REFLECTIONS ON TENURE IN LEGAL EDUCATION

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La permanence, dans les Facultés de droit nord-américaines, est un phénomène fort répandu mais relativement peu examiné. Son histoire et sa fonction actuelle demeure méconnues.

Dans cette étude, l'auteur revoit systématiquement les arguments "traditionnels" (positifs et négatifs) dans le débat sur l'opportunité de la permanence; il apporte un soin particulier aux caractéristiques particulières des Facultés de droit. Puis, après avoir souligné de nouveaux développements démographiques et financiers, il relie l'étude "traditionnelle" à un examen nouveau et innovateur du concept de la permanence. Perçue comme phénomène social et (surtout) économique, la permanence perd sa raison d'être classique, et requiert une nouvelle justification dont l'auteur doute de l'existence.

Un sondage réalisé dans quatre Facultés de droit canadiennes vient confirmer plusieurs aperçus théoriques de cette étude radicale de la permanence, et met en relief la nécessité, selon l'auteur, de remettre l'institution en question.

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SUMMARY

INTRODUCTION

"Inflation: economists ÷ tenure: professors"
(Richard Chait, Harvard University)

It is hardly customary to commence an article in this fashion; nevertheless, it must from the outset be admitted that the subject of tenure seems to be perceived as having been 'talked out' in academic literature[1]. The interested researcher will uncover a flurry of writing, of often dubious quality, in the waning years of the Vietnam conflict[2]; and he or she might well conclude that the issue, today, is largely confined to the periodical and tedious Academicfreedomandtenure Committee reports of the Canadian and American Associations of University Professors (C.A.U.T. and A.A.U.P., respectively)[3].

The researcher should nonetheless take heart, for it will readily become apparent that the lull in the literature is not indicative of a consensus in the conclusions of academics. Indeed, they may simply have 'agreed to disagree' on the question. A survey of attitudes of Canadian law professors[4] revelead an astonishing range of opinions on the merits of tenure:

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1. One finds few critical treatments of the subject in the very recent writings. The rare current discussions of the question (e.g., R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", (1981) 26 *McGill L.J.* 362; S. LELEIKO, "An Analysis of the Interrelationship between Tenure, Academic Freedom, and the Teaching of Professional Responsibility", (1980) 55 *Notre Dame Lawyer* 485) are invariably purely technical, lacking any treatment of the merits of the tenure system and simply considering its maintenance as a 'given.' An important, but almost painfully cursory exception is "Symposium: Motivating the Law School Faculty in the Twenty-First Century: Is There Life in Tenure?", (1980) 30 *Journal of Leg. Ed.* 1-12. Acknowledgements are due to the publishers of this symposium for having sparked this author's interest, the end product of which might hopefully encourage or enrage others to further research this field.

2. Many of these articles, written for journals of higher education, in essence claim either that "Tenure is bad because it prevents we radical professors from being hired, since the Faculty/Department is controlled by tenured reactionaries," or that "Tenure is bad because Faculties/Departments have come to be dominated by tenured anti-war liberals who deny tenure to young conservatives like me." We shall see that this is indeed a problem of tenure, but it is far from being tenure's only (or even principal) problem.

3. The terms are so regularly and inextricably linked in CAUT/AAUP jargon that it seemed appropriate to coin one 'word' with them. We shall claim, *infra*, that the connection between academic freedom and tenure is no longer, if it ever was, necessary.

4. Cf. *infra*, *passim* and esp. Part III.

"[Tenure] provides an independent stimulus to achieve a more secure status in the university environment";

"[Tenure] just makes the lazy professors even more lazy. It has little more impact than that";

"[La permanence] permet à l'universitaire d'acquérir et exercer l'indépendance dont il a besoin pour générer des idées nouvelles et, parfois, hétérodoxes";

"[La permanence] assure la médiocrité inhérente au système. ..."[5].

The diversity in viewpoints about tenure seems, in effect, as important now as it was during its subject's doctrinal heyday. Analysis of the institution of tenure thus seems appropriate today, if only to remind Law professors of the multiplicity and implications of the traditional 'for and against' arguments.

The first part of the article consists of a critical examination of the origins and classical justifications for academic tenure. In addition, the pedagogical attacks on tenure will be outlined in some detail.

Sandwiched between the *pro* and *contra* discussions is a section dealing with several contemporary "complicating factors". In effect, it seems that recent demographic and budgetary constraints shed a new light on the tenure problem, highlighting both the shortcomings of its apologia and the force of some of its strictures. The important issue of unionization of Law faculties (and on campuses in general) cannot be avoided in the discussion of such "complicating factors". Although some juridical obstacles to accreditation may recently have been erected in the United States[6], Law Faculty unionism does exit to a significant degree in parts of Canada, and "informal unionism" (*via* un-incorporated "faculty associations", etc.) is even more widespread. The structural causes, and implications, of this phenomenon are (even where case law has prophylactically intervened) of some importance, it is posited, in the understanding of tenure's contemporary function.

In Part II, I wish to depart from the more trodden pathways of the tenure debate. The concept of tenure, *senso largo*, can be examined phenomenologically, i.e. as an aspect of many diverse human institutions. Such an examination assists in providing a contextual framework for the tenure debate. The reflections here are incomplete, and

5. The two initial citations and the two last ones come from the same Law Faculties and, in all four cases, from tenured professors with over ten years' experience. For methodological notes on the survey, see *infra*, Part III, section A.

6. In some restricted cases, professors have been deemed ineligible for the protection of the various "right-to-organize" laws: cf. ex. *N.L.R.B.* vs *Board of Trustees of Yeshiva University*, (1980) 100 S. Ct. 856, briefly discussed in Part I, *infra*.

may hopefully prompt further analysis. I propose to examine "tenure" as an example of a more comprehensive phenomenon of *protection*, both in a sociological and in an economic sense. The thesis, in Part II as in Part I, is that modern tenure in this complicated world is perhaps a costly and inefficient, if rather understandable, aspect of Legal education.

As part of my examination of tenure, I surveyed professors at four 'representative' Canadian Law Faculties[7]. At different points in the article, the questionnaire's results will be summarized; a more detailed analysis will be the object of Part III. It is submitted that the results of this brief survey confirm several points raised in the paper, and give interesting insights into the structure of Canadian Legal education.

PART I:

THE TRADITIONAL TENURE DEBATE, REVISITED

Section A of this Part of the analysis has two objects. The first consists of a very brief sketch of the rise of the concept of academic tenure in North America. The second is a survey of the more cogent arguments invoked to justify tenure protection.

A. The Entrenchment of, and Justifications for Academic Tenure

1. The Entrenchment of Academic Tenure

An understanding of academic tenure in the New World requires some grasp of professorial status in the Old. Scholars have, at some length, documented this aspect of the *studium generale* (or university)

7. Canada has 21 Law Faculties. The sample covered 19% of the relevant populations, both as regards the number of Law Faculties and the number of Canadian Law Professors. See *infra*, Part III, section A, for a discussion of survey methodology.

since its rise in the high middle ages[8], and the very limited treatment here both requires and permits slight simplification of their analyses.

With that *caveat*, it may be asserted that the magisterial universities (of which the Université de Paris is probably the ultimate ancestor, and North American institutions eventual heirs) were, generally, *lieux* of high social standing. Professors, or masters, were not employees but rather corporate directors (or entrepreneurs) of the *studium generale*. They were often well remunerated[9], and usually quite powerful. Producers of a very scarce commodity (literacy), they were habitually protected, in their privileges, by wealthy and powerful consumers of this commodity (e.g. the Crown, the Church). In rough times, ill became of those who dared strike out at the professor or future professor (the "scholars"). A nearly octocentarian anecdote vividly illustrates professorial unity in the face of outside threats[10]:

> "In 1209 the faculty at Oxford... put on an epic demonstration of power. The issue was not pay but prerogative: namely, in the relations between town and gown, who was the boss? Some typically unruly scholars had killed a townswoman. The town retaliated by seizing and executing two scholars. The university-both masters and scholars-countered with a cessation of classes and a relocation to other places, including Cambridge. In 1214, the Pope himself intervened and ordered the town to do penance: barefoot, they had to distribute 42 shillings to poor scholars every year; they had to make a feast for one hundred poor scholars every St. Nick's Day; they had to freeze their rents for the first ten years. Finally, the masters who 'scabbed' were suspended from teaching for three years."

This fascinating example of Faculty self-protection, it should be noted, was directed at forces *outside* the university; this of course makes sense, since professors controlled, indeed constituted, the colleges themselves. Thus can one read of monopolistic Faculty actions designed to exempt professors from tolls, local taxes, conscription, etc.[11]. *Inside* the university, myriad theological, ideological, and

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8. Cf., e.g., H. RANDALL, *The Universities of Europe in the Middle Ages*, New Edition by F. Powicke and A. Emden, Oxford, Clarendon Press, 1936, 2 vols.; P. KIBRE, *Scholarly Privilege in the Middle Ages*, Cambridge, Cambridge U. Press, 1962.
9. Cf. G. POST, "Masters' Salaries and Student Fees in the Medieval University", (1932) 7 *Speculum* 182.
10. Source: G. TYLER, "The Faculty Joins the Proletariat", in C. Hughes (ed.), *Collective Bargaining in Higher Education*, 1973. Obviously, if masters were protected *by*, they were *not* protected *from* their mentors. See *infra*, note (12) and accompanying text.
11. See, e.g., W. METZGER, "Academic Tenure in America: A Historical Essay", in *Faculty Tenure*, A Report by the Keast Commission on Academic Tenure in Higher Education, San Francisco, Jossey-Bass, 1973, pp. 95-101.

ethnic barriers to entry were routinely erected by the masters, however[12].

It is, then, possible to perceive, in these early times, embryonic "lobbies" of professors, formed for self-advancement and self-protection. The lobby often had rigid membership requirements. One scholar has found that, in both professional and general faculties,

> "To be admitted to the *consortio magistrorum* was to submit to a rulership of peers, a rulership stiffened by a siege mentality, a taste for detailed regulation, and a subscription to received religious truth"[13].

The lobby also exhibited primitive cartelizing characteristics. After strenuous pressure, masters at Paris (later elsewhere) succeeded in obtaining a papal decree limiting the award of the *licentia docendi* (a credential entitling its holder to give an academic lecture) to persons certified by the faculty[14]. And disrespect for professional (cartel) rules resulted, according to the chronicles of Oxford and Paris, in *privatio* or *exilium*; such unemployment was accompanied by formal ostracism, preventing study towards future degrees anywhere, in most cases[15].

It is difficult to say precisely when the era of the master ended, and that of the professor-as-employee began, in European universities. In reality the process of change was a rather gradual one, roughly spanning the years of the Protestant Reformation. The fading of Church/State omnipotence in higher education was accompanied by a gradual rationalization of university authority; the prototypical master was slowly dislodged by the more employee-like tutor-fellow[16].

The first New World universities were, of course, products of this evolutionary process and, save rare exceptions, their professors were perceived as employees. It is perhaps understandable that the professorial lobby's emphasis shifted, with professors' class status, away from 'town-gown' problems and towards a more classical, quasi-union advocacy of employee benefits.

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12. For a list of what he calls "miscellaneous acts of bigotry and chauvinism", cf. F. MACHLUP, "European Universities as Partisans", in *Neutrality or Partnership: A Dilemma of Academic Institutions*, Bulletin No. 34, Carnegie Foundation, New York, 1971, pp. 6 ss.

13. METZGER, *loc. cit. supra*, note (11), p. 101.

14. Cf. KIBRE, *op. cit. supra*, note (8), pp. 121 ss. This is of course an early example of exclusion of entry through licensing requirements.

15. METZGER, *loc. cit. supra*, note (11), pp. 103-104.

16. Cf. *id*, pp. 105-110, for a brief description of the process.

It is important to note that, though such benefits were often subsumed under rubrics such as "academic freedom", they can often profitably be seen as in-group protection of job security. Thus, at Virginia's College of William and Mary, professors had no objection to the required (for *initial hiring*) oath of subscription to the Thirty-nine Articles of the Anglican Church; but when political disputes resulted in the firing of already-hired professors, the latter claimed that they had permanent status, and were therefore not dismissable at pleasure[17]. They eventually litigated this point (and lost)[18]. Professors fought just as unsuccessfully in the 18th Century against employers' prerogatives at other universities, like Yale[19] and Harvard[20].

In a legal and economic sense, then, professors' status was transformed from one of corporate "partner" to one of corporate employee. Contemporary case law often used the term "servant" to describe them[21]. Yet surely that word is misleading, as it fails to convey the inherently personal (i.e. non-dictatable, in the particular) nature of the teaching function[22].

To the extent that universities added research functions to teaching duties, the importance of professional autonomy was necessarily

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17. *Journal of the President and Masters of William and Mary College*, May 4, 1768; reprinted in 5 *William and Mary Quarterly* 83 (1897).

18. *Bracken* vs *Visitors of William and Mary College*, 3 Call 574 (1790).

19. F. DEXTER (ed.), *A Documentary History of Yale University*, New Haven, Yale U. Press, 1916, pp. 28-29.

20. J. QUINCY, *The History of Harvard University*, Cambridge, Harvard U. Press, 1840. One aspect of the new professorial status was a tendency to sign teachers to temporary contracts, as opposed to appointing them with sinecure. Professors protested bitterly whenever this was attempted. Quincy (at p. 281) justified Harvard's contract policy in purely motivational terms that are not without value for today's tenure debate:

> "the corporation began to perceive the inconvenience [of hiring] very young men without limitation of time who, if they possessed good talents, would speedily be induced to resign, and if they did not possess the ability to become eminent in a profession, would be fixed on the college for life."

21. For an early Canadian Case, *Ex parte Jacob*, (1861) 10 N.B.R. 153 (New Brunswick Supreme Court's refusal to review the dismissal of a professor because of his "servant" status).

22. METZGER, *loc. cit. supra*, note (11), explains at length that those professors, though salaried, continued to make collective and individual decisions that were vital to their universities' effective operation.

heightened[23]. This research-oriented conception of the University was essentially a German contribution of post-Civil-War vintage[24]. Along with German-educated professors, several universities in late nineteenth century North America imported the Teutonic idea of autonomy embodied in the concepts of *Lernfreiheit* and *Lehrfreiheit*. The latter notion is really at the heart of our modern definition of academic freedom and, as understood at the time, it implied two prerogatives:

1) the professorial right to examine bodies of evidence, and to report findings publicly (i.e. in lectures);
2) the consequent absence of any fixed syllabus of course content, the details of which depended on the professor's interest[25].

The research duties (that is, the discovery of truth, as opposed to the communication of verities) of the university rendered this freedom an essential condition of the academic profession in German eyes[26]. This feeling was quickly espoused by Faculty in North America. In its first "Report on Academic Freedom," the fledgling A.A.U.P. asserted:

> "Academic freedom has traditionally had two applications — to the freedom of the teacher and to that of the student, to Lehrfreiheit and Lernfreiheit"[27].

Tenure as we know it[28] eventually came to be invoked in North America by professional guilds, as a tool guaranteeing the exercise of *Lehrfreiheit*. Gradually universities (possibly led by Harvard[29]) replaced their "renewal-at-the-trustees'-pleasure" appointments by hirings that eventually acquired some degree of permanence. For a time, two classes of professors (those on indefinite contract and removable only "for cause", and those whose temporary hiring required periodic renewals) coexisted on campus. However, it was felt that many 'temporaries' were being perpetually renewed out of pity;

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23. Discovering the unknown requires, by definition, a leeway not needed in expounding the gospel.
24. Cf. generally, R. HOFSTADTER and METZGER, *The Development of Academic Freedom in the United States*, New York, Columbia U. Press, 1955, pp. 369 ss.
25. *Lernfreiheit* dealt with students' freedom to learn.
26. It should be noted that *Lernfreiheit* was a strictly instrumental concept for the Germans; thus, the same exceptional freedom was not granted professors in their extracurricular life. Cf. *id*, pp. 389 ss.
27. (1915) 1 *A.A.U.P. Bulletin* 20.
28. I have conscientiously resisted defining the notion, and shall only attempt to do so once its historical parameters have been sketched. Cf. *infra*, note (33).
29. Cf. METZGER, *loc. cit. supra*, note (11), p. 121.

the "two-track" system was eventually suppressed, Harvard again innovating in 1860[30] with an "up-or-out" technique whereby lack of promotion to a tenured position after a limited number of years implied termination.

Faculty associations, of course, have led the bandwagon in favour of tenure. The A.A.U.P. has produced major documents justifying tenure in 1915, 1925, 1940, 1956, 1958, and 1970[31]; these "Statements of Principle" have had considerable impact on universities' hiring policies[32]. A section of the C.A.U.T.'s quarterly *Bulletin* has traditionally, dealt with tenure issues, and the A.A.U.P.'s Tenure Surveillance group is its Committee Number One.

One should not conclude, from the above, that sinecure has been obtained for all tenured professors at every American and Canadian Faculty of Law[33]. In fact, three levels of qualification are in order here:

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30. Cf. "Academic Tenure at Harvard University", (1972) 58 *A.A.U.P. Bull.* 62, at p. 68. Most other universities followed in the 20th Century. It might be noted here that *if* tenure is regarded as a cartelizing device (cf. *infra*), it is, like any cartel, largely ineffective if a competitive open market for professors is allowed to coexist alongside it. It is thus in the interests of cartel members to close down this competition, and that of course is exactly what the abolition of the two-tier system has accomplished. Cf. notes (72)-(75), *infra*, and corresponding text.

31. Cf. the corresponding volumes of the *A.A.U.P. Bulletin*. The 1925 A.A.U.P. Statement (10 *A.A.U.P. Bull.* 85) had permitted the maintenance of a "two-track" system, but its definitive 1940 paper (still in effect today) promotes a one-track, seven-year-maximum "probation" (or non-tenure) period.

32. Cf. R. BROWN, "The Usefulness of A.A.U.P. Policy Statements", (1978) 59 *Educational Record* 30. It might be noted that the American Association of Law Schools (A.A.L.S.) has endorsed the 1940 Statement.

33. This affirmation requires some treatment of the question heretofore evaded, namely: what *is* academic tenure?

    The A.A.L.S. has endorsed the A.A.U.P.'s 1940 Statement of Principles, describing tenure as the state where a teacher's services "should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies", ((1974) 60 *A.A.U.P. Bull.* 269).

    As is indicated below, however, "adequate cause" is costly and difficult to prove; and "financial exigencies" habitually hit all *non*-tenured Faculty before any tenured professors are affected. In practice, tenure is not very different than an "appointment for life" or a "lifetime contract" (if one rather crudely assumes that "life" ends at retirement...).

    Note that, whether one accepts the legalistic definition or its sociological counterpart, tenure does *not* permit termination "because a better professor has been found". In this absolutely essential sense, tenure shields its beneficiary from all competition, forever.

1) *Tenure coverage*: every Faculty of Law in Canada recognizes some tenure rights but 10% of the Law schools in the United States apparently have no system of tenure[34];
2) *Extent of tenure coverage*: some institutions maintaining a tenure policy have attempted to dilute it by indicating in their "Handbooks" that their policy is morally, but not legally, binding; elsewhere "cause for dismissal" of a tenured professor is so largely defined as to re-establish termination "at pleasure"[35]. These practices are on the wane, and are virtually nonexistant where collective bargaining prevails (see *infra*, section B);
3) *The Legal protection granted to tenured professors*: It is not my aim, here, to detail or even completely summarize the state of case law regarding dismissal of tenured professors in North America's sixty jurisdictions. Nevertheless, some generalizations can usefully be made.
   a) *in Canada*: for an extended period of time, many Canadian courts held tenure to be the object of universities' generosity, rather than of any enforceable right, especially as it rarely figured explicitly in the contract of hire[36]. More recently, courts have judged that rules of natural justice must be obeyed in dealing with tenured professors (or with applications for tenure) and that writs of evocation (*certiorari*) lie against abusive procedures[37],
   b) *in the United States*: Tenure seems, here too, to grant its possessor "procedural due process" rights, at least in state

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34. Cf. LELEIKO, *loc. cit. supra*, note (1), p. 485. However, *all* A.B.A./A.A.L.S. accredited schools have a tenure system. To the extent that the A.B.A./A.A.L.S. accreditation system can be seen as an effective cartel structure (cf. *infra*, note (132)), one can posit that tenure coverage is functionally complete in the U.S.

35. Cf. C. BYSE and L. JOUGHIN, *Tenure in American Higher Education*, Ithaca, N.Y., Cornell U. Press, 1959, pp. 1-41.

36. Cf. CAMPBELL, *loc. cit. supra*, note (1); also I. CHRISTIE and D. MULLAN, "Canadian Academic Tenure and Employment", (1982) 18 *Dalhousie L.J.* 72, at pp. 103-107. The poignant 1958 experience of the late Prof. Harry Crowe (dismissed from his tenured position for political reasons) illustrates this problem: cf. *C.A.U.T. Bulletin*, Octobre 1982, pp. 20 ss. Obviously, if tenure is an explicit part of the contract of hire, contract remedies will lie.

37. Cf. *Paine* vs *University of Toronto*, 1981 Ontario Supreme Court (on appeal); *C.A.U.T. Bulletin*, December 1982, p. 23. See, generally, D. MULLAN, "The Modern Law of Tenure", in H. Janisch (ed.), *The University and the Law*, Halifax, Dalhousie Continuing Legal Education Series, no 8, 1975.

institutions[38]. In private institutions, it seems that only contractual claims (if available) may be made[39].

In both countries, then, courts seem to offer essentially procedural safeguards to tenured professors. As will be indicated *infra*, however, additional legal bulwarks are available to all professors, tenured or not.

2. The Contemporary Defense of Tenure

The preceeding brief portrayal of academic tenure depicts an entrenched institution whose spread was roughly coterminous with the end of professorial entrepreneurship, and whose existence is constantly defended by guilds of university professors. Obviously, the latter are not likely to plead that their members should receive tenure in order to shield them from superior competition (cf. *infra*); rather, their arguments depict tenure as instrumentally linked to various social goals. I shall paraphrase and synthesize the more traditional defenses of tenure here[40], and submit that the multitude of 'pro-tenure' pleas may be analytically subsumed under the following headings:

(i) Academic Freedom is Good; and Tenure is Necessary to Achieve it.

This is the classic utilitarian argument for tenure. At times quoting John Stuart Mill[41] to underline the importance to society of free competition among opinions, proponents of tenure submit, in essence, that their proposed restriction of free markets for (Law) professors will paradoxically lead to the free market of ideas. Without tenure, it is argued, universities could fire a professor for her (new, interesting, but unpopular) thoughts, thereby depriving society of their benefit. This

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38. Cf. *Board of Regents* vs *Roth*, (1972) 408 U.S. 564.

39. Cf. e.g., S. OLSWANG and J. FANTIL, "Tenure and Periodic Performance Review", (1980) 7 *J. Coll. and Univ. L.* 1; but see R.O. NEILL, "Private Universities and Public Law", (1970) 19 *Buffalo L. Rev.* 155, arguing that state and federal funding have "publicized" the private schools.

40. Ream upon ream awaits the researcher of tenure's proponents. Follows a very brief non-random sampling: BYSE and JOUGHIN, *op. cit. supra*, note (35); Commission on Academic Tenure, *op. cit. supra*, note (11); W. VAN ALSTYNE, "Tenure: A Summary, Explanation, and Defense", (1971) 57 *A.A.U.P. Bull.* 328; METZGER et al, *Dimensions of Academic Freedom*, Chicago, U. Illinois Press, 1969; E. STENE, "The Bases of Academic Tenure", (1955) 41 *A.A.U.P. Bull.* 584.

41. "On Liberty", in his *Utilitarianism, Liberty and Representative Government.*

justification for tenure seems obviously linked to *Lehrfreiheit*, and its intuitive attractiveness is such that we need not insist on it further here.

Some defenders of academic tenure almost fanatically cling to this justification for it, as in:

> "[A] tenure system is the *only* device known for the preservation of academic freedom"[42].

This inquiry will reveal, *infra*, that a radical critique contests the major grounding of this syllogism (academic freedom as a Good), while a more traditional school of thought disputes the minor premise (the requirement of tenure to achieve the Good).

(ii) Academic Tenure Helps Both Tenured and Non-Tenured Professors Achieve Academic Freedom (*the "ricochet" argument*)

A natural reaction to argument #1 was that, since academic freedom is deemed Good for *all*, tenure is an inherently inappropriate tool since it applies to only a subset of all professors. Such a criticism is common in anti-tenure literature. The riposte essentially turns this criticism of its head by postulating that the tenured will protect the non-tenured, thus providing additional justification for a tenure system:

> "[T]he freedom of non-tenured teachers depends largely on the presence, on any faculty, of tenured professors committed in principle to intellectual freedom, acting individually or collectively to assure the rights of their junior colleagues"[43].

(iii) Tenure Provides Peace of Mind, and Peace of Mind is Good (*the "shield from the market" claim*)

The argument here is, basically, that by removing market-place pressure from the tenured professor, tenure contributes to a more serene and efficient execution of academic functions. One variation on this argument stresses the need for long-term 'risky' (in the sense that no positive result is guaranteed) research, and submits that such potentially useful risks would not be undertaken by professors preoccupied with short-term (i.e. contract-renewable) performance: without tenure, it is felt that

> "what should be a venture in creative discovery would for almost everyone degenerate into a safe-sided devotion to riskless footnote gathering. Authenti-

42. STENE, *loc. cit. supra*, note (40), p. 585. Our emphasis.

43. "Tenure at Harvard", *loc. cit. supra*, note (30), p. 64.

> cation would replace discovery as the goal. The results might not startle the world, but they would be impressive in quantitative terms and invulnerable to devastating attacks."[44]

Other commentators see Peace of Mind as leading to a greater camaraderie among angst-free professors; the resulting *esprit de corps* promotes loyalty to one's institution, and discourages opportunistic extramural commitments prompted by a felt need to curry external favour[45].

(iv) Tenure as Necessary to Attract Competent (Law) Professors (*the "meet the market" claim*)

Here again the content of argument varies, but its root is invariably the same: since professors' monetary income is so low[46] the only way to attract competent people into Academia is to "pay" them an in-kind benefit, like job-security, that private enterprise doesn't offer. A major and important variation on this general theme is directly relevant to Legal education. In effect, it is argued that private legal practice already provides "probation" and "tenure" (in the form of associate status and partnership, respectively), and that Legal education, to compete for manpower, must provide a "tenure" of its own[47].

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44. K. BREWSTER, *The Report of the President of Yale University*, New Haven, 1972, pp. 14-15. It might be noted that different psychological premises coexist for this argument, and that its proponents rarely clarify their thoughts on this point. For example, do they assume that professors as a class are risk-averse (if so, problems of tautology may intervene)? Do they assume, instead, that university administrators are myopic (i.e. refusing to sanction long-term risks undertaken by a professor through renewal of his short-term contracts)? If so, is this because university administrators are risk-averse? Do they (as some feel is the case for elected politicians) lack long-term interests? Are they simply irrational? Such speculation, while interesting, cannot be pursued here; yet it does seem important to clarify the bases of the "riskless-footnote" argument.

45. Cf. e.g., "Harvard", *loc. cit. supra*, note (30), p. 66.

46. For more on this subject, cf. *infra*. It must be admitted that Law professors' money salaries are lower than higher-level legal partners' income. On Sept. 1, 1981, the *Wall St. Journal* estimated that top pay for Law professors in North America was U.S. $75,000, while many partners earned in excess of US $300,000. (p. 52). In addition, of course, other career options (often in the executive and judiciary branches of government) often provide greater monetary rewards than does teaching. Since Law professors are, typically, first-class law school graduates, the lucrative career opportunities named above are realistic alternatives for them.

47. Cf. e.g., NOTE, "Tenure and Partnership as Title VII Remedies", (1980) 94 *Harv. L. Rev.* 457, where the two institutions are considered analytically identical.

(v) Tenure as Insuring Academic Quality

Essentially, the thesis here is that by forcing (through the 'up-or-out' system) institutions to decide on whom to confer tenure and whom to let go, universities avoid clinging to those "who are agreeable but not outstanding, and whose term appointments might otherwise be renewed regularly out of generosity, friendship, or neglect"[48]. In our survey, one respondent perceptively varied this argument by submitting that, in Law School, "the Faculty [can] rid itself of persons who might not be good scholars or teachers, in particular by [inducing] those persons to resign to practice Law without have to face the tenure decision". In other words, Law (unlike some other disciplines), offers a 'safety valve' facilitating negative tenure decisions by rendering them less costly to their victims, and therefore less painful to tenured colleagues.

(vi) The Tenure System Ingrains Good Habits (*the "socialization" claim*)

Succinctly, this position is that the pressures of tenure review force the young professor to become a "scholar", and that scholarship techniques she has picked up during probation will remain with her throughout her career[49].

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Before examining the viewpoints of the opponents of academic tenure, it seems appropriate to place the traditional pro-tenure positions in the context of recent developments in Legal education. This is the task of Section B.

B. Contemporary Complicating Factors

Modern discussions of the tenure controversy cannot, if they are to be complete, avoid the inextricably linked problems posed by Demography, Funding and Collective Bargaining. To a great extent, these issues were neglected in the nore "classical" studies. Their examination does not strengthen tenure's case.

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48. Keast Commission on Academic Tenure, *op. cit. supra*, note (11), p. 16. Cf. also *supra*, note (30) and accompanying text.

49. Two professors, both tenured and with more than ten years' experience, made this claim on our survey.

1. Demographics and Funding

Two demographic phenomena must be reckoned with: the Baby-Boom, and the End-of-the-Baby-Boom.

In the 1960's and 1970's, higher education (Legal and otherwise) was, in boardroom parlance, a rapid growth industry. Unprecedented numbers of young adults pounded the doors of Academia, first as undergraduates, then as graduate (including Law) students[50]. Existing Faculties of Law greatly expanded; new Faculties were created. In both cases, hiring of professors proceeded at a rapid rate. Fierce competition for the available crop of pre-Baby-Boom academics drove up their asking "prices", and tenure was at times offered to prospective newcomers with little or no teaching experience. In 1970, 30% of all university professors were under 35 years of age, and in many institutions this percentage was much higher[51].

The demographic boom was, of course, accompanied by economically "Happy Days". Public funding was unhampered by huge governmental budget deficits[52], and higher education had the same

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50. Some areas were harder hit than others. In Québec, the 1960's marked the beginnings of a move towards accessibility in higher education that the rest of North America had experienced two generations earlier. The demographic effect was thus multiplied, as it were, by a social-class effect, creating a veritable quantitative revolution in Québec centres of higher education. On the other hand, some "elite" American law schools were conceivably less affected by demographic growth. For such schools, excess student demand had long been the case. By simply upgrading admissions standards, these schools were able to transfer demographic pressures to "lower" points on the totem pole of U.S. Legal education.

51. Carnegie Commission on Higher Education, *Priorities For Action*, New York, McGraw-Hill, 1973, p. 119. "Instant tenure" was not the only job-inducement. This author has been told several anecdotes by professors hired and, for example, immediately sent on paid "sabbatical" leave, then "promoted" upon their return.

52. Most Canadian universities are private legal entities; but all are (and have been) funded through their provincial governments, often to the tune of 90% of gross revenues. The provinces, in turn, receive considerable grants from the federal government, as aid to higher education. In the United States, the private/public funding dichotomy is real, but not as stark as might be imagined. Metzger has reported, for example, that 75% of Princeton's revenues in 1964 came from the federal government (other private institutions had lower, but still considerable, figures): "Academic Freedom in Delocalized Institutions", *in* METZGER et al., *op. cit. supra*, note (40), p. 21. See also O'NEILL, *loc. cit. supra*, note (39). Again, to the extent that certain "elite" private American institutions are sheltered from mass public funding by substantial endowments, the decline in funding (cf. *infra*) is not nearly as disastrous for them.

sort of politically-inspired fiscal clout as do pensions for the elderly today.

Clearly, demographic pressures and the funding context have changed drastically. University enrolment has in most cases peaked, and is often on the decline, for reasons due both to population curves and to economic stagnation. Arts-faculty declines do not seem to have spread to prestigious Legal education as of yet, although a certain stagnation may well result[53] from well-publicized reports of saturation of the legal services markets. Funding problems are often equally severe. "Proposition 13" cost 150 jobs in the California State University system[54]. Recently announced measures to reduce the Québec government's enormous deficit may well have near catastrophic effects on personnel[55].

The overall result of these diverse forces has been dismal. At a time when Baby-Boomers are reaching "professorship" age, there are fewer jobs for the asking[56]. A large part of this problem is created by the 'tenuring-in' of many Faculties. Recent estimates have placed overall 'tenure density' near 85%[57], a figure corroborated by our survey[58]. Professors who obtained their tenure during the rapid growth years are, of course, shielded from competition with aspiring young academics. Consequently, important numbers of prospective law professors find employers' doors closed to them, regardless of their relative promise. It has been predicted that only 3.8% of professors will be under 35 years of age in 1990[59]. Rather tragically, women and minor-

53. At the 1980 convention of the Association des professeurs de droit du Québec, it was reported that applications for admission were no longer on the rise, and that all faculties were obliged to dig a little deeper into their applicant pool in order to fill their classrooms. For a report, cf. (1980) 11 *Revue Générale de Droit* 359 ss.

54. *Wall St. Journal*, March 13, 1979, p. 1.

55. The Université de Montréal (Canada's largest) was reported to have fired 103 professors, of which 4 taught in the Faculty of Law. At the Université de Sherbrooke, 12 professors (2 at the Law Faculty) have received pink slips. See *Le Devoir*, 17 Nov. 1981, p. 2. Outside Québec, many other Canadian Law Faculties have adopted a hiring freeze.

56. For general statistics, cf. R. FREEMAN, "Demand for Labor in Non-Profit Markets: University Faculty", in D. Hamermesh (ed), *Labor in Non-Profit Markets*, Princeton U. Press, 1975.

57. Cf. C. McLANE, "The Malaise of Tenure Decisions", (1979) 65 *Academe* 133.

58. 80% of the respondants were tenured (the spread being 75-77% at the Civil Law Faculties, and 80-86% at the Common Law Faculties).

59. Carnegie Commission, *op. cit. supra*, note (51), p. 119.

ities, severely under-represented as Law professors[60], are confronted with increasingly tenured-in Faculties. They may compete for only a limited number of probationary positions; and if they land one, their chances of eventually obtaining tenure are now exceedingly slim, since universities must resist many meritorious tenure requests if they wish to avoid near-100% tenure-density (and, thus, near-total inflexibility for future hirings)[61].

The result, already prevalent in Humanities departments and creeping in at many Law faculties, is a system of "revolving-door appointments", whereby young professors are systematically "terminated" at the end of their probationary period, regardless of their merit as scholars. These casualties of the tenure system, termed "gypsy scholars", suffer inordinate psychological trauma and continual disruption of their personal lives[62]. Extending the maximum length of

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60. In Canada in 1970, only 2.3% of full-time Law professors were women (source: O.E.C.D., *Quantitative Trends in Teaching Staff in Higher Education*, Paris, 1971, p. 65). The OECD did not furnish comparable figures for American Law schools, but the total university situation is not at all dissimilar: cf. e.g., L. HORNIG, "Untenured and Tenuous: the Status of Women Faculty", in (1980) 448 *Annals of the American Academy of Political and Social Science* 115; cf. also the contribution of Y. Northridge (a female law student) to "Symposium", *loc. cit. supra*, note (1), p. 9.

61. McLANE, *loc. cit. supra*, note (57), details this phenomenon, with statistics. Also, cf. D. WEISBERG, "Women in Law School Teaching", (1979) 30 *J. Leg. Ed.* 226. Weisberg asserts that, in 1972, 8% of full time Law faculty were women. By 1977, this figure had risen to 9%... It is obviously difficult to seriously modify the situation when new positions are rare, and old ones are tenured-in. Hornig (*loc. cit. supra*, note (60)) found that 65% of all women faculty have non-tenured positions... Northridge (*loc. cit. supra*, note (60)) claims that tenure keeps Faculties "white and male". Minority student unrest is sure to be prompted by their increased perception that Law school faculty positions are not open to them. In this vein, the Black American Law Students' Association's claim that Columbia Law School has a discriminatory hiring policy (*New York Times*, Feb. 26, 1982) can be seen, in part at least, as a result of the tenure dilemma.

62. Cf. J. COONEY, "The Gypsy Scholars", March 13, 1979 *Wall St. Journal* 1. Cooney writes that, with enrolments expected to decline as much as 19% over the 1980's, and with actual tenure rates often over 80%, many Faculties simply cannot afford to grant tenure to *anybody* until a tenured position becomes vacant. Temporary "gypsy scholars" "make up the bulk of Columbia's hiring in the Humanities". Thus even "elite" colleges are hit, although their Law schools seem to have avoided this problem so far, for reasons alluded to *supra*, notes (50) and (52). This suggests an important point. Law faculties created during or just before the Baby Boom, and presently at a consolidation stage where they might normally want to enter the labour market and improve their Faculty's

probationary appointments is certainly a palliative[63], but of course this is an embryonic 'two-track' system of tenured "haves" and non-tenurable-and-expendable "have-nots"[64].

2. Collective Bargaining

The sombre demographic and budgetary horizons of most modern universities contrast vividly with the almost cloistered aloofness corporate faculty could enjoy in centuries gone by[65]. As faculty members feel the pinch, professorial 'class-consciousness' invariably increases. In the last decade we have witnessed an amazing ascension of unionism on campus. By 1980, 29% of public universities in the United States had accredited professorial trade unions[66]. In Québec, all but one of the Faculties of Law are unionized, and the unionization movement has spread its tentacles into English-speaking Canada as well[67].

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quality, are virtually prevented from doing so because of tenure constraints. On the other hand, older and more established schools, whose Faculty profile barely changed during the '60's, do not have this problem. One might thus posit that demographics and the economic bind have contributed with tenure to freeze the general "caste-like" structure of U.S. Legal education. Brahmins, consequently, might not find tenure counter-productive...

An additional clarification seems appropriate here. It might in effect be pointed out that in one sense "gypsy" scholars have long been a feature of legal education *and* private practice (overstaffed associate pools at law firms, numerous lecturers being 'tried out' by faculties, etc.). The important difference between that traditional situation and the one we are describing, of course, is that whereas the former constitute competition for quality, the latter frustrates precisely because negative career decisions must be made regardless of the quality of the candidate affected.

63. This is apparently being considered at Columbia College. Cf. *The Columbia Daily Spectator*, Oct. 22, 1981, p. 1.

64. LELEIKO, *loc. cit. supra*, note (1), deplores this tendency which he sees as common for non-orthodox (e.g., clinical) Law professors. Cf. *supra*, note (30), for a different explanation of guild displeasure with a two-track system.

65. Cf. *supra*, notes (9)-(10) and corresponding text.

66. J. GARBARINO, "Faculty Unionism", in *Annals*, *op. cit. supra*, note (60), pp. 75-77. In states where laws explicitly permit such organization, the rate skyrockets to 85%. Law schools in the U.S. are, admittedly, much less affected by unionism at the present time.

67. The faculties of at least thirty-five Canadian universities have opted for collective bargaining. Cf. CHRISTIE and MULLAN, *loc. cit. supra*, note (36), p. 91. Cf. generally, B. ADELL and D. CARTER, *Collective Bargaining for University Faculty in Canada*, Kingston, Queen's U. Press, 1972; and A. DESGAGNÉ and R. MILLER, *L'Université et la Syndicalisation des Professeurs*, Québec, Éditeur Officiel, 1975.

It is not appropriate, here, to chart exhaustively the causes, effects and extent of Faculty unionism[68]; indeed, as regards private American Law Schools, collective bargaining has recently suffered a legal set-back that may or may not be eventually overcome[69]. However, it is possible to underline some consequences of this phenomenon on the classic tenured employment system (and on the peer governance and collegiality inherent to it).

Two related factors deserve emphasis. Firstly, the inherent incompatibility between collective bargaining and collegial governance must be recognized (indeed, this hostility was crucial to the *Yeshiva* decision). Both the causes and the effects of unionism discourage peer governance. As Baldridge has noted:

> "Collective bargaining does not accept the presumption of shared governance, which is central to academic collegiality. Instead, collective bargaining divides the world into a we-they dichotomy... The best way to guarantee shared decision-making, according to many union advocates, is to mandate it in a legally binding contract"[70].

One could thus expect tenure procedures to become formalized, and bureaucratized, upon entrenchment of collective bargaining. Such a phenomenon is not, it is posited, conducive to honest and case-by-case peer judgments, in the university's interest, of professorial quality.

It had been predicted by some that unionization might result in the 'negotiating-away' of tenure protection for professors[71]. This prediction ignores a second and closely related point; that the structure of unionism does not stress individual skills and merit (which, in the

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68. In addition to the above-cited works, see, e.g., J. GARBARINO, *Faculty Bargaining*, New York, McGraw Hill, 1975; pp. 157 ss.; F. KEMERER and J. BALDRIDGE, *Unions on Campus*, San Francisco, Jossey-Bass, 1975; R. LINDERMANN, "Five Most-Cited Reasons for Faculty Unionization", (1973) 102 *Intellect* 85.

69. In *N.L.R.B.* vs *Yeshiva U.*, (1980) 100 S. Ct. 856, the Supreme Court ruled that Yeshiva's professors were not covered by the "right to organize" of labour codes, since they had retained too many governance powers over the years to be considered non-managerial employees. It is not yet certain whether this judgment will apply only to Yeshiva (where the degree of self-governance was indeed very important) or will be extended to other private universities. Cf. e.g., G. BODNER, "The Implications of the Yeshiva Decision", (1980) 7 *J. Coll. U.L.* 53.

70. *Op. cit. supra*, note (68), p. 30.

71. Cf. e.g., W. McHUGH, "Faculty Unionism and Tenure", (1973) 1 *J. Coll. U.L.* 46; and VAN ALSTYNE, *loc. cit. supra*, note (40).

absence of tenure rights, might determine the composition of a Faculty), but rather works, through its one-man/one-vote majoritarian decisional system, to ensure the *equality* of all employees, irrespective of individual worth. Such a predilection is not easily reconciled with the evaluation of each teacher on the basis of performance, but is quite compatible with the maintenance (and equal advancement) of each incumbent regardless of individual merit. Tenure is, obviously, a potentially useful tool for achieving blanket job security, and one would expect unionization (or even its precursor, professorial 'class-consciousness') to lead to an emphasis on tenure as a protectionist measure.

It is this latter tendency that is confirmed by the empirical analysis. Marshall has found that unions actually sacrifice salary increase to emphasize the formalization of seniority and tenure rights (the latter two, at least once tenure is obtained, are not performance-related, while the former can be used to reward merit)[72]. Campbell has discovered that Canadian collective agreements placed tenure under the "job-security" rubric of the contract, rather than in the "academic freedom" section[73]. In 1973, when the City University of New York ordered performance reviews for its highly tenured-in faculty, the union struck and the order was rescinded... On the "flip-side", when in the same year union negotiators at the University of Hawaii agreed to higher pay (performance related) in exchange for a five-year "rolling contract" (see *infra*) system replacing tenure, the Faculty repudiated the new contract by a 77% margin, and ultimately replaced the union[74].

The demographic and budgetary crunch of the '70's and '80's set the stage for self-protective guild measures just as surely as did 13th century violence. In each case, the protective measures were adapted to their times. Recent efforts to counter administrative threats to job security by unionizing, and the resultant formalization of procedures and de-emphasis on individual merit, have in many cases destroyed real collegial government[75], and slowed down any increase in quality

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72. J. MARSHALL, "The Effects of Collective Bargaining on Faculty Salaries in Higher Education", (1979) 50 *J. Higher Ed.* 163.

73. *Loc. cit. supra*, note (1), p. 366.

74. Cf. R. CHAIT, "Tenure and the Academic Future", in *Three Views on Tenure*, New Rochelle, N.Y., Change Magazine Press, 1979, p. 49.

75. Cf. GARBARINO, *op. cit. supra*, note (68), p. 158. It is not surprising that unionism made its first and clearest advances precisely in those politically centralized and geographically widespread universities (e.g., The City University of New York, and the 5-pronged Université du Québec network, etc.)

that unionized institutions might have wished to implement. The institution of tenure has been a functional tool in this development.

C. Attacks on Tenure

Rather surprisingly, the dismal macroeconomic and demographic outlook has not resulted in a flare-up of attacks on the academic tenure system. Committees of scholars have been appointed to critically investigate the matter, and virtually all of them conclude their reports by bestowing a seal of approval on tenure[76]. Having consulted all published North American studies, I must agree with Robert Nesbitt that intense normative pressures seem to be at work:

> "[O]ne may write about tenure, discuss it reflectively, be solemn about abuses of tenure, exhort one's fellows to higher standards, consider wistfully the never-land where tenure might not be needed, but then one must reach the conclusion, embroidered by Jeffersonian rhetoric, that tenure is, much as we all regret it, absolutely necessary"[77].

Let us throw caution to the wind, then, and attempt to synthesize the arguments against tenure in the same order and fashion with which its justifications were summarized[78].

(i) Reply to the "Academic Freedom" Argument (*supra*, p. 102)

Two levels of response exist to the argument asserting that tenure is necessary to Academic Freedom, which is Good. A radical attack negates the major ideological premise, while a more conventional critique concedes the "Goodness" point and disputes the minor (empirical) statement about tenure.

One can trace the roots of the radical perspective as far back as 1915 (when, coincidentally, the A.A.U.P. recommended nation-wide

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where collective governance was bureaucratically impossible. Cf. on this point, W. LAUROESCH, "Québec-Early Warning System for American Higher Education", (1979) 8 *J. of Collective Negotiations in the Public Sector* 333.

76. The most famous, but not at all the only, quasi-official investigation of tenure is the Keast Commission's 1973 study for the A.A.U.P. (*op. cit. supra*, note (11)). It is interesting and, we think, important to note that *no* non-tenured professors were named to this commission. From an economic point of view, then, this study was undertaken by the very people protected by the barriers to entry they were to evaluate.

77. "The Future of Tenure", 5 *Change* 27, at p. 29 (April 1973).

78. For the reader's commodity, I have indicated opposite each reply the page of the corresponding pro-tenure argument. It might be useful to re-read the former rapidly at this point.

tenure for the first time). In that year, the trustees of the University of Pennsylvania fired a professor for his admitted socialist leanings. Many criticized the dismissal, but the *New York Times* found their arguments in favour of academic freedom illegitimate:

> "Men who through toil and ability have got together enough money to endow universities or professors' chairs do not generally have it in mind that their money shall be used for the dissemination of the dogmas of socialism...
>
> We see no reason why the upholders of academic freedom in this sense should not establish a university of their own. Let them provide the funds, erect the building, lay out the campus, and then make a requisition on the padded cells of Bedlam for their teaching staff. Nobody would interfere with the full freedom of professors; they could teach socialism and shiftlessness until Doomsday without restraint."[79]

The *Times* was making an important economic point, which has since been restated in less colourful, and more reasoned, terms[80]. It is, essentially, that the free market in ideas should abstract from any notion of just distribution. More simply put, consumers should be allowed to influence the propagation of ideas by "purchasing" them just as they may purchase, say, newspapers. In both cases, those dissatisfied with the ideas "sold" are free to consume ideas elsewhere or, indeed, to found or purchase their own idea-factory. Academic-freedom worshippers will patronize academic-freedom-granting institutions, while lovers of propaganda will invest in/attend authoritarian institutions, and so on, until the socially desired amount of each sort of 'product' is found on the idea-market.

At the minimum, this perspective complains that they who pay for a service (e.g., alumni and students of private universities) should be able to determine, *in the particular*, what the service rendered shall be, and that academic freedom denies this power[81]. At the maximum, the libertarian position would permit explicit ideological bribery[82]. In either case, we see problems with the radical critique. Primary among these is the absence of an adequate theory of distribution justifying initial entitlements. At a more mundane level, it is possible to object

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79. Reproduced in METZGER, *op. cit. supra*, note (40), pp. 13-14.

80. Cf. e.g., A. ALCHIAN, "Private Property and the Relative Cost of Tenure", in P. Bradley (ed.), *The Public Stake in Union Power*, New York, McGraw Hill, 1963, pp. 350 ss.

81. J. LOVEJOY, "Academic Freedom", in 1 *Encyclopaedia of the Social Sciences* 384 (1930), makes this point quite eloquently.

82. ALCHIAN, *loc. cit. supra*, note (80), p. 368, defends (rhetorically?) bribery of college presidents on efficiency grounds.

that this viewpoint ignores or denies the existence of monopoly problems (many universities have no possible competition, because of mobility costs for students), information problems (students are, arguably, incapable of determining the precise content of their purchased product in the Law school market), and public-goods problems (the product of the professor's research benefits, one could submit, society as a whole: thus those who pay him receive only a part of the total wealth he produces, and may not demand the optimal amount of his product). Finally, government financing of virtually all Canadian and many American institutions renders this argument practically (if not theoretically) moot.

It is important to realize that it is possible to concede the major premise that professorial Academic freedom is a good thing for society, and still attack tenure as an inappropriate instrument of that freedom. Elements of such an argument might be as follows:

a) contemporary legal protection guarantees many aspects of academic freedom, without need for tenure. In Québec (the situation is similar in several other Canadian provinces[83]), the *Charte des droits et libertés de la personne* prohibits firing anybody (tenured or not, professor or not) for her political beliefs[84]. In the United States, the federal 1st Amendment protects (*via* due-process 14th amendment claims) both tenured and probationary professors in state-affiliated institutions from politically-based discharge[85]. Aside from additional recourse to state constitutions, an array of

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83. For a comparative account, cf. D. PROULX, "Égalité et discrimination dans la Charte des droits et libertés de la personne", (1980) 10 *R.D.U.S.* 381, at p. 456.

84. L.R.Q. 1977, c. C-12, section 10. At the Université de Sherbrooke, a private institution, an economics professor was recently denied tenure, upon negative recommendation by colleagues and Dean. He had, it seems not published any refereed article, and had encouraged student protests against his department. He justified both aspects of his behaviour as manifestations of his Marxist comtempt for bourgeois activities, and claimed his termination denied him political liberty. The *Commission des droits de la personne* opted to reinstate him. The University has refused, and the case is presently before the courts...

85. *Perry* vs *Sindermann*, (1972) 92 S. Ct. 2694, at p. 2697. Regarding private institutions, cf. *supra*, notes (39) and (52). See also *Board of Regents* vs *Roth*, (1972) 92 S. Ct. 2701, at p. 2708, footnote (14). Cf. W. GRIGGS and H. RUBIN, "Legal Ramifications of the Tenure Crisis", (1977) 6 *J. Collective Negotiations in the Public Sector* 119, and C. SHULMAN, *Employment of Non-Tenured Faculty: Some Implications of Roth and Sinderman*, Washington, Am. Ass. of Higher Ed., 1973.

case law[86] and statutes[87] may well prohibit the firing of many "at will" employees without "cause"[88];

b) in the pinch, at any rate, tenure adds precious little to the protection of academic freedom. Tenure did not protect academic freedom in the U.S. during the McCarthy era[89]. Canada experienced precisely the same problem during that period[90]. Except in marginal cases, it is not A.A.U.P./C.A.U.T. Statements that guarantee the essential scholarly rights of professors so much as cultural and political tradition;

c) by severely restricting access of 'new blood' in times of demographic and economic stagnation, the tenure system actually *decreases* the likelihood that qualified professors with unpopular beliefs will be hired[91]. In addition, those who do make it to tenure will be, save rare exceptions, thoroughly socialized into traditional scholarly/pedagogic mindsets (see point (vi), *infra*). So the tenure system actually has a negative effect on academic freedom today.

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86. Recent cases have increasingly relied on an implied obligation to fire "at-will" employees "for cause" only: cf. e.g., *Fortune* vs *N.C.R. Co.*, (1977) 364 N.E. (2d) 1251 (Mass. Supreme Judicial Court), and *Monge* vs *Beebe Rubber*, (1974) 316 A (2d) 549 (N.H. Supreme Court). Cf. also M. GLENDON and E. LEV, "Changes in the Bonding of the Employment Relationship: an Essay in the New Property", (1979) 20 *Boston Coll. L. Rev.* 457.

87. E.g., Title VII of the *Civil Rights Act of 1964*, S 703(a) 42 U.S.C. s. 2000e.2.

88. Note that this is *not* the same as universal tenure. Relative incompetence (that is, the discovery of a more productive alternative job applicant) is a reasonable cause for replacement.

89. Cf. S. SLAUGHTER, "The Danger Zone: Academic Freedom and Civil Liberties" in Annals, *op. cit. supra*, note (60), pp. 46 ss. for a documented study. Slaughter also gives several examples of what she claims are contemporary denials of academic freedom.

90. Cf. October 1981 *C.A.U.T. Bull.*, pp. 20 ss, for a documented account of incidents in the 1950's (before the legal protection mentioned *supra* was implemented, and despite tenure protection). Cf. also, *supra*, note (36).

91. SLAUGHTER, *loc. cit. supra*, note (89), p. 61:

> "[T]he tenure review process, governed by senior faculty who have already proved to be responsible, respectful, and conscientious of their particular obligations, is probably the major mechanism for insuring the continued conservative management of knowledge. Ideologically suspect and politically active young faculty are often denied permanent positions on grounds of professional inadequacy."

Slaughter provides several recent examples. She could have, but doesn't, mention in support of her claim the fact that Harvard denied tenure to Robert Trivers (the sociobiologist) and to Carl Sagan...

(ii) Reply to the "Ricochet" Argument (*supra*, p. 103)

The "Ricochet" argument is an accessory to the principal Academic Freedom argument, and cannot survive alone. Sub-argument c), immediately above, addresses the Ricochet argument directly, of course, postulating that tenured professors may actually deny their junior colleagues academic freedom. As has been briefly noted by others[92], tenure can be usefully analyzed as a cartel, *one* of the aims and functions of which is redistribution of employment insecurity to the non-members of the cartel[93]. It is not self-evident that inordinate *angst* positively correlates with academic freedom.

(iii) Reply to the "Shield From the Market" Argument (*supra*, p. 103)

This rather complex psychological argument has several responses. Most directly, its principal assumption (that serenity leads to greater productivity) may be challenged, either by reference to other areas of life where incessant competition enhances performance (athletics, business, etc.), or by anecdotal commentary (which abounds) concerning tenured 'deadwood'[94]. On another level, the variant that professors are risk-averse, and that tenure lowers the risk of long-term productive study, seems:

(i) at least partially circular, since one could posit that it is largely the tenure system itself which encourages the non-tenured to spend years at "riskless footnote gathering" to impress the tenure committee[95];

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92. Cf. e.g., T. Sowell's contribution to "Symposium", *loc. cit. supra*, note (1), p. 11. We have already alluded to this possibility on several occasions.

93. Another function of many cartels is to create wealth for its members by charging a price for entry into the industry, where previously no such entry-fee existed. Here, of course, the fee is the accomplishments of acts (which may include favours in some cases, but usually consists of intellectual and career conformity) designed to please cartel members and enhance their sense of intellectual worth.

94. Not all the evidence is anecdotal. D. Katz ("Faculty Salaries, Promotions, and Productivity at a Large University", (1973) 63 *Am. Econ. Rev.* 475) found that research production quantitatively declined after tenure. This is admittedly ambiguous for our purposes, since the *number* of articles published is not necessarily indicative of the quality of the research performed. L. Lewis ("Academic Tenure: Its Recipients and its Effects", in *Annals*, *op. cit. supra*, note (60), pp. 86 ss) discovered (at p. 99) that half of the tenured professors in his sample had "little or no research output after tenure". His sample, however, excluded Law professors.

95. Several respondants to the survey indicated annoyance at this. In the words of

(ii) empirically questionable, since it abstracts from both pre-tenure-era intellectual creation and contemporary 'deadwood'. More importantly, perhaps, it hardly explains the non-academic intellectual centres ('think-tanks', etc.), also built around the ideals of boldness and intrepidity in the search for knowledge, but where periodic performance review (and sanctions) fail to choke off short-term or long-term creativity[96];

(iii) entirely forgetful of the fact that many of the most talented Law professors continue to dabble with the market from which tenure shields them, as consultants, arbiters, government officials, etc. In this sense, it is not obvious that tenure leads to an increase in research.

As for the *esprit de corps* variation,[97] it hardly seems causally related to tenure, except in a very negative way that we shall explicate below. *Unionization* certainly fosters (or, perhaps, is a symptom of) a certain professorial *esprit de corps*, though it is not certain that is what the authors of the Harvard paper had in mind. As for tenure, the have/have-not dichotomy it may foster in tough times hardly seems amenable to faculty camaraderie[98]. Of course, those who are or become too mediocre to receive outside offers (including offers from other Law Faculties), but whose tenure protects their existing employment, may over time come to identify, and even to feel a certain *esprit de corps* with their congeners...[99].

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one tenured veteran, "unhealthy pressure on younger academics to produce publishable material at too early a stage in their career" was the main effect of tenure. See also *supra*, note (44).

96. Nisbet makes this last point, *loc. cit. supra*, note (77), p. 30.

97. Cf. *supra*, note (45), and corresponding text.

98. Things are certainly not this bad at most Law Faculties (as our survey confirms — cf. *infra*), but these remarks of Prof. Dabney PARK ("Down with Tenure!", (March 1972) 4 *Change* 32, at p. 36) are striking:

> "At the University of North Carolina, non-tenured faculty members are often so reduced by the uncertainties of their situation that they don't even eat lunch with their tenured colleagues. In their relations with the non-tenured faculty, those who are tenured often act as doctors reluctant to become too friendly with their terminal patients; in order to protect themselves from beng too disturbed by academic deaths looming in the future, they keep their non-tenured colleagues at a safe distance."

99. Cf. also *infra*, note (115) and corresponding text.

(iv) **Reply to the "Meet the Market" Argument (*supra*, p. 104)**

The view that tenure is an in-kind,' non-taxable benefit that should be seen as part of the real income package of tenured professors is economically correct. It is, however, unclear why this point is invoked in *favour* of tenure. In the first place, other in-kind benefits (sabbatical leaves, longer-than-average summer vacations, the freedom to "work one's own hours", the pleasure, for myself and others, of doing something one likes) exist for Law professors. It is not obvious that, with these benefits included, the total "income" of Law professors is that terribly low. In the second place, it is even less clear that the tenure aspect of the 'package' attracts and retains the 'right' sort of professor. The point, quite succinctly, is that, as is the case for all inkind benefits, people cannot adjust tenure to their tastes by trading it for something they may value (this, of course, is the great advantage of money). Since tastes differ, not every professor's 'income' will be increased by equal amounts. Those who will benefit the most are those putting the greatest value on job security, while those placing little or no value on it (e.g. because they are so competent that they are confident of getting alternative employment) will receive a lower 'income' and be comparatively disadvantaged[100].

Tenure would hardly seem to attract valuable new professors — at least, I can hardly imagine a bright rookie who, at age 28 (say), would or should value job security. For *retaining* professors tenure does seem to be effective (see *infra*). It is, however, neither certain that the best ones are retained by tenure[101], nor that more motivating retainers (sabbatical leaves, promotion in rank, etc.) are insufficient.

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100. Sowell submits (*loc. cit. supra*, note (92), p. 12) that "the answer to the question of why we do not find diverse, bold, or innovative people dominating the civil service is that we have created a benefit attaching to civil service positions that is of enormous value precisely to timid, uncreative people."

101. Cf. M. LANGLEY, "More Professors are Leaving their Law Schools to accept Rewarding Jobs in Private Practice", Sept. 1, 1981 *Wall St. Journal* 52. Langley interviews several "elite" Law School professors who are leaving university for good. A fifty-year old Cornell professor left because "the academic pace is far more sluggish than private practice". More importantly, perhaps: the Dean of Stanford Law School left for a prestigious firm because, in his words, he was "burned out" as a professor. The implication here is crucial: while Stanford (and other elite schools) are less hurt by tenure since their unproductive faculty conserve other options, what of the non-outstanding and "burned-out" professor at Average School of Law, who has no private firm beating down his door with lucrative offers. Again, it is the "non-elite" Faculties that are hit hardest by tenure, and their mediocre professors who are retained by it.

As for the claim that, in Faculties of Law, tenure is a necessary equivalent of private-practice-partnership, two points: firstly, partnership implies ownership and profit-sharing (and loss-sharing) arrangements. The partnership decision is thus made by people who will personally, and certainly, pay if their decision is not strictly meritocratic. The Law Faculty is a non-profit organization, and the decision-makers (tenured colleagues and, formally, trustees) will not suffer direct loss if their 'business decision' is unwise. Indeed, the contrary is conceivable:

> "Certainly no professor wants his department to become a laughing-stock in the field because of its low quality, but there's also a temptation not to appoint anyone too brilliant or too ambitious, for fear that he'll overshadow you."[102]

Secondly, we shall posit (*infra*) that partnership is *not* an analytically equivalent measure to tenure, but is rather a sociological manifestation whose equivalent would prevail in Law Faculties even if academic tenure were abolished.

(v) Reply to the "Academic Quality" Argument (*supra*, p. 105)

Here the argument is that no one would be fired were it not for the tenure decision. This claim seems utterly vanquished by demographic and economic realities. It has been noted, above, that tenured-in faculties must terminate professors on probation that may be far more competent than members of their tenured staff[103]. In some cases[104], the university has announced that all vacated positions will be closed: here the Faculty labours under an insuperable conflict of interests, and virtually all candidates who arrive at the term of their probation are recommended for tenure by their peers. In addition, ecological and

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102. M. NADEL, "The Trouble with Tenure", (January 1978) 9 *Washington Monthly* 29, at p. 32. Again, this proviso less affects "elite schools", whose tenured professors do reap a "profit" (prestige) from their school's nationwide ranking. At "average" Law Faculties, however, and especially at poor schools striving to improve (*supra*, note (62)), tenured professors could suffer eventually "losses" (humiliation, etc.) through productive hiring decisions.

103. Nadel (*id*, p. 31) adds "When I was up for tenure myself, I had the strange experience of being told by the department chairman, who hadn't written anything substantial in 20 years, that I was being turned down because my second book wasn't as good as my first book and it was only my second book that counted." The double standard is an economic inevitability of the tenure cartel, given any sort of budgetary constraint. If ten farmers, through some sort of cartel, manage to allot to themselves 90% of all farmland, then put the remainder up for auction, the bidding may be quite high.

104. Several, if not all unionized Québec Law Faculties are in this jam.

psychological factors often foster a 'buddy' system which makes negative recommendation doubtful in the absence of personal incompatibilities[105]. Is the "private-practice safety-valve" prophylactic in this sense[106]? Only if the ledger includes "incompetent non-tenured pushed into private practice" but excludes "incompetent tenured neither pushed nor pushable"...

(vi) **Reply to the "Socialization" Argument (*supra*, p. 105)**

The point is, of course, that this claim in favour of academic tenure cuts very sharply the other way. Six years' work, with colleagues whose eventual support is extremely important to one's career, does tend to result in a certain internalization of mindsets, epistemological categories, work habits, even preferred sports. To the extent that the existing structure was productive, this is perhaps good (although, even then, innovation and interdisciplinary work may suffer); to the degree the opposite is true,...[107].

* * * * *

It is possible to criticize academic tenure in ways that are, I think, conceptually distinct from the six rubrics dealt with above. Here are some:

(vii) **Tenure Limits Mobility of Scarce Resources**

This point has been alluded to several times above, but is important enough to warrant specific treatment.

In economic theory, optimal allocation of scarce resources is fundamentally dependent upon the assumption that resources will move toward their most valued use, i.e., that paying the highest

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105. The Keast Commission found an over-90% approval rating in 1971 tenure decisions (*op. cit supra*, note (11), p. 12). This figure has likely diminished since; but as we have seen, *supra*, this would imply mere "tenure-density" problems rather than increased quality control.

106. *Supra*, note (48) and corresponding text.

107. One might query at this point whether the situation would be (even theoretically) any better under a system of periodic performance review. The short answer is that under such a system, no one is 'entrenched'. Those who one might be tempted to emulate would be identified by their performance (remember, they too must undergo review), not their seniority. In other words, the crucial difference would be the absence of any clearly defined "in-group" and "out-group", and the consequential lessening of pressures to conform.

economic remuneration[108]. Tenure subverts this process of mobility, and consequently hurts Legal education and its participants, in several often-pernicious ways:

a) Tenure is *formal* (and getting more and more formalized with collective bargaining). As we shall note, *infra*, informal "tenure-like" arrangements exist in many walks of life, but their customary nature is more amenable to eventual resource shifts, as incumbents gradually discover that their fulfilment can best be achieved elsewhere, and as employers profit by moving people around (see Part II, *infra*);

b) Tenure is *irreversible*. Even staunch defenders of tenure acknowledge that removal 'for cause' is rather theoretical, absent "some frightful act of moral turpitude or persistent neglect of *all* university responsibilities"[109]. For many, knowing that they are 'entrenched' vanquishes a natural tendency to evolve and fight against stagnation[110]. Psychological immobility may easily result[111], and career growth become distorted;

c) Tenure lowers professors' self-image. Professors (especially, but not only, Law professors) are not unemployable elsewhere; yet many feel they have 'no place to go' but to the shelter of their protected tenured job[112]. Often, the most powerful holding power of tenure is the fear that one wouldn't be able to compete in the

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108. Differently put, if one prefers: turnover is economically beneficial, because all industries need new people with new ideas to remain vital. See, on this point generally, J. O'TOOLE, "A Conscientious Objection", in *Three Views*, *op. cit. supra*, note (74), pp. 9 ss.

109. Cf. BREWSTER, *op. cit. supra*, note (44), pp. 11-12. See also *supra*, note (33).

110. Cf. O'TOOLE, *loc. cit. supra*, note (108), summarizing the thoughts of Jung and Erickson on this point. Cf. also R. SCHRANK, *Ten Thousand Working Days*, Cambridge, M.I.T. Press, 1978, for an excellent blue-collar enunciation of this thesis.

111. S. LESSARD ("The Terms of Tenure", (Sept. 1971) 3 *Washington Monthly* 11, at p. 13) waxes nearly poetic in this vein: "Tenure is like a Eurailpass... [when] you come upon a town which promises you an unprecedented good time if only you would stop over." "[S]omehow job guarantees intimidate people into staying when they would otherwise go."

112. Cf. L. SOLOMON, "The Labor Market for Humanities Doctorates", (1978) 1 *Higher Ed. Research Institute Quarterly* 1. Solomon found that many of these people could (and wished to) hold satisfying jobs outside of academia, but that, significantly, few realized this until they were *forced* to take non-academic positions. See also *supra*, note (101), and *infra*, Part II.

'outside', unprotected, world. Like a self-fulfilling prophecy, tenure may create the vulnerability it pre-supposes[113];

(viii) **Tenure Encourages Credentialism in Legal Education**

This can happen in at least two ways. Firstly, the technological difficulties involved in the evaluation of teaching often imply that publications (in *which* Law Review?, etc.) will be over-valued. Secondly, the present buyers' market in Legal education encourages employers to lower selection costs by filtering large numbers of candidates through their credentials (what Law school?, on the Law Review?, etc.). Personalized evaluation of each candidate's professorial potential becomes uneconomical when, even if the candidate is superior to 80% of the staff, he can only compete for one position[114].

(ix) **The Tenure Dilemma Can Spiral**

Again, this is a problem gently alluded to, above. It is an economic and logical one, and requires the following assumptions: that the Law school in question is not an "elite" one; that the better professors are more mobile, *ceteris paribus*; that if only two categories of professors exist (good ones and bad ones), some of both sorts manage to achieve tenure. Granted these assumptions, economist John Sheehan has observed the following phenomenon occur[115]:

> "There is a curious complication which haunts the sleep of administrators... namely, the hazard of appointing incompetent or idle men (sic) to tenured positions... In a theoretical extreme case, in which all tenure appointees retained their positions for life, the proportion of 'deadwood' on the faculty would be the same as the proportion originally appointed[116]. However,... the ablest members of the faculty will tend to be the most mobile, because of their attractiveness to other institutions, and the least competent members will tend to be immobile. For a weak major university, there is a real danger that almost all its superior appointees will eventually be lured away, leaving a permanent cadre which has been vigorously selected for incompetence."

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113. Cf. D. BROWN, *Academic Labor Markets*, Vol. 2, Washington, U.S. Dept. of Labor, 1965. Brown found (p. 72) that mobility of tenured professors is lower than that of non-tenured, even after correcting for age and seniority.

114. This rational credentialism only exacerbates certain social problems in the law school. Cf. e.g., *supra*, note (61), and corresponding text.

115. J. SHEEHAN, *The Economics of Education*, London, George Allen & Unwin, 1973, p. 228.

116. This of course kindly assumes away any possibility that competent professors might become less competent *because of* tenure, as discussed *supra*. In this sense, Sheehan's paradox can actually be seen as optimistic!!

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In résumé, it is possible to envisage tenure, at least in our time, as a tool for job security rather than an insurer of academic freedom. Historically said to protect the daring, the tenure system at an average Faculty of Law can be seen as helping attract and retain the unimaginative. Theoretically a fringe benefit, tenure can also constitute a psychological ball-and-chain, dragging the professor and his school down together. Justified through lofty ideals, tenure can also be analyzed as a cartel designed to transfer costs to non-members, i.e. the non-tenured, the university, and the students alike.

PART II:

PROLEGOMENON TO A NON-TRADITIONAL INQUIRY: TENURE AS A SOCIOECONOMIC PHENOMENON

It would be negligent to conclude this study of academic tenure with facile censure at this point. If, for example, academic tenure is symptomatic of a more general societal protective tendency, an out-of-context critique might be both incomplete and misleading. In this Part of the study, I wish to outline elements of a phenomenological examination of tenure.

A. Tenure in a Sociological Perspective

One respondent to the survey, after having criticized tenure for "protecting poor colleagues in their poor performance", added this *caveat*:

> "[However], as a practical matter, in any corporation and at any level, no one is realistically fired: rather, they are only moved out of the mainstream of influence. This tends to happen here as well".

This observation is not entirely accurate. In a profit-searching enterprise, the spectre of insolvency (and, to a lesser but still significant degree in North America, of shareholder discontent) *does* push corpo-

rations to displace, and at times discharge, professional personnel[117]. (Significantly, this seems far less true of non-profit organizations[118].)

Still, the reflection is legitimate, and is largely confirmed both by one's own experiences and intuitions, and by examination of several formal legal structures[119]. While some jobs (professional athlete, self-employed cab driver, elected politician, carpenter, etc.) seem (at least at first blush) contingent upon regular productivity at a relatively high level, many others seem to lack this characteristic. Often, a dismissal of a veteran contract employee seems unjustified to us, even though the employer is acting in an appropriate way, business-wise (i.e. replacing the terminated worker by a more productive one, thereby increasing the efficiency of the firm and the value of its product)[120]. If the same employee has been only recently hired, dismissal somehow seems much less immoral to all concerned (witness the general acceptance, even by new employees, of the 'fairness' of seniority-based, as opposed to productivity-based layoff plans at factories). As time goes by, there seems to be an increased expectation for continuity and stability in professional activities.

Indeed, many walks of life seem to exhibit an informal sort of probation followed by an equally informal permanence. Lawyers and doctors, after years of (probationary?) study, are accorded licenses to practice; both groups have fiercely resisted the idea of compulsory mid-career competence evaluations. Yet *young* attorneys have their competence evaluated all the time (during their articling in Canada: as a junior associate in the U.S.). Baseball players and Members of Parliament have obtained extravagant pension plans that, after a

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117. It is not necessary that bankruptcy (à la Massey-Ferguson or Chrysler) be impending for this to occur. On Jan. 31, 1982, *CBS News* announced that General Motors was conducting a "purge" in its upper-level management, in order to stimulate performance. Several industries (advertising, "think-tanks", micro-technology, etc.) are known for their high turnover (both voluntary and forced).

118. See *infra*, Part II, section B.

119. Japan's "work for life" rule most quickly comes to mind, although even there the system protected essentially non-executive personnel. Other countries have less entrenched systems (cf. e.g., J. WINDMULLER, "Legal Restrictions on Employment Termination in the Netherlands", (1967) 18 *Lab. L.J.* 39).

120. Audiences cringed when ineffective Willie Lomas was fired in Miller's *Death of a Salesman*. In October of 1981, the C.B.S. programme *60 Minutes* "exposed" the practice of the American retailer I. Magnin, who dismissed contract employees in its fashion department, often after over twenty years "faithful" service, to replace them by younger recruits more in tune with modern trends.

fairly short (probationary?) period, guarantee important rewards regardless of subsequent "poor" performance (demotion to the minor leagues, defeat at the polls)[121]. People often re-elect X (or vote that Y play in the All-Star Game) simply because he has "been there" and it would seem unjust not to return him.

Seen in this light, "tenure" (*lato sensu*) can be simply ascribed to the catch-all of "human nature": to a "natural" desire for continuity in life, for conformity to expectations, for gradual rather than brusque alterations. Sociological and anthropological studies have led William Goode to conclude that virtually all groupings will develop "arrangements for protecting the less able"[122]. He finds, interestingly enough, that such arrangements are even more pervasive than those protecting the collectivity *from* the inept[123]. Obviously, academic tenure can be described as one such pattern of insulation, protecting the less able from the rigours of open competition, after a certain lapse of time affords them a moral claim to such protection.

Of course, the demarcation between the useful *explanation* (or understanding) of a phenomenon and the *justification* of same (weakly as inevitable, or strongly, as Good), hardly needs to be stressed here. None of the consequential criticisms of academic tenure are in any way rebutted by its contextual examination. Indeed, to the degree that sociological permanence can be seen as a *continuum* of strength of claims to coherence[124], the absoluteness of the academic tenure

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121. We might extrapolate from John Silber ("Tenure in Context", in B. Smith (ed.) *The Tenure Debate*, San Francisco, Jossey-Bass, 1973, p. 39) the point that non-professional life also exhibits "tenure" (*lato sensu*) characteristics. After a (probationary?) engagement period, parties acquire marital obligations toward each other. Not only is "dismissal" (e.g., desertion) seen as immoral; it may also be sanctionned by the courts' ordering the deserter to pay his "tenured" spouse the "salary" to which the spouse had grown accustomed *over time*, in some cases. "Palimony" illustrates this analogy most clearly, by making passage of time (rather than the intervention of formal marriage vows) sufficient to create this obligation.

122. "The Protection of the Inept", (1967) *American Sociological Review* 5.

123. *Id.*, p. 6. We shall, *infra*, section B, offer an economic explanation of the same phenomenon.

124. This is essentially Silber's thesis, *loc. cit. supra*, note (121). Gradualism would, for example, protect the poor 'veteran' performer from instananeous removal. However, as it became clear that his talents were waning, the unproductive gradually loses his moral claim to permanence, until he can be replaced, with minimal personal trauma and non-maximal consumer loss.

claim[125] would seem abusive even under the above-outlined moral standards. Alternative systems to tenure, such as Franklin Pierce (N.H.) College's "rolling contract" plan (cf. *infra*), would seem to more effectively conjugate security and motivational needs, while simultaneously safeguarding 'quality of product'.

It is not a main purpose of this paper to describe or imagine alternative systems to tenure. Nonetheless, the "what-will-you-replace-it-with" problem might be briefly addressed at this point.

Firstly, as the above discussion implies, it is quite possible that a pure contract system would not result in "cruel" mass firing; on the contrary, the gradual process observed elsewhere should prevail.

"Rolling Contract" systems internalize such a process. A faculty member is first awarded one or more one-year contracts during a probationary period. If she survives the probation, she is granted a 3-year contract and is evaluated annually, from the first year of the contract. If the evaluation is positive, her contract is immediately extended one year. If it is negative, she has the remaining two years (and two evaluations) to remedy the deficiencies and receive extensions (of one, two, or three years), according to performance. Take-offs on this theme have been suggested in the literature[126].

Hampshire College (Mass.) uses an interesting "growth contract" concept. The initial appointment lasts three years, and, one year before its expiry, the faculty member may request a new contract through a "growth contract" proposal, in which he justifies his proposed term and sets forth the goals he expects to achieve during that term[127]. From 1970 to 1978, 88% of these proposals have been accepted (as presented or after modification through mutual consent)[128]. This should go a long way to dispel fears that professors could not survive in a performance-based employment system[129].

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125. Cf. *supra*, note (109) and corresponding text. There is possibly, but only possibly, some literary license in F. Moog's assertion that:

"There seems to be no record of any tenuree having taught badly enough, or neglected his obligations flagrantly enough, to warrant dismissal on such grounds". ("A Dragon Called Tenure", (Nov. 1972) 4 *Change* 10, at p. 11).

126. Cf. L. VACCARO, "The Tenure Controversy: Some Possible Alternatives", (1972) 43 *J. Higher Ed.* 35.

127. See, generally, Keast Commission, *op. cit. supra*, note (11), pp. 11 ss.

128. O'TOOLE, *loc. cit. supra*, note (108), p. 50.

129. In other words, the elimination of the quasi-sinecure system does not sweep away socio-psychological "permanence", though it may boost motivation considerably.

Of course, more radical solutions are at least theoretically imaginable[130]; and none of the above-presented solutions are defended here as perfect[131]. The point is, simply, to emphasize that tenure (*stricto sensu*) may be sociologically disfunctional, but that remedies must, to be efficacious, address the perceived psychological need for security.

B. Tenure in an Economic Perspective

Interspersed throughout the discussion have been frequent glimpses of an economic treatment analyzing tenure as a cartel preventing a free market for Law professors; viewing associations such as the A.A.L.S. and the C.A.U.T. as institutional embodiments of the cartel[132]; finally, underlining the distributional (to non-tenured professors) and allocational (vis-à-vis the students, the universities, and the consumers of legal services) costs of this cartel.

Without taking up the above-mentioned points again, this section will outline two economic constructs that seem potentially useful in completing a discussion of academic tenure. The first, Non-Profit Organization (NPO) analysis, helps explain (but, again, not justify) tenure. The second, appropriation of professorial "quasi-rents", could at the limit (though I doubt it) justify the institution of tenure.

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130. For example, it would be possible to appoximate the partnership model if economic responsibility could be introduced. This might entail: (1) returning to a structure where professors constituted the firm, or making their salary contingent on performance; (2) requiring full consumer (student, law review etc.) payment for faculty services, and; (3) transforming the university into a profit-making (and loss-incurring) structure. In this way the tenure decision would be stripped of many of its extraneous influences, discussed *supra*.

131. The Hampshire model, for example, seems susceptible to "back scratching" problems (i.e., mutually bartered contract approval). It is indeed evident that phenomena such as the decline of peer governance and the "proletarization" of professors must be addressed simultaneously with the tenure problem.

132. For an interesting examination of Legal education as a monopoly, cf. H. FIRST, "Competition in the Legal Education Industry", (1978) 53 *N.Y.U.L. Rev.* 311, (1979) 54 *N.Y.U.L. Rev.* 1049. First's analysis deals with monopolization among Law schools, rather than professorial barriers to entry. His lengthy and documented study identifies the A.A.L.S./A.B.A. structure as the embodiment of a classic cartel: sanctioning non-members through non-certification (which has often-catastrophic legal and social effects on the quality of the Law Faculty); extracting monopoly prices (income, prestige) for its members through such restrictions of entry; being insensitive to consumer demands, etc. First does not deal with tenure, but his approach does provide exciting insights into the usefulness of treating Legal education as a commodity (and consequently, legal educators as producers).

1. NPO Analysis[133]

Very summarily, this behavioural theory focuses on employers' incentives. In a competitive profit-making institution, employers (who pocket net profits) have incentives to encourage maximum employee productivity. NPO's, of course, do not permit employer appropriation of produced wealth. Personal utility-maximization, rather that company wealth-maximization, will increasingly become the employer's password[134]. Job security (i.e. tenure) is a form of increased wealth for employees and, since it makes for (arguably) more pleasant employer-employee relations, it is a source of utility for employers. Since the costs of such a choice are not measured in profits lost to the employer, his willingness to grant this type of wealth to employees would be relatively strong[135]. One would thus expect tenure to be more prevalent in NPO's (like Faculties of Law) than in private business[136]. (In passing, it might be noted that the rise of "academic freedom" can be explained in a similar economic fashion. As ownership and control of Faculties became increasingly divorced, and as outside funding permitted "below-cost" tuition[137], trustees progressively lost financial interest in determining what their employees researched or taught[138]).

Similarly, since tenured faculty cannot reap the product of their managerial behaviour, their hiring and tenure decisions are likely to have non-efficiency motives[139]. Empirical analysis tend to support the resulting hypothesis that holders of job property-rights (like tenure)

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133. Cf. generally, A. ALCHIAN and R. KESSELL, "Competition, Monopoly, and the Pursuit of Money", in *Aspects of Labor Economics*, Washington, Nat. Bureau of Econ. Research, 1962, pp. 152 ss.

134. Note that while legal *wealth*-maximization requires offering desirable services or products to others (thereby making them "happy"), personal *utility*-maximization permits self-gratification at the expense of social inefficiency.

135. Note that administrators of "elite" schools *would* suffer from lowered quality through loss of prestige. However, we have on several occasions attempted to demonstrate that the institution of tenure is likely not to hurt "elite" schools, but rather to enhance their "elite" status.

136. Cf. e.g., J. WOROFF, "Japan's Disastrous Work For Life", (Nov. 1979) 15 *Asian Business*. Woroff traces the cultural transformation of Japanese industry (i.e. the drive towards efficiency), and the concomitant decline of tenure.

137. Thereby and simultaneously reducing consumer (i.e., student) sovereignty.

138. Cf. H. MANNE, "The Political Economy of Modern Universities", in Manne, ed., *The Economics of Legal Relationships*, St. Paul, West, 1975, pp. 614 ss.

139. Cf. *supra*, note (102) and corresponding text.

find it relatively less costly to pursue sources of utility that conflict with the purpose of their job[140].

2. Opportunistic Appropriation of Quasi-Rents[141]

Welfare economics has long been concerned with minimizing opportunistic behaviour (or, more generically and crudely, "cheating") that discourages parties from contracting in an efficient manner. When one party to a contract makes an investment in skills *specific to* a second party, occasions may arise for opportunistic behaviour. I shall illustrate this point using a simplistic hypothetical case, then relate the question to the problem of academic tenure.

Suppose that X, owner of a boat, contracts with Y to create and install a winch specially adapted to X's boat. Relevant dollar figures might be as follows:

— Fixed cost of winch to Y:	500/wk
— Net value of winch if taken off boat:	100/wk
— Operating costs of winch (paid by Y):	150/wk
— Rent agreed to by X and Y (one-week contract):	700/wk

Here the winch is worth \$550/wk (\$700 minus the operating costs) on X's boat, but only \$100/wk if it is installed anywhere else. The difference (\$450) is Y's "quasi-rent", in economic terms[142]. The point is that X can appropriate this quasi-rent by waiting until the winch is installed, and then opportunistically lowering his payment during the second week to just over \$250[143]. In other words, Y's investment, being specific to X, creates the danger of successful but counter-efficient exploitation.

Economists have for some time now employed similar analyses to explain "vertical integration": in the above example, a relatively cheap

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140. Cf. e.g., D. MARTIN, "Job Property-Rights and Job Defections", (1972) 15 *J.L. and Econ.* 385.

141. Cf. generally, B. KLEIN, R. CRAWFORD and A. ALCHIAN, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process", (1978) 21 *J.L. and Econ.* 297.

142. "Rent" signifies the return to a factor whose supply is completely inelastic (i.e., land). The return to any factor in only *temporary* fixed supply (a plant, a winch or other machine) is referred to a "quasi-rent", since, in the long run, its supply need not be fixed.

143. At just over \$250, Y will lose money, but he would lose *less* than in any alternative use of the winch. At just over \$250, Y is recovering his operating costs and slightly more than \$100.

way to avoid opportunism (cheaper to enforce than, say, a long-term rental agreement) would be to sell (rather than rent) the winch. The winch's owner being also the boat's owner, no occasion for exploitation arises[144]. Where the resource is human (as opposed to physical) capital, no such vertical integration is possible, since slavery is forbidden.

It is here that the concept becomes relevant to our discussion of tenure. If a professor, over time, makes an investment that is specific to his own particular Law Faculty (course preparation, etc.), then the administration might opportunistically lower his income in future years (i.e. offer him a "take-it or leave-it" low-pay contract). A solution to this might be a long-term package of enforceable in-kind benefits like tenure[145].

Is this the case? It does seems rather doubtful that a professor's investment at one Law school would be terribly less valuable at other Faculties (though it might be less valuable in private practice). The large number of North American Faculties of Law make combines to appropriate quasi-rents just as unlikely[146].

On the other hand, general transactions-costs problems (moving costs between schools, non-fungibility of Law Faculties, informational requirements) might imply that quasi-rent appropriation is possible in the absence of such a cartel. Of course, even if needed empirical research substantiated this theoretical justification of tenure, such a claim is totally unrelated to the glorious justifications usually invoked by tenure's defenders, which it has already been submitted, appear largely unfounded.

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144. Cf. R. COASE, "The Nature of the Firm", (1937) 4 *Economica* 386 (examining General Motors' purchase of the Fisher Body Corp.).

145. It should be noted that another theoretically plausible solution is *Faculty unionism*. If effect, a comprehensive collective agreement will determine the professor's pay in future years, AND will provide for severe sanctions (collective strike) and cheap enforcement (arbitration, etc.) in case of employer non-performance. Tenure would round out the protection package. One would thus expect faculty unionism to arise as a cheap enforcement mechanism where quasi-rents of university-specific human capital can be appropriated.

146. But cf. FIRST, *loc. cit. supra*, note (132). This raises an interesting point. Québec's unique mixed legal system constricts (arguably) the relevant market to its five Law Faculties. It is much easier for a few geographically concentrated institutions to cartelize than it would be for 250 schools dispersed over a continent. Given the point raised *supra*, note (145), it would thus make sense, *ceteris paribus*, for Québec Law professors to unionize — which is what they have done.

PART III:

TENURE AS PERCEIVED BY CANADIAN LAW PROFESSORS

A. Survey Sample

To complement this theoretical study of tenure, a mini-survey was distributed to all full-time Professors of Law, except those serving decanal or vice-decanal functions, at four Canadian Faculties of Law[147].

Because of Canada's bipartite legal system (Civil Law in Québec, Common Law in English-speaking Canada), and because the degree of unionism is higher in Civil Law schools, two Faculties from each system were chosen, on a non-random basis. The Faculties may be briefly described as follows:

Faculty A is a young Common Law school, recruiting students primarily from its region of English Canada. It emphasizes pedagogic innovation;

Faculty B is an older, well-reputed, and more established Common Law school, recruiting students from across English Canada;

Faculty C is an old Civil Law school, recruiting students from across French Canada, and of equal reputation to...;

Faculty D, which is a younger (though much older than Faculty A) Civil Law school, also recruiting students from across French Canada.

Degree of response to the questionnaire varied from a low of 33% (Faculty C) to a high of 75% (Faculty A), with Faculties B and D providing 50% response rates. Overall response was 52%, quite high considering the limited time (2 weeks) allowed. Concern prompted by Faculty C's low degree of response was alleviated by the fact that, for each of the questions, its responses were substantially identical to those of Faculty D. Significant differences were noted, depending on the question asked, between:

(i) Faculty B and the other three Faculties;

(ii) The Common Law Faculties and the Civil Law Faculties.

As can be seen (Appendices 1 and 2), the surveys are quite simple. Questions were primarily closed-ended, to facilitate computation and

147. Cf. *supra*, notes (7) and (58).

objectivise responses. Open-ended answers were also permitted, both to facilitate classification of responses where the respondent felt uneasy with the suggested answers, and to guide personal research.

One other terminological point: Questions 1 and 2 permitted permutation of tenure status with seniority. As expected, it was discovered that all *non*-tenured had *less* than five years experience; in addition, for Faculties B, C and D, all *tenured* professors had *more* than five years' experience. At Faculty A, four tenured professors had less than five years' experience. This could be, of course, due to the tendency of rapidly-growing, very young Law schools to offer tenure as part of a package to attract bright new candidates to the Faculty[148].

B. Survey Results and Analysis

1. Question 3: On What Basis is Tenure Granted?

Here, Faculties A, C, and D furnished similar responses. Differences between tenured and non-tenured were insignificant.

TABLE I QUEST. #3	REWARDS TALENT	GRANTED AUTOMATICALLY	OTHER/ D.K.-N.A.
OVERALL (n = 50)	44%	52%	4%
FACULTY A	33	60	7
FACULTY B	93	7	—
FACULTY C	25	75	—
FACULTY D	15	77	8
TENURED	45	53	2
NON-TENURED	40	50	10

148. A final note: where numbers were too small to permit useful categorization, collapsing categories was resorted too. For this reason, "5-10yr." and "over-10yr." tenured professors will be treated together. Similarly, the small number of non-tenured per Faculty (cf. *supra*, note (58)) made treating them on an inter-Faculty basis appropriate in most cases.

Three points seem worthy of interest here: Firstly, perceptions of the motives for granting or denying tenure do not seem to depend on one's own tenured or non-tenured status. Secondly, in three Faculties clear majorities did *not* see tenure as a reward for academic excellence. The preceeding theoretical analysis predicted as much. Note that the tendency was exacerbated in Civil Law Faculties C and D, which are unionized and where tenure decisions might be, according to the theoretical overview, made in a routinized and highly formalistic way. The data would thus tend to confirm the impressions of several scholars[149] that unionization further accentuates the job-security aspects of tenure. Thirdly, the contrast between Faculty B and the other schools is striking, and could have at least two explanations[150].

2. Question 4: Is It Easy to Obtain Tenure?

This question was inserted partially as a test of the 'buddy' system, and also as a control for Question 3. Since Canadian Law Professors have often-similar biographical profiles[151], the 'objectivity' of question 4 might serve to enlighten, it was thought, the subjectivity of question 3[152].

TABLE II QUEST. #4	TENURE IS EASY TO OBTAIN	TENURE IS HARD TO OBTAIN	OTHER/ D.K.-N.A.
FACULTY A	73%	20%	7%
FACULTY B	79	21	—
FACULTY C	75	25	—
FACULTY D	69	23	8
TENURED	70	25	5
NON-TENURED	90	10	—
OVERALL (n = 50)	74	22	4

149. Cf. *supra*, notes (72) to (75), and corresponding text.

The most stunning aspect of these results is their uniformity. In all Faculties, unionized or not, Common Law or Civil Law, tenure was seen as not being difficult to obtain. Faculty B's response, in the light of its preference on Question 3, is extremely interesting[153]. Finally, it should be noted here that several respondants (from Faculties B, C, and D) added to their responses "has been easy, but will be getting more difficult in the future", or words to that effect. This seems to be a clear allusion to the budgetary (and, to a lesser but still noticeable extent for Faculties of Law, demographic) problems now striking these schools, already tenured-in. Rather than suggest that tenure will in the future reward excellence, these *dicta* imply that tenure is progressively being transformed into an allocative mechanism for a scarce resource (faculty positions).

3. Question 5: What is the Influence of the Institution of Tenure on the Quality of the Faculty?

This very important question went to the heart of the investigation and, it should be noted, is *not* logically determined by the answers to Question 3 and 4[154]. The responses were most diverse:

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150. E.g., *either* tenure *is* difficult to obtain and is only granted to excellent candidates, and the Faculty is excellent; *or* tenure is not difficult to obtain, and Faculty B's respondents simply *perceive* themselves as being excellent! Either way, Faculty B's response is indicative of self-perceived "elite" status. This actually corresponds with Faculty B's public profile.

151. A 'top-of-the-class' LL.B., and, increasingly, a Master's degree (from an American or British school in English Canada; from an American, French, or Canadian school in French Canada).

152. The proviso at the end of Question 4 eliminates extraneous answers. At several institutions, it is possible to demand tenure 'early', and such demands are often rejected without any prejudice (i.e., at little or no 'cost') to the applicant. Since I wished only to discover if it was difficult to become tenured (i.e., in the up-or-out process), the qualification became necessary.

153. Cf. *supra*, note (150). Several respondants from Faculty B penned the words "not difficult because we have good people" under their answer, thus resolving the apparent ambiguity.

154. E.g., even if tenure is granted automatically and easily, its "Peace of Mind" effect may be beneficial to all, etc. (cf. *supra*, Part I). Also, and importantly, this question may be interpreted by respondants as the equivalent to "is it a good thing that you have tenure or will receive it?"

TABLE III QUEST. #5	OVERALL POSITIVE EFFECT	OVERALL NEGATIVE EFFECT	NO OVERALL EFFECT	OTHER/ D.K.-N.A.
FACULTY A	7%	13%	67%	13%
FACULTY B	71	—	29	—
FACULTY C	50	38	12	—
FACULTY D	38	31	31	—
TENURED	35	23	40	2
NON-TENURED	60	—	30	10
OVERALL (n = 50)	40	18	38	4

It appears, at first, difficult to draw definitive conclusions from these diverse results. Nevertheless, it seems that Faculty A (the youngest school, with possibly little or no hierarchy among its professors) was most indifferent to tenure. Faculty B, a well-established school, was most supportive. This seems consistent with Faculty B's response to Question 3. For, if tenure rewards excellence, it may well be judged responsible for that excellence. It would seem that Faculties responding "negatively" to Question 3 would feel indifferent to, or negative towards, tenure, and the following table confirms this:

TABLE IV QUEST. #5	OVERALL POSITIVE EFFECT	OVERALL NEGATIVE EFFECT	NO OVERALL EFFECT	OTHER/ D.K.-N.A.
FACULTIES A, C, D (n = 36)	27%	25%	42%	4%

In the "non-elite" schools, then, fully two thirds of respondants felt that tenure was of no use or, worse, pernicious to their Faculty. In the "elite" school, over two-thirds felt tenure was a boon to their school (Table III). Not only do these results not seem surprising, they might indeed have been predicted from the theoretical study. Finally, note

that, among the two-thirds who did not approve of tenure, indifference characterized non-unionized Faculty A, while hostility was much more prevalent in unionized Faculties C and D (Table III). Again, this concords with the hypothesis that unionization may 'bring out the worst' in tenure.

4. Question 6: How Would (Does) Unionization Affect the Tenure Process?[155]

TABLE V QUEST. #6 (n = 50)	UNION-IZATION WOULD HAVE/HAS NO EFFECT	UNION-IZATION WOULD HAVE/HAS AN EFFECT	OTHER/ D.K.-N.R.
FACULTY A	27%	47%	27%
FACULTY B	64	21	14
FACULTY C	12	75	12
FACULTY D	23	69	8
CIVIL LAW (C + D)	19	71	10
COMMON LAW (A + B)	45	34	21

Here again, the results are quite interesting. In the Civil Law schools, where unionization is a reality, fewer than one in five feels that it has not affected the tenure process. At Faculty A (not unionized and "non-elite"), the results are more ambiguous, with roughly half either not knowing or not feeling that collective bargaining would affect tenure. At "elite" Faculty B, however, only one in five feels that unionization would be of influence on tenure. Tenure works well for this

155. By consulting Appendices 1 and 2, the reader will note that the English version of the survey, addressed to two non-unionized Faculties, asks a hypothetical question. The French version, addressed to unionized schools, asks an empirical question.

school, and one wonders whether unionization: (i) is a realistic possibility; and (ii) if it were a possibility, would quickly modify the "elite" profile favouring tenure[156-157].

* * * * *

This survey of the attitudes of Canadian Law professors towards tenure provides several insights. Firstly, it is interesting to note that, in general, tenured and non-tenured professors had similar perspectives; indeed, the Faculty of employment was a much better predictor of response than was seniority or tenure status. Professors at "non-elite" schools felt that tenure was granted automatically and easily (though several feared for the future), and they judged tenure useless (or worse) for their Faculties. Unionized professors were especially wary as to tenure's value, and especially cynical as regards its granting. The one "elite" Faculty praised tenure, both as a process and as an instrument of Faculty improvement. Theoretical study (Part I) showed that these different perceptions are actually all quite accurate.

CONCLUSION

This paper attempted to provide a comprehensive theoretical overview of the "tenure dispute" by examining its historical background as well as the major claims of its protagonists. It endeavoured, in addition, to situate tenure contextually. Finally, it inquired as to its actual and perceived value.

Academic tenure emerges from this study more understandable, but perhaps not very justifiable. As an obstacle to mobility (of professors themselves, and for Faculties in their efforts to improve their positions in Legal education's pecking order), tenure can be seen as contributing to important pedagogical, psychological, and social problems. As a tool for job security, contemporary tenure seems rather

156. No significant differences between tenured and non-tenured professors was observable for this question, and the data was therefore omitted from *Table V* for purposes of clarity.

157. Question 7 was open-ended and served primarily to direct our research. The response rate was poor to this question, and no useful quantification was feasible.

symptomatic of a broader tendency towards professorial class-consciousness.

It is to be hoped that this overview will inspire more intensive research — theoretical, contextual, and empirical. It seems bizarre to this author that, despite any conclusive and validifying studies, we seem to accept tenure in the late 20th century, simply because it is there.

APPENDIX I

QUESTIONNAIRE REGARDING TENURE

1. Have you been granted tenure by your Faculty?

   _____ yes

   _____ no

2. For how many years have you been a full-time Law professor?

   _____ less than five years

   _____ more than five years, but less than ten years

   _____ more than ten years

3. In your opinion, is tenure at your Faculty:

   _____ granted primarily in regognition of demonstrated academic talent

   _____ granted as a rather automatic procedure, based on years of service

   _____ granted primarily for reasons relating neither to years of service nor to demonstrated academic talent (please explain your answer, very briefly, on the reverse side of this page)

4. Would you say that it is difficult to obtain tenure at your Faculty (N.B. if more than one application for tenure may be made by a non-tenured professor, please consider only the overall process culminating in the ultimate application for tenure)?

   _____ difficult to obtain tenure

   _____ not difficult to obtain tenure

5. All things considered, do you feel that tenure, as an institution, has an influence on the quality of the Faculty?

   _____ of no influence on the quality of the Faculty

   _____ a positive factor, contributing to the improvement of the quality of the Faculty

   _____ a negative factor, hindering efforts to improve the quality of the Faculty

   Please justify your opinion briefly, invoking where appropriate *your* conception of the requisite qualities of "Law professorship", and considering the short- and long-term effects of tenure on the development of such qualities:

   _____

   _____

   _____

   _____

   _____

6. In your opinion, would unionization of Law professors at your Faculty affect the value or the functioning of your tenure process? Please justify *very briefly*:

   _____ unionization would have an impact

   _____ unionization would have no significant impact

   _____

   _____

7. What is, in your view, the practical effect (as distinguished from any articulated goal) of the tenure policy?

   _____

   _____

   _____

   _____

   _____

Thank you very much.

APPENDIX 2

QUESTIONNAIRE SUR LA PERMANENCE

1. Avez-vous obtenu la permanence?

   _____ oui

   _____ non

2. Depuis combien de temps êtes-vous professeur de droit à temps plein?

   _____ moins de cinq ans

   _____ plus de cinq ans, mais moins de dix ans

   _____ plus de dix ans

3. À votre avis, la permanence à votre Faculté est-elle:

   _____ accordée surtout pour sanctionner l'excellence académique

   _____ accordée de façon plutôt automatique, i.e. selon les années de service

   _____ accordée principalement pour des motifs n'ayant trait ni aux années de service ni à l'excellence académique (veuillez dans ce cas expliquer brièvement votre réponse au verso)

4. À votre avis, est-il difficile d'obtenir la permanence à votre Faculté (N.B. si un professeur régulier peut demander la permanence plus d'une fois, veuillez ne considérer que le processus global qui se termine avec la dernière demande de permanence)?

   _____ il est difficile d'obtenir la permanence

   _____ il n'est pas difficile d'obtenir la permanence

5. Toutes choses considérées, croyez-vous que la permanence, en tant qu'institution, affecte la qualité du corps professoral?

   _____ aucun effet sur la qualité du corps professoral

   _____ un effet positif: elle contribue à l'amélioration de la qualité du corps professoral

   _____ un effet négatif: elle nuit aux efforts d'améliorer le corps professoral

Veuillez motiver brièvement la réponse que vous venez de donner. Votre motivation devrait invoquer les qualités que *vous* estimez appropriées pour un professeur de droit, et les effets (à court terme et à long terme dans une carrière) d'une politique de permanence sur le développement de ces qualités:

_____

_____

_____

_____

_____

6. À votre avis, la syndicalisation des professeurs de droit a-t-elle un effet sur la valeur ou le fonctionnement du processus de permanence à votre faculté? Veuillez motiver *très* brièvement:

_____ la syndicalisation a un impact

_____ la syndicalisation n'a pas d'impact significatif

_____

_____

_____

7. Quel est, selon vous, la fonction réelle (plutôt que tout but qu'on a pu énoncer) de la politique de permanence?

_____

_____

_____

Merci de votre collaboration.