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GOOD CAUSE AND JUST EXPECTATIONS: ACADEMIC TENURE IN OKLAHOMA'S PUBLIC COLLEGES AND UNIVERSITIES

HARRY F. TEPKER, JR.*

I. Introduction

The significance and meaning of academic tenure in public colleges and universities is a source of constant litigation. Oklahoma law is not exempt from the confusion caused by the idea that tenure is a guarantee of lifetime employment. Additionally, the confusion in Oklahoma is perpetuated by the oft-quoted principle that the state cannot enter into contracts that bind subsequent legislatures to spend Oklahoma tax dollars.

In a recent case, the Attorney General of Oklahoma briefly submitted — and then withdrew — an argument that a tenured professor who is unjustly discharged is entitled to pay for the remainder of an academic year, but no more.[1] This essay attempts to survey the legal principles governing academic tenure, damages for wrongful discharge and the meaning of Oklahoma's constitutional prohibition against deficit spending and certain types of binding contracts.

Section II of this essay attempts to describe the nature and meaning of academic tenure. Specifically, the essay addresses whether faculty who have earned tenure at

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* Professor of Law, University of Oklahoma. This article is drawn from research and argument submitted in a brief filed on behalf of the American Association of University Professors, the Oklahoma Conference of the American Association of University Professors, the Faculty Senate of the University of Oklahoma and the Faculty Council of Oklahoma State University as amici curiae in Murray State College v. Brown, No. 78,293 (Okla. filed July 20, 1992). The author acknowledges and appreciates the thoughtful help of Ann H. Franke, Counsel, American Association of University Professors, who was co-counsel on the brief. Also, the author would like to thank Denise R. Boklach for her research assistance on both the brief and on this article. Finally, the author would like to thank his colleagues, Michael Scaperlanda and Peter Graves, who reviewed and commented on the brief.

1. Appellant's Petition in Error at 10, Murray State College v. Brown, No. 78,293 (Okla. filed Sept. 18, 1991).

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Oklahoma's public colleges and universities enjoy tenure protection as customarily defined by colleges and universities throughout the United States.

In section III, the problem of remedies is considered. One of the most frequently misunderstood notions surrounding academic tenure is the idea that a professor terminated in violation of tenure rights is entitled to full salary until retirement. The idea seems logical to the layman because problems of proof, mitigation and the alternative possibility of reinstatement are not considered. Still, it is appropriate to consider whether ordinary contract damages are available. This means a court must decide whether a faculty member who is dismissed in violation of tenure rights by a public college or university in Oklahoma is entitled to a remedy that protects his or her expectation interest in performance of the contract.

Finally, in section IV, the essay focuses on an alleged conflict between the common law of contracts and the Oklahoma Constitution. This conflict presents the issue of whether the contract rights of tenured faculty serving in Oklahoma's public colleges and universities are abrogated, nullified or impaired because of the balanced budget provisions of the Oklahoma Constitution.[2]

II. Academic Tenure in Higher Education

Academic tenure is a "status granted, usually after [a] probationary period, which protects [a] teacher from dismissal except for serious misconduct, incompetence, financial exigency, or change in institutional programs."[3] Though tenure is often perceived as a commitment to employ a professor until death or retirement, the commitment is not absolute in any sense. "Tenure . . . lays no claim whatever to a guarantee of lifetime employment."[4] Instead, academic tenure is appropriately and precisely defined as "an arrangement under which faculty appointments in an institution of higher education are continued until retirement . . . subject to dismissal for adequate cause."[5]

Colleges and universities make express offers and guarantees of tenure to attract faculty of quality through promises of economic security and academic freedom. In

2. OKLA. CONST. art. 10, § 23.

3. Price v. Oklahoma College of Osteopathic Medicine & Surgery, 733 P.2d 1357, 1358 n.1 (Okla. Ct. App. 1986).

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

5. COMM'N ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: A REPORT AND RECOMMENDATIONS 256 (1973); *see also, e.g.*, King v. University of Minn., 774 F.2d 224, 227 (8th Cir. 1985) (removal of tenured professor for cause), *cert. denied*, 475 U.S. 1095 (1986); Levin v. Harleston, 770 F. Supp. 895, 925 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992); Van Alstyne, *supra* note 4, at 328 ("Tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*."); Robert C. Ludolph, *Termination Of Faculty Tenure Rights Due To Financial Exigency and Program Discontinuance*, 63 U. DET. L. REV. 609, 617 (1986) ("The 'for cause' grounds for dismissal of tenured faculty are generally of three types — immorality, incompetence, and insubordination."); Joe L. Heaton, Comment, *Administrative Law: Dismissal of Tenured Faculty in Oklahoma Colleges and Universities*, 29 OKLA. L. REV. 370 (1976); CLARK BYSE & LOUIS JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES AND THE LAW 9 (1957).

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its historic *Statement of Principles on Academic Freedom and Tenure*, the American Association of University Professors (AAUP) described the purpose of tenure:

> Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.[6]

The security of academic positions has been the subject of debate throughout American history. In oral argument before the U.S. Supreme Court in the historic case of *Dartmouth College v. Woodward*,[7] Daniel Webster described "the estates and freeholds of a most deserving class . . . of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature, and the instruction of youth, in the quiet retreats of academic life."[8] Webster contended the faculty of the college possessed "sacred" property rights which were imperiled when New Hampshire sought to seize the college.

> Whether, to dispossess and oust them; to deprive them of their office, and turn them out of their livings; to do this, not by the power of their legal visitors, or governors, but by acts of the legislature; and to do it without forfeiture, and without fault; whether all this be not in the highest degree an indefensible and arbitrary proceeding, is a question, of which there would seem to be but one side fit for a lawyer or a scholar to espouse.[9]

Webster's remarks foreshadowed the defense of tenure as a useful way to promote the special purposes of academic communities. As the AAUP wrote in 1915,

> The . . . conception of a university as an ordinary business venture, and of academic teaching as a purely private employment, manifests also a radical failure to apprehend the nature of the social function discharged by the professional scholar. . . . [I]t is to the public interest that the professorial office should be one both of dignity and of independence.
>
> If education is the corner stone of the structure of society and if progress in scientific knowledge is essential to civilization, few things can be more important than to enhance the dignity of the scholar's profession, with a view to attracting into its ranks men of the highest ability, of sound learning, and of strong and independent character.[10]

6. *1940 Statement of Principles on Academic Freedom and Tenure, reprinted in* AAUP POLICY DOCUMENTS & REPORTS at 3 (1990) [hereinafter *AAUP Statement*].

7. 17 U.S. (4 Wheat.) 518 (1819).

8. *Id.* at 584 (argument).

9. *Id.*

10. COMM. ON ACADEMIC FREEDOM & TENURE, AMERICAN ASS'N OF UNIV. PROFESSORS, GENERAL

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Tenure protects and reflects the tradition — once described by Justice Benjamin Cardozo — that

> [t]he governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters, and not servants, in the conduct of the class room. They have the independence appropriate to a company of scholars.[11]

Tenure also became a principal method of insulating the individual professor from governmental and societal pressures. "Through the influence of the American Association of University Professors (AAUP), academic tenure gradually gained acceptance as a means of protecting the right to pursue research and to state convictions without fear of reprisal from a hostile university administration or public."[12] In short, tenure is "a long-term academic and financial commitment by a university to an individual" that allows an economic security and freedom of expression that permits "the university [to] carry out a basic function — the vigorous exchange of ideas — a function that itself enjoys constitutional protection."[13]

The distinctive mission of American higher education may help to explain why institutions grant tenure; but the enforceability of tenure rests also on contract principles applicable to a wide variety of employment relationships. Academic tenure is the product of a bargain between academic institutions and faculty to create a relationship that is an exception to the general rule that indefinite employments are terminable at will. In contrast to ordinary "at-will" employments, a "written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown."[14]

For many decades, institutions denied tenure protection to men and women who dedicated themselves to academic pursuits. Until the twentieth century, professors in both public and private institutions often served at the will of the president and

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REPORT (1915), *reprinted in* 53 LAW & CONTEMP. PROBS. 393, 396 (1990).

11. Hamburger v. Cornell Univ., 148 N.E. 539, 541 (N.Y. 1925); *cf.* NLRB v. Yeshiva Univ., 444 U.S. 672, 673 (1980) (holding that full-time faculty members exercising extensive control over academic and personnel decisions and over the central policies of the university come within "judicially implied exclusion for 'managerial employees'" not protected by Taft-Hartley Act).

12. Ludolph, *supra* note 5, at 613.

13. Beitzell v. Jeffrey, 643 F.2d 870, 875 (1st Cir. 1981); *see also, e.g.*, William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).

14. Perry v. Sindermann, 408 U.S. 593, 601 (1972); *see also, e.g.*, Bishop v. Wood, 426 U.S. 341, 344-47 (1976) (stating that a person who holds a job from which he can be removed "at will" does not have a protected property interest); *Beitzell*, 643 F.2d at 874-75 (holding that "[I]n the area of government employment, a person who holds a job from which he can be removed only 'for cause', has a protected property interest, while one who can be removed 'at will' does not); Olivier v. Xavier Univ., 553 So. 2d 1004, 1009 (La. Ct. App. 1989) (Plotkin, J., concurring), *writ denied*, 556 So. 2d 1279 (La. 1990); Thorne v. Monroe City Sch. Bd., 542 So. 2d 490 (La. 1989).

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the governing board.[15] Though academicians argued that their responsibilities were different and more socially important than other work, their arguments began to persuade courts only after the law began to recognize employment agreements that included explicit promises of job security. As public employees, labor union members and, later, other workers in the private sector challenged the rule that indefinite employments were terminable at will, academicians were more able to defend tenure rights. As described by Professor Matthew Finkin, "most of what may have appeared exceptional at the time of the [AAUP's] 1940 Statement is no longer exceptional today, as employer policies and employment law have extended to employees in other fields much of the job protection and workplace liberty the 1940 Statement accorded to professors."[16] Indeed, the concept of academic tenure probably anticipated and encouraged similar legal security for workplace liberty for many other workers in many other types of employment relationships.[17]

Tenured professors enjoy a property interest protected by the Due Process Clause of the Fourteenth Amendment.[18] Oklahoma recognizes tenure rights as customarily defined by colleges and universities throughout the United States.[19]

Oklahoma is one of many states which has declined to overturn the traditional at-will rule by "judicial fiat," but which also protects "the benefits which employees can and should get only through collective bargaining agreements or tenure provisions."[20]

Academic tenure in Oklahoma's public colleges and universities has both a statutory and contractual basis. Oklahoma law authorizes the Oklahoma State Regents for Higher Education to "establish and maintain plans for tenure . . . with funds available for payment of its operating expenses."[21] The Oklahoma legislature decided not to define tenure rights by statute; rather, it chose to vest the Regents with authority to define tenure rights as part of the Regents' overall authority for public institutions of higher education.[22] This practice is not unusual. Many states entrust independent boards to handle questions of tenure to protect public colleges and universities from undue political pressure. As a result, tenure in a public institution becomes a vested right authorized when the institution acts based on the constitutional or statutory authority vested in a governing board.[23]

15. *See, e.g.*, Ludolph, *supra* note 5; Arthur O. Lovejoy, *Academic Freedom and Tenure: Rollins College Report*, 19 AAUP BULL. 416, 422 (1933), *quoted in* Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, LAW & CONTEMP. PROBS., Summer 1990, at 357, 357 (vol. 53, no. 3).

16. Finkin, *supra* note 15, at 358.

17. *Id.* at 360, 366.

18. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Short v. Kiamichi Area Vocational-Technical Sch. Dist., 761 P.2d 472, 475 (Okla. 1988), *cert. denied*, 489 U.S. 1066 (1989).

19. *See* Price v. Oklahoma College of Osteopathic Medicine & Surgery, 733 P.2d 1357, 1358 n.1 (Okla. Ct. App. 1986) (holding that academic tenure is a "status granted, usually after probationary period, which protects a teacher from dismissal except for serious misconduct, incompetence, financial exigency, or change in institutional programs.").

20. Hinson v. Cameron, 742 P.2d 549, 554 n.18 (Okla. 1987) (quoting Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985)).

21. 70 OKLA. STAT. § 3205(a) (1991).

22. King v. Board of Regents, 541 P.2d 836, 837 (Okla. 1975).

23. *See, e.g.*, Stebbins v. Weaver, 396 F. Supp. 104 (W.D. Wis. 1975), *aff'd*, 537 F.2d 939 (7th Cir.

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As is sometimes true in commercial, business, or other public employment contexts,[24] an academic institution's rules and policies may establish the existence or meaning of an employment contract.[25] In the academic setting, a professor's contractual rights are often articulated in faculty handbooks because, in part, the basic terms and conditions of employment cannot be spelled out in the letter or notice of appointment.[26] This approach is especially important for "contracts in and among a community of scholars, which is what a university is."[27]

When public colleges and universities dismiss faculty members in violation of their contract rights, the victims suffer a deprivation of property interests in violation of due process principles.[28] Oklahoma law establishes tenure policies and procedures, which include removal criteria and procedural guidelines for dismissal of faculty.[29] In such cases, tenured faculty have more than an abstract need, desire or unilateral expectation in continued employment. They have a property interest in their position protected by the Due Process Clause of the Fourteenth Amendment.[30] Prior to termination, tenured faculty must be given notice and an opportunity to be heard.[31]

III. Expectation Interests and Tenure

When a university violates its own rules and regulations and dismisses a faculty member without just cause and without a hearing, the victim deserves the same remedies that are generally available for other workers in the private and public sector who made similar bargains for job security.

1976), *cert. denied*, 429 U.S. 1041 (1977); Sheppard v. West Va. Bd. of Regents, 378 F. Supp. 4 (D. W. Va. 1974), *aff'd*, 516 F.2d 826 (4th Cir. 1975); State *ex rel.* Bourgeois v. Board of Supervisors, 17 So. 2d 25 (La. 1944); Papadopoulos v. Oregon State Bd. of Higher Educ., 511 P.2d 854 (Or. Ct. App. 1973), *cert. denied*, 417 U.S. 919 (1974); Cathcart v. Anderson, 517 P.2d 980 (Wash. Ct. App. 1974), *aff'd*, 530 P.2d 313 (Wash. 1975).

24. *See, e.g.*, Blanton v. Housing Auth., 794 P.2d 412, 414-15 (Okla. 1990) (holding that absent evidence of a substantive restriction on the authority's power to dismiss employee or a statute conferring a property right in continued employment, employment contract was terminable at will) (citing Asbill v. Housing Auth., 726 F.2d 1499, 1502 (10th Cir. 1984) (stating that if a policy restricts the reasons for discharge of an employee to just cause shown, then the employee has a right to employment until such cause is shown)); *Hinson*, 742 P.2d at 554-57 (holding that "employer handbooks and policy manuals" are among the "[f]actors which have been isolated as critical to evaluate whether an implied contract right to job security exists"); *id.* at 560 (Kauger, J., concurring in part and dissenting in part) (stating that "[e]mployers may be accountable for the promises they make, and the policies they adopt, when those promises and policies induce employee reliance or form part of a contract.").

25. *See, e.g.*, Miller v. Independent Sch. Dist. No. 56, 609 P.2d 756, 759 (Okla. 1980) (deciding that the board's policy statement was incorporated by implication in a teacher's contract of employment).

26. Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969) (holding that faculty employment contracts "comprehend as essential parts [a university's] employment regulations and customs").

27. *Id.*; *see also* Finkin, *supra* note 15, at 361.

28. Short v. Kiamichi Area Vocational-Technical Sch. Dist., 761 P.2d 472, 475-76 (Okla. 1988), *cert. denied*, 489 U.S. 1066 (1989).

29. *See id.* at 482.

30. *Id.* at 476 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

31. *Id.* at 478; *see also* Maupin v. Independent Sch. Dist., 632 P.2d 396, 397-99 (Okla. 1981); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

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There is little reason to depart from the established principles governing contract remedies. If a tenured professor at a public university is wrongfully dismissed, he or she should be "put in as good a position as he [or she] would have been in had the contract been performed."[32]

Ordinarily, a promisee may recover damages for loss of anticipated profits, if such profits were contemplated by the parties at the time the contract was formed, if the loss was the proximate result of the promisor's breach of contract, and if the loss is capable of reasonably accurate measurement.[33] In other words, "[t]he law of damages permits recovery of lost profits to protect the injured promisee's 'expectation interest,' his prospect of net gain from the contract."[34]

Bruno v. Detroit Institute of Technology[35] is one of the few cases that discusses the problem of damages in an academic tenure case. In *Bruno*, the Michigan Court of Appeals held that a professor who had been wrongly discharged was entitled to future damages because the institute's policy defined tenure as an "expectation of continuous appointment until retirement, with stipulations that it may be terminated for causes specifically identified in the present statement of tenure policy."[36] The court continued: "The proper measure of damages[] is 'to "put the injured party in as good a position as he would have had if performance had been rendered as promised."'"[37] The court admitted that calculating damages would be difficult, but difficulty alone was not sufficient to bar recovery.[38] "There will be a great many problems in attempting to ascertain what the anticipated salaries and earnings will be; however, . . . 'It is the uncertainty as to the fact of legal damages that is fatal to recovery, but not uncertainty as to the amount.'"[39] Moreover, as the court noted, "the entire problem of future damages could be avoided if defendant were now willing to abide by its contractual obligation and again allow plaintiff to return to his teaching post."[40]

Legal protection of a contracting party's "expectation interest" does not require a monetary windfall. In fact, courts should be reluctant to "consider remedies beyond compensation for the employee's reliance and expectation interests,"[41] and

32. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981).

33. *See* Groendyke Transport, Inc. v. Merchant, 380 P.2d 682, 684-86 (Okla. 1962); Ash v. Chas. F. Noble Oil & Gas Co., 223 P. 175, 178 (Okla. 1923); Cloe v. Rogers, 121 P. 201 (Okla. 1912).

34. Osborn v. Comanche Cattle Indus., 545 P.2d 827, 831 (Okla. Ct. App. 1975); *see also* Lindsey v. University of Ariz., 754 P.2d 1152, 1157-58 (Ariz. Ct. App. 1988) (upholding damages award to fully compensate for expectations of three years' continuing employment, though employee's written contract was for a one-year term and dismissal did not violate the explicit contract terms); *cf.* Linn v. Andover Newton Theological Sch., Inc., 874 F.2d 1, 9 (1st Cir. 1989) (holding that in age discrimination case, tenured professor entitled to "frontpay" damages equal to the salary to be earned until age 70).

35. 215 N.W.2d 745 (Mich. Ct. App. 1974).

36. *Id.* at 749.

37. *Id.* (quoting Dierickx v. Vulcan Indus., 158 N.W.2d 778, 781 (Mich. Ct. App. 1968) (quoting in turn 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 992, at 5 (1951))).

38. *Bruno*, 215 N.W.2d at 749-50.

39. *Id.* (quoting Barry v. Flint Fire Dep't, 205 N.W.2d 627, 632 (Mich. Ct. App. 1973)).

40. *Id.* at 750.

41. Hinson v. Cameron, 742 P.2d 549, 561 (Okla. 1987) (Kauger, J., concurring in part and dis-

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only in cases in which "the employee proves that the employer acted for legally intolerable motives,"[42] should the court consider such remedy. The victim of a contract breach has no right to more than performance would have provided.

> This [expectation] interest is given legal protection to achieve the paramount objective of putting the promisee injured by the breach in the position in which he would have been had the contract been performed. But the protection of the promisee's expectation interest extends no further; he may not recover more than the amount he might have gained by full performance.[43]

For this reason, a "court may limit damages for foreseeable loss . . . if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."[44]

Also, if a prevailing plaintiff fails to show the amount of damages flowing from the contract breach or if the amount of damages is otherwise uncertain, a court is well within established principles of justice if it limits recovery. "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."[45]

In many cases, recovery of damages from the time of termination until anticipated retirement may prove, on closer scrutiny, to be unsuitable.[46] First, it may not be clear whether reinstatement is an alternative to monetary relief for salary until after trial. Second, a reinstatement order might be properly subject to the rights of the college to pursue appropriate procedures to resolve whether a professor might truly deserve termination — after appropriate hearings. Specifically a tenured professor can recover only those monetary damages flowing from the breach, which may be minimal if the college's failure is only a failure to follow its own procedures, including a failure to hold a hearing. The possibility would exist in such cases that a professor might have been terminated anyway.

With all factors in mind, a trial court must consider whether compensation for expected earnings under the contract is appropriate relief. In *Bruno*, the court offered the trial court guidance for computing damages. First, damages to compensate for the years after the filing of the complaint "must be reduced to their present worth."[47] The appellate court provided instructions on "the proper method for computing . . . future damages."[48]

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senting in part).

42. *Id.*

43. Osborn v. Comanche Cattle Indus., 545 P.2d 827, 831 (Okla. Ct. App. 1975) (citations omitted).

44. RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981).

45. *Id.* § 352.

46. Federal law will abolish mandatory retirement for tenured faculty on December 31, 1993. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(b), 100 Stat. 3342, 3344, (amending 29 U.S.C. § 631 (1982 & Supp. II 1984)).

47. *Bruno*, 215 N.W.2d at 749 n.1.

48. *Id.* at 749.

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Based on evidence of the college's past experience, the trial court should project the anticipated level of compensation for similarly situated professors for each of the years until the date when plaintiff probably would have retired.[49] Next, a trial court should project plaintiff's anticipated earnings based on the assumption that plaintiff would make good faith efforts to mitigate damages by securing another job in his chosen profession.[50] Third, for each year, the court should subtract anticipated earnings of plaintiff in mitigation from the anticipated salary he would have received at the defendant institution.[51] Next, for each year, the court should reduce the difference to its worth as of the date of the filing of the complaint.[52] Finally, the trial court should award plaintiff the sum of these properly mitigated and reduced figures.[53]

Reinstatement and back pay may be a more appropriate remedy.[54] In most cases, damages awards to compensate for future earnings under a contract — or "front pay" — are only necessary because reinstatement is not appropriate either because it is unacceptable to both the employer and employee or because it is impractical for job-related reasons.[55]

In *King v. Board of Regents*,[56] the Oklahoma Supreme Court considered the rights of four terminated professors who were tenured at the time of their dismissal. The college's tenure policy stated that tenured instructors were permanent members of the college faculty and could only be dismissed for cause. The policy manual required written notice, a hearing and an opportunity for appeal prior to termination. The instructors in *King* were given no notice of the cause for their dismissal and no hearing was granted. The college offered to reinstate the four instructors. The court held that reinstatement was sufficient to support a finding that tenure rights had not been violated.[57] In short, reinstatement is an equitable remedy that fully vindicates the expectation interest.

IV. Tenure, Balanced Budgets and the Constitution of Oklahoma

Tenure rights need not — and must not — be nullified in order to preserve the state's ability to respond to actual fiscal crisis. The balanced budget provision of the Oklahoma Constitution[58] must be given a meaning that allows the provision to

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *See, e.g.*, Redman v. Department of Educ., 519 P.2d 760, 769-70 (Alaska 1974) (holding that reinstatement ends monetary liability); Board of Trustees v. Holso, 584 P.2d 1009, 1014-16 (Wyo. 1978) (affirming award of reinstatement and back pay).
55. *See, e.g.*, White Man v. Gunnick, 473 N.W.2d 148, 151 (S.D. 1991) (remanding case to determine whether reinstatement is a viable alternative).
56. 541 P.2d 836 (Okla. 1975).
57. *Id.* at 840.
58. The relevant provision provides: "The state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any department, institution or agency

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satisfy its purpose. However, it must not be distorted to impair or void the expectations of public servants dedicated to higher education in Oklahoma.

The object of article 10, section 23 of the Oklahoma Statutes is to preserve the legislature's capacity to ensure that the state lives within its means. The constitutional provision is also designed "to prevent one legislative assembly from laying its mandate upon a future one."[59] "Article 10, § 23 was adopted by the people in 1941 to provide for budget balancing in this state. . . . The fiscal responsibility shown by Oklahoma has become an enviable example for the nation. This policy of fiscal restraint and control can only be applauded in a time of monetary crisis."[60] In *Prudential Property and Casualty Company v. Grimes*,[61] the Oklahoma Supreme Court reaffirmed the meaning and purpose of the balanced budget provisions of the Oklahoma Constitution:

> [T]he debt limitation provisions of the Oklahoma Constitution are a vital part of the document and were adopted for the purpose of fixing the power and responsibility of legislation relating to the fiscal affairs of the state upon the existing legislative assembly, and to prevent one legislative assembly from laying its mandate upon a future legislature. Thus, debt limitation guarantees the autonomy of future legislative bodies and protects Oklahoma citizens from deficit spending beyond the revenues available.[62]

The tenure rights of college and university faculty do not truly "bind the revenues of a succeeding fiscal year."[63] State and local governments could not function "except under severe handicap" if all contracts to pay money in the future were barred by constitutional prohibitions relating to governmental indebtedness.[64] As a result, courts do not impose straitjackets on public authorities by automatically nullifying "contracts payable by a government in installments in the future when the consideration which the payor is to receive in return for such payments is also to be provided in the future."[65]

Apart from the balanced budget guarantee, tenure rights do not impair the ability of public authorities to make reasonable judgments based upon fiscal need. Financial exigency can be a valid cause for dismissal of tenured faculty.[66] In *Krotkoff v. Goucher College*,[67] the United States Court of Appeals for the Fourth

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thereof, regardless of its form or the source of money from which it is to be paid . . . ." OKLA. CONST. art. 10, § 23.

59. Boswell v. State, 74 P.2d 940, 947 (Okla. 1937).

60. Smith v. State Bd. of Equalization, 630 P.2d 1264, 1267 (Okla. 1981).

61. 725 P.2d 1246 (Okla. 1986).

62. *Id.* at 1251-52.

63. Consolidated Sch. Dist. v. Panther Oil & Grease Mfg. Co., 168 P.2d 613, 614 (Okla. 1946) (quoting Smith v. School Dist. No. 1, 102 P.2d 131, 135 (Okla. 1940)).

64. *In re* Oklahoma Capitol Improvement Auth., 355 P.2d 1028, 1032 (Okla. 1960) (quoting State *ex rel.* Thomson v. Giessel, 65 N.W.2d 529, 536 (Wis. 1954)).

65. *Id.* (quoting *Giessel*, 65 N.W.2d at 536).

66. *See AAUP Statement*, *supra* note 6, at 4.

67. 585 F.2d 675 (4th Cir. 1978).

Circuit accepted the AAUP's *Statement of Principles on Academic Freedom and Tenure* as part of the academic common law. The court concluded that the national academic community understands the concept of tenure to embrace financial exigency as a basis for breaking a tenure contract.[68]

In another case, *Jimenez v. Almodovar*,[69] the United States Court of Appeals for the First Circuit concluded that due process principles did not bar a university's decision to discontinue a program for fiscal reasons:

> American courts and secondary authorities uniformly recognize that, unless otherwise provided in the agreement of the parties, or in the regulations of the institution, or in a statute, an institution of higher education has an implied contractual right to make in good faith an *unavoidable* termination of right to the employment of a tenured member of the faculty when his position is being eliminated as part of a change in academic program.[70]

Moreover, "[t]he scope of judicial review of the decision to declare exigency is narrow. Determinations by public governing boards are reviewed as agency decisions which are presumed to be correct. . . . These decisions will not be overturned unless the individual can show arbitrary action or discriminatory motivation."[71]

There is nothing unusual about a contract for professional services and compensation limited to a specific period of time which also includes duties, promises or covenants that survive for a longer period. For example, a collective bargaining agreement may be "effective" for a specified time, but the duty to arbitrate and other duties may survive for longer periods of time.[72] Finally, employees may make enforceable covenants that survive a contractual term. An obvious example is an employee's covenant not to compete with an employer for a period of time after an employment relationship has terminated.

68. *Krotkoff*, 585 F.2d at 678.

69. 650 F.2d 363 (1st Cir. 1981).

70. *Id.* at 368.

71. Ludolph, *supra* note 5, at 652; *see also, e.g.*, Brenna v. Southern Colo. State College, 589 F.2d 475, 476 (10th Cir. 1978) (holding that termination of a tenured faculty member rather than untenured faculty was made in good faith and was not a pretext for unlawful motives); Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976); Browzin v. Catholic Univ. of Am., 527 F.2d 843, 847 (D.C. Cir. 1975) (holding that in the interest of administrative flexibility, "for cause" dismissal procedures were not required for terminations due to financial exigency or program discontinuance); Scheuer v. Creighton Univ., 260 N.W.2d 595, 600 (Neb. 1977) (holding that a university may eliminate faculty within school of pharmacy to alleviate a university-wide fiscal crisis); Klein v. Board of Higher Educ., 434 F. Supp. 1113 (S.D.N.Y. 1977) (upholding mass termination of tenured faculty in response to New York City's financial emergency); Graney v. Board of Regents, 286 N.W.2d 138, 146 (Wis. Ct. App. 1979) (holding that dismissal based on financial exigency does not violate tenure rights).

72. *See, e.g.*, Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers, 430 U.S. 243, 249 (1977) (upholding arbitration order because "[t]he dispute . . . although arising after the expiration of the . . . contract, clearly arises under that contract"); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (stating that courts should not overrule arbitrator's decision that employer's duty survived expiration of collective bargaining agreement).

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The relationship between tenured faculty and an institution is a contractual arrangement. It may consist of separate appointments for one-year periods or other specified terms. It may also include institutional covenants or promises to renew or reappoint for a longer — perhaps indefinite — period.[73] Viewed in this manner, the annual appointment for a specified salary is only one aspect of an employment contract that encompasses many other elements. The United States Supreme Court recognized that an employment relationship may include an employer's duty to give fair consideration to an employee for promotion or even partnership.[74] Similarly, an academic employer's duties include fair, nondiscriminatory treatment of faculty for tenure. One remedy for a violation of the duty may be an order reinstating a faculty member and granting tenure.[75]

In *University of Arizona v. County of Pima*,[76] the university hired a basketball coach with the assurance that his contract would be resubmitted annually for reappointment for a minimum of four years, even though the university made faculty and other appointments only for one-year terms. One year after the coach was hired, the athletic director notified him that his contract would not be submitted for renewal. The university sought to avoid liability by arguing that it could not make an enforceable contract for more than one year because of a state statute prohibiting any obligation not authorized by appropriation.

Though tenure was not involved in the Arizona case, the court reviewed the tenure provisions of the university's policy manual.[77] The policy manual specifically mentioned that appointments or reappointments would be for a period not longer than one fiscal year. However, the policy manual referred to tenure, which promised reappointment until death, retirement, or resignation, unless a faculty member was terminated for just cause, including budgetary reasons or misconduct. Read together, the seemingly contradictory provisions of the policy manual obliged the university to resubmit a tenured faculty member's appointment year after year until resignation or retirement. To give effect to the Arizona statute, the court of appeals emphasized that the "final word is spoken by the legislature" because the faculty member can be released for budgetary reasons.[78] The law established a "fiscal out" which

73. A faculty member's service is sufficient consideration for enforceable contract promises by a university that extend beyond the one-year term. The fact that the promises of the college or university may prove to be unenforceable or voidable because of possible fiscal need "does not prevent [them] from being consideration." RESTATEMENT (SECOND) OF CONTRACTS § 78 (1981). "There is no additional requirement of . . . (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'" *Id.* § 79; *see also id.* §§ 71, 80.

74. Hishon v. King & Spalding, 467 U.S. 69, 75 (1984) (being considered for partnership was term or condition or benefit "that is part and parcel of employment relationship . . . [and] may not be doled out in a discriminatory fashion").

75. Brown v. Trustees of Boston Univ., 891 F.2d 337, 360 (1st Cir. 1989) (holding that order of tenure is appropriate equitable remedy for violation of Title VII of Civil Rights Act of 1964), *cert. denied*, 496 U.S. 937 (1990).

76. 722 P.2d 352 (Ariz. Ct. App. 1986).

77. *Id.* at 355.

78. *Id.*

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operated as a condition subsequent, allowing the university to avoid its obligations if the requisite funding was not forthcoming.[79]

However, the Arizona Court of Appeals respected and enforced the university's promises of job security to the coach.[80] The court found that, subject to a condition subsequent of available funding, contracts for more than one year were valid and did not violate the statutory prohibition against financial obligations for which there is no appropriation.[81] Because the University of Arizona had maintained its basketball program after the coach's departure, the court found that funding for the coach's position must have been approved by the legislature.[82] On that basis, the court approved an award of damages beyond the one-year contract term and including the entire four years originally promised by the university.[83]

V. Conclusion

Tenure is a controversial practice. Nothing in this essay directly addresses whether tenure is an effective measure to secure better faculty and academic freedom. Instead, the focus of this essay is that if tenure is to be abolished, the decision must be made after a genuine and candid reevaluation of real arguments for and against job security for academics.

Cases in which tenure rights are measured against state constitutional guarantees of a balanced budget are poor vehicles for rethinking tenure in Oklahoma. In short, state colleges and universities must not destroy existing expectations by means of a back-door analysis of state constitutional provisions that have little or nothing to do with tenure customs.

79. *Id.*
80. *Id.* at 356.
81. *Id.*
82. *Id.*
83. *Id.*

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