenured professors extends even to urging them to resign. In my experience, such encouragement can be surprisingly effective in the rare instances when it occurs. Through personal observation, I am aware of an academic administrator who initiated discussions that led two extremely unproductive senior professors to resign without any negative institutional ramifications. No one had ever previously approached these professors even though they had been unproductive for decades. I have also realized that post-tenure review has produced some resignations of incompetent professors. Post-tenure review is appropriately designed to maintain competence and to offer remediation when recommended by faculty peers rather than

129. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 34.

130. For example, the hearings in the dismissal case at Rutgers, *see supra* text accompanying notes 112–124, took 250 hours over 46 days. Mooney, *supra* note 54.

as a first step in dismissal proceedings. But some professors, after receiving extremely negative reviews, decide to resign or retire rather than to begin a program of remediation. I have been told by a former administrator that in the years immediately following implementation of post-tenure review there was a doubling of annual resignations by tenured professors.<sup>131</sup> A special report of the Virginia General Assembly in 2004 provides more comprehensive data. After examining all 400 post-tenure reviews in the 16 Virginia public colleges and universities from 1998–99 through 2002–03, the report determined that 286 found no problems.<sup>132</sup> Of the remainder, 52 led to decisions by the professor under review to terminate employment, mostly by retirement.<sup>133</sup> Among faculty found deficient, 26 subsequently met all expectations for improvement and 35 did not.<sup>134</sup> The majority of these 35 agreed to phased retirement.<sup>135</sup> Others accepted mandatory teacher training, changes in workload assignments, and freezes or reductions in salary.<sup>136</sup> Only 2 were dismissed.<sup>137</sup> These voluntary departures indicate that a university that is serious about addressing incompetence can often use effective measures short of costly dismissal proceedings.

Some administrators worry that peer review committees will not uphold charges of incompetence. I disagree. Although Kingman Brewster was correct in identifying “human” reasons for not invoking dismissal for cause, I think peer review committees, confronted with convincing evidence of incompetence, would vote for dismissal as a matter of professional responsibility, especially if institutional regulations defined incompetence in the specific and extreme terms I suggest. The very few litigated cases involving incompetence as cause for dismissal support my view.<sup>138</sup> It is also worth reiterating that under the AAUP’s widely adopted Recommended Institutional Regulations, even if the faculty hearing committee votes against dismissal, the administration and the governing board can reverse as long as they provide reasons in writing and allow the faculty committee a chance to respond and reconsider.<sup>139</sup> If the dismissed faculty member appeals the administrative reversal of a faculty committee to a court, I think the court, consistent with the justification for expert peer review in the 1915 Declaration, properly would be more likely to find for the faculty member than if the faculty committee had itself recommended dismissal. But if the evidence of incompetence is sufficiently strong, as in the case at Ball State, I think a court, consistent with the warning in the 1915 Declaration about the consequences of the failure of faculty to “purge” incompetent

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131. E-mail from Sheldon Eklund-Olson, Former Provost, Univ. of Tex., Austin, to David M. Rabban (July 20, 2015) (on file with the Indiana Law Journal).

132. JOINT LEGISLATIVE AUDIT & REVIEW COMM’N OF THE VA. GEN. ASSEMBLY, SPECIAL REPORT: TENURE AND POST-TENURE REVIEW POLICIES AT VIRGINIA’S PUBLIC COLLEGES AND UNIVERSITIES 28 tbl.5 (2004).

133. *Id.* at 28 tbl.5, 30.

134. *Id.* at 28 tbl.5.

135. *Id.* at 30 tbl.6.

136. *Id.*

137. *Id.* at 30 tbl.6, 31.

138. *See supra* Part V.

139. Recommended Institutional Regulations on Academic Freedom and Tenure, *supra* note 43, at 27 regs. 5(16), 6.

colleagues, properly would be likely to uphold the dismissal even if the administration and the board reversed the faculty committee. I am not aware of a judicial decision reviewing an administrative reversal of a faculty hearing committee's finding that adequate cause for dismissal had not been established. But in the case at Ball State the faculty committee, which initially recommended probation for three years for unethical conduct, subsequently recommended dismissal when the board of trustees rejected probation and remanded the case for reconsideration.<sup>140</sup>

In my opinion, broader concerns about human costs provide by far the most significant explanation for the reluctance to bring dismissal proceedings against clearly incompetent professors. Even if members of a faculty hearing committee would fulfill their professional "obligation" to exercise "impersonal judgment" and, when necessary, "judicial severity," as the 1915 Declaration urges,<sup>141</sup> there is a widespread aversion within universities to imposing this task. It is difficult to tell a colleague, and particularly a friend, that his performance does not meet minimal standards of competence. It is much more difficult to end that person's career through dismissal. In addition to the disastrous impact on the dismissed professor, the proceeding can generate lingering conflict within the university community among those who have different views on whether charges should have been brought. Universities require collegiality to perform their educational missions. For many administrators as well as faculty, the potential cost to collegiality produced by dismissal proceedings far outweighs the cost of tolerating the small number of professors who are clearly incompetent.

The 1915 Declaration recognized that many professors might find the obligation of peer review "unwelcome and burdensome."<sup>142</sup> Yet it warned that if faculty do not accept this obligation, the task of purging the incompetent would be performed by others, who would lack the expertise to make informed judgments and who would be more likely to take inappropriate factors into account, including, most importantly, considerations that violate academic freedom.<sup>143</sup> This warning has not materialized. In fact, university administrators, rather than asserting more authority for themselves over faculty dismissals, are primarily responsible for the extreme underutilization of peer review. Administrators must take the initiative in bringing charges of incompetence before a peer review committee, and they rarely do so. Overwhelmingly, trustees, alumni, and government officials have not tried to intervene in the assessment of faculty competence, perhaps in large part because they are convinced by the argument of the 1915 Declaration that only faculty have the required expertise.

Although the underutilization of peer review has not produced the dangers foreseen by the 1915 Declaration, there are good reasons, stressed by the 1915 Declaration itself, for universities to bring dismissal proceedings against the clearly incompetent. Academic freedom and tenure provide professors at American universities much more autonomy and security than most employees. The 1915

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140. *Korf v. Ball State Univ.*, 726 F.2d 1222, 1225 (7th Cir. 1984).

141. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 34.

142. *Id.*

143. *Id.* at 34–35; *see id.* at 25–26.

Declaration convincingly reasons that autonomy and security enable professors to perform their vital social function of producing and disseminating knowledge.<sup>144</sup> The 1915 Declaration is equally convincing in reasoning that this social function imposes “correlative obligations”<sup>145</sup> on professors to monitor departures from professional standards. The protection of academic freedom does not extend to unprofessional speech. The protection of tenure does not extend to professional misconduct, failure to meet minimal standards of quality, or extreme lack of productivity. These departures from professional standards impede the production and dissemination of knowledge. The convincing arguments for academic freedom and tenure cannot be sustained unless professional standards are maintained by the faculty peers who are able to assess them.

The underenforcement of incompetence as cause to dismiss tenured faculty undermines the integrity of the protection of academic freedom through tenure. It weakens public support for tenure in general, thereby jeopardizing academic freedom. I think that these costs are greater than the human costs that dismissal for cause imposes on the dismissed professor and on collegiality generally. And though dismissal has an enormous personal cost, organizations, including universities, have legitimate interests in firing clearly incompetent employees. While the job functions of a professor justify the special protection of academic freedom, they do not justify special protection for incompetence. I also think that there would not be substantial conflict disrupting collegiality if dismissal proceedings are brought under the strict standards I propose and are justified as a means to uphold the legitimate function of tenure in protecting academic freedom. It is worth observing as well that the toleration of incompetence causes some conflict and loss of collegiality among professors, which would be alleviated through the proper use of dismissal proceedings. Indeed, I predict that faculty morale would improve if charges were brought against the few people who are widely recognized as clearly incompetent. It is often bad for faculty morale to have such colleagues. I know it is for mine. It makes me feel complicit in an institutional failure to maintain professional standards and the proper operation of the tenure system, in which I deeply believe.

Proceedings to dismiss tenured faculty members for incompetence should be rare, but not as rare as they currently are. Administrators should bring charges before faculty hearing committees in appropriately extreme circumstances and should give substantial deference to their decisions. Doing so would uphold the principle of academic freedom, based on professional competence as determined by peer review, that is at the heart of the 1915 Declaration and that is still convincing today.

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144. *Id.* at 25–26.

145. *Id.* at 33.