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Academic institutions are steeped in several centuries of tradition. Tenure as we know it, however, is a development of the 20th century; affirmative action has been a consideration in hiring and promoting faculty members for less than a decade. Affirmative action has been controversial since its inception; however the controversy is likely to become even more accute during a financial crisis. Just as women and minorities are beginning to take their rightful places on faculties in more than the token numbers, institutions of higher education are beginning massive retrenchment efforts that threaten to destroy this progress. The situation is similar to that of a decade ago when layoffs resulting from the recession of the early 1970's caused a resounding clash between seniority provisions and the gains that minorities and women had achieved in industry. This article will examine the relationship among higher education's financial crisis, the tenure system and affirmative action gains against the backdrop of that industrial experience.

I

A seniority system is a set of rules governing job movements such as promotion, transfer, downgrading and layoffs in an employment unit. Seniority is measured by length of service in the company or in the department and is either "benefit" or "competitive" seniority. Benefit seniority refers to an employee's seniority credits in determining economic fringe benefits such as pensions and vacation time increments. Competitive seniority refers to an employee's right to a

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job while someone else is laid off.[1] Generally length of service is the factor determining who is to be laid off during a reduction in force; layoffs are usually in inverse order of seniority: last hired, first fired. Some seniority systems, however, allow especially skilled workers to retain jobs when more senior workers are laid off. Seniority systems in which jobs are diverse or require lengthy training often include a requirement of ability to do the job in order for a worker to be retained during a layoff. Seniority systems may be structured by collective bargaining agreements or they may be the result of custom or of administrative fiat.[2] Seniority rights are modified by statute, by court action or by negotiation of a collective bargaining agreement.[3] Seniority is a fringe benefit, not a property right.[4]

A seniority system is advantageous to employers, unions, and employees. Seniority provides an objective standard by which to measure time-based benefits; it allocates employment opportunites "without risking accusations of favoritism;"[5] it reduces work force turnover, assures employees of their status as to promotion and job security, increases productivity, protects long time employees, and leads to better morale.[6] Seniority has been criticized, however, for preventing "younger, more energetic workers from advancing as rapidly as motivation and ability might otherwise allow, thus placing a premium on mediocrity,"[7] and for allowing the employer less management control over promotions and layoffs, a restriction that may prevent maximizing efficiency.[8]

The Civil Rights Act of 1964, hereinafter referenced as Title VII, was passed during a time of economic prosperity. Congress addressed specifically the issue of seniority and prohibited seniority systems

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[1] Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 782-91 (1976).

[2] In Loy v. City of Cleveland, 8 FEP Cases 614 (N.D. Ohio 1974), *dismissed as moot*, 8 FEP Cases 617, the seniority system apparently was not based on a collective bargaining agreement but instead was adopted by administrative fiat as a basis for deciding who was to be laid off.

[3] *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962); SLICHTER, HEALY & LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT, 136 (1960); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Franks v. Bowman Transportation Co., 424 U.S. at 747, 778-79.

[4] Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968). Ford Motor Co. v. Huffman 345 U.S. 330 (1953) Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1982).

[5] Silbergeld, *Title VII and the Collective Bargaining Agreement: Seniority Provisions Under Fire*, 49 TEMP. L. Q. 288, 291 (1976).

[6] Craft, *Equal Opportunity and Seniority: Trends and Manpower Implications*, 26 LAB. L.J. 752 (1975); *See also* SLICHTER, HEALY, & LIVERNASH, *supra* note 3, at 105.

[7] Silbergeld, *supra* note 5, at 291.

[8] For a discussion of seniority and its use during layoffs, *see* SLICHTER, UNION AND INDUSTRIAL MANAGMENT, 98-163 (1941).

that discriminated against members of protected groups.[9] The conflict between the traditional seniority systems and Title VII arose during the recession of the early 1970's when industrial facilities were forced to lay off large numbers of workers. Because many of these companies had hired only token numbers of racial minorities and females prior to 1964, these reductions, usually made on the basis of inverse seniority, frequently resulted in layoffs of virtually all of a company's minorities or women. The employer thus faced the "unenviable dilemma of possibly violating his affirmative action agreement if he used seniority in layoffs, or alternatively, violating the collective bargaining agreement (or administrative custom) if he retained minorities with less seniority than white workers who were laid off."[10]

The emotionally charged atmosphere in which this drama waa played out is illustrated in a case originating in the Detroit police department, wherein the court granted a preliminary injunction preventing layoffs of all the officers hired pursuant to an affirmative action plan because of the "disparate burden" on the women resulting from past discriminatory practices in the police department.[11]

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[9] Section 703(a)(2), 42 U.S.C. § 2000e-2(a)2 (1964), states:

> It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversly affect his status as employee, because of such individual's race, color, national origin, religion or sex.

Section 703(h), 42 U.S.C. § 2000e-2(h) (1970), provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . .

Section 703(j), 42 U.S.C. § 2000e-2(j) (1970), provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

[10] Craft, *supra* note 6, at 753; *see also* Jersey Central Power and Light Co. v. Local 327 IBEW, 508 F.2d 687 (3d Cir. 1975).

[11] Schaefer v. Tannian, 394 F. Supp. 1136 (E.D. Mich. 1975), *aff'd in relevant part*, 538 F.2d 1234 (6th Cir. 1976). To preserve the effect of its earlier hiring order, the district court ordered that no layoffs be made of police officers, male or female, paid with federal funds. Since most of

Subsequent to the decision and a similar action brought by black police officers, a thousand off-duty policemen picketed the Detroit Federal Building.[12] That this conflict between seniority rights and equal employment opportunities should come before the courts was inevitable. The stakes involved employees' rights to jobs, and the judicial answers determined the competitive status of workers for these jobs.

Although the common interest of labor and the civil rights movement is the restriction of managerial freedom of action which adversely afffects workers, the viewpoints of these groups diverged on the issue of seniority and Title VII. The EEOC's position was that layoffs based on inverse seniority may perpetuate the effects of past discrimination. The position of the AFL-CIO was that "facially neutral" plant-wide seniority systems were bona fide (and thus permitted under Title VII) because they were not designed purposefully to affect minorities. The issue posed by these viewpoints proved complex because many systems that appeared to be neutral on their face actually perpetuated the effects of past discrimination.

As the courts faced the conflict between affirmative action and seniority, they applied remedies pursuant to Title VII, attempting to strike a balance between preferential treatment of minorities and women and remediation because of past discrimination. Three philosophies were explored in the judicial efforts to find an appropriate balance between the protection of seniority rights and Title VII's prohibition against discriminatory seniority systems: status quo, rightful place, and freedom now. The "status quo" approach leaves the seniority rights of white workers intact and, in a non bona fide seniority system, would appear to violate Title VII; the "rightful place" approach allows minorities and females to bid for openings in in traditionally white male jobs but would not allow displacement of white males by less senior minorities and women; the "freedom now" approach entitles minorities and women to immediately claim any job they might normally be entitled to even though white males may be displaced.[13]

The "freedom now" approach has been more formally titled by the

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the newly hired female officers were paid with such funds, the injunction had the effect of causing the layoff of officers with greater seniority who were paid with local funds.

[12] N. Y. Times, May 15, 1975 at C-27.

[13] For a more complete discussion of these approaches, *see* Thorp, *Racial Discrimination and Seniority*, 23 LAB. L. J., 402-03 (1972); Note, *Title VII, Seniority Discimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967); United Steelworkerrs v. Weber, 443 U.S. 193 (1979); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 988 (5th Cir. 1969).

courts as "fictional" or "constructive" seniority[14] and has been rejected as allowing preferential treatment for minorities rather than remedial treatment mandated by Title VII. The Fifth Circuit in *Franks v. Bowman Transportation Co.*[15] stated:

> In seeking application-date seniority . . . appellants ask us to take a giant step beyond permitting job competition on the basis of company seniority. They ask us to create constructive seniority for applicants who have never worked for the company. Granting that the black . . . applicants who were rejected on racial grounds suffered a wrong, we do not believe that Title VII permits the extension of constructive seniority to them as a remedy . . . .[16]

The court continued, quoting Judge Wisdom in *Local 189:*

> It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs (within the company) be given equal status with time working in white jobs . . . (C)reating fictional employment time for newly hired Negroes would constitute preferential rather than remedial treatment.[17]

The court in *Franks* clarified the law: Title VII does not require seniority adjustments to remedy the effects of illegal post-Act discrimination; Title VII requires constructive seniority for persons who can show they would have been hired earlier but for discrimination.

The Seventh Circuit faced a similar remedial question in considering Wisconsin Steel's seniority system.[18] When the plaintiff, Waters, applied for a job in 1957, he was rejected. In July, 1964, he was hired as a bricklayer but was laid off in September, 1964, before he could obtain regular status as an employee. He was rehired in March, 1967, and again laid off during his probationary period in May, 1967.[19] Although the court found that Wisconsin Steel had been guilty of discriminatory hiring practices,[20] the court rejected fictional seniority as comprising preferential rather than remedial treatment. Critics of the decision have suggested that the court failed to consider alternatives other than fictional seniority which might have precluded the return

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[14] "Fictional seniority" is given for the time the employee was prevented from working because of the employer's discrimination and is distinguished from "retroactive seniority" which refers not only to the time worked, but also to the time from the date of employment until the discrimination ceases. *See* SLICHTER, HEALY & LIVERNASH, *supra* note 3, at 106; Stacy, *Title VII Seniority Remdies in a Time of Economic Downturn,* 28 VAND. L. REV. 489 (1975).

[15] 495 F.2d 398 (5th Cir. 1974); *cert. denied,* 419 U.S. 1050, *reh. denied,* 420 U.S. 984.

[16] *Id.* at 417.

[17] *Id.* at 417-18.

[18] Waters v. Wisconsin Steel Works of Int'l. Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

[19] *Id.* at 1313.

[20] *Id.* at 1314.

to an all white workforce.[21]

The "rightful place" approach proved more palatable to the courts and was adopted in *Quarles v. Philip Morris*[22] as a remedy for a departmental seniority system that had a disparate effect on minorities. In *Quarles* the company's manufacturing operations were divided into four main departments; prior to implementation of Title VII, two departments were almost exclusively white and two (where pay was lower) were almost exclusively black. Although the collective bargaining agreement historically did not allow inter-departmental transfers, in 1966, under pressure from the EEOC, the agreement was amended to allow these transfers. Quarles wished to transfer into a different department, but if he did so, he would lose all of his seniority and become the most junior person in his new department. Quarles alleged that present differences in departmental seniority of blacks resulted from the company's intentionally discriminatory policies in effect prior to 1966. The court invalidated the departmental seniority system, stating that "Congress did not intend to require 'reverse discrimination' . . . it is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[23]

Other courts followed the lead of the court in *Quarles*, holding that the departmental seniority system violated Title VII and should be replaced with a seniority system based on mill wide seniority,[24] and that "continued use of the craft and class seniority systems to restrict the transfer and promotion opportunities of incumbent black employees at the Terminal is neither bona fide (as required by Title VII) nor a business necessity: such systems necessarily exclude blacks from jobs for which they might otherwise qualify."[25] In *Acha v. Beame*, the court ruled that a seniority system was not bona fide if it did not afford previous discriminatees their rightful place. In *Acha*, female police officers won a preliminary injunction after they were disproportionately laid off subsequent to New York City's abolishing sex segregated police officer classification.[26]

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[21] *See* Westerfield, *Title VII & Seniority Systems: Back to the Foot of the Line?* 64 KENT L. J. 135 (1975-76); Note, 43 GEO. WASH. L. REV. 947-69 (1975); Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. COL. L. REV. 87-88 (1975).

[22] 279 F. Supp. 505 (E.D. Va. 1968).

[23] *Id.* at 517.

[24] United States v. Local 189, United Papermakers and Paperworkers Union, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[25] United States v. Jacksonville Term. Co., 451 F.2d 418, 453 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[26] 531 F.2d 648 (2d Cir. 1976).

Another remedy applied by the courts is apportionment of layoffs on a pro rata or modified pro rata basis. In *Watkins v. United Steelworkers of America, Local No. 2369,*[27] a group of black employees brought a class action suit alleging that layoffs based on seniority perpetuated the effects of past discrimination. The workers, employees of Continental Can, showed that the company hired only token minorities during World War II, that blacks were hired in increasing numbers after 1965, and that by 1971, 50 out of 400 employees were black. After extensive layoffs, 152 employees remained, two of whom were black; the first 138 names on the recall list were white.[28] After finding that the seniority system perpetuated past discrimination, the court found that the best remedy was "apportionment of layoffs among whites and blacks on the basis of the proportion of each group in the total workforce."[29] The court suggested that other remedies might also be appropriate: compensatory lump sum payments to laid off workers and reductions of the total workweek for the entire work force.[30]

Proportional layoffs as a remedy have been applied by other courts. In *Loy v. City of Cleveland,*[31] the Cleveland police department had only recently begun to hire women in reasonable numbers. When faced with a financial crisis, the City developed a layoff schedule based on seniority and test scores. As a result, 13 of the 15 females hired in 1973 were scheduled for layoff, as opposed to 76 of the 179 males hired during that same year. The court issued a temporary restraining order limiting the percentage of females who could be terminated to the percentage they represented in the 1973 hires. Following the reasoning of the *Watkins,* the court stated:

> [S]hould plaintiffs succeed at trial in proving that the hiring of 15 women as patrol officers was a long over-due step toward the non-discriminatory hiring required under the law, this court would be amiss in permitting, one year later, all but two of the women to be laid off simply because discrimination had prevented them from earlier securing seniority rights.[32]

The case was later dismissed as moot when the city's financial position improved so as not to require layoffs.

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[27] 369 F. Supp. 1221 (E.D. La. 1974), *rev'd on other grounds,* 516 F.2d 41 (5th Cir. 1975).

[28] *Id.* at 1224.

[29] *Id.* at 1232.

[30] *Id. See also* Delay v. Carling Brewing Co., 10 FEP Cases 164 (N.D. Ga. 1974) wherein the Court also ordered affirmation action to eliminate the vestiges of past discrimination.

[31] *Loy v. City of Cleveland,* 8 FEP Cases 614 (N.D. Ohio 1974), *dismissed as moot,* 8 FEP Cases 617. *See also* N.Y. Times, March, 9, 1975 § 3 at col. 1 and § 1 at 1 col. 1.

[32] *Loy,* 8 FEP Cases, at 616.

Another case adopting the remedy of proportional layoffs was *Chance v. Board of Examiners.*[33] *Chance* arose as a result of budgetary-induced layoffs in the New York City School System. Both examinations and eligibility lists were found discriminatory,[34] and the court granted a preliminary injunction ordering the system not to reduce the existing percentage of positions presently held by black or Puerto Rican supervisors.

As the law evolved, the courts clarified the requirements of a bona fide seniority system. Although departmental seniority systems were invalidated, the early decisions upheld company-wide seniority as bona fide under Title VII. The Third Circuit faced this issue in *Jersey Central Power & Light Co. v. Local 327, IBEW.*[35] The company was faced with an EEOC conciliation agreement calling for increased employment opportunities for female and minority workers. Layoffs, however, were to be effectuated in compliance with the collective bargaining agreement, which provided for reductions in order of inverse seniority—a system having a disproportionate impact on females and minorities. Jersey Central sought a declaratory judgment as to its rights under the collective bargaining agreement, the conciliation agreement, Title VII, and Executive Order 11246. The court upheld the plant-wide seniority agreement and stated that a "*neutral company-wide seniority system, without more,* is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices."[36] Subsequently, the Supreme Court faced the conflict between seniority and Title VII in *International Brotherhood of Teamsters v. United States.*[37] The Court ruled that a seniority system not having its genesis in racial discrimination is exempt from the prohibition of VII and does not become illegal solely because that system may perpetuate pre-act discrimination. The Court discussed five attributes of the seniority system in the Teamsters and found them sufficient for immunity from Title VII: it applied equally to all races and ethnic groups; it did not have its genesis in discrimination; it was negotiated and maintained free from any illegal purpose; it was in accord with industry practice; and it was consistent with National Labor Relations Board (NLRB) precedents.[38]

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[33] 330 F. Supp. 203 (S.D.N.Y. 1974), *aff'd* 458 F.2d 1167 (2d Cir. 1972).

[34] *Id.* at 223.

[35] 508 F.2d 687 (3rd Cir. 1975).

[36] *Id.* at 710.

[37] 431 U.S. 324 (1977).

[38] *Id.* at 356. For an analysis of each of these attributes, *see* Note, *Title VII and Seniority*

The latest Supreme Court ruling on the conflict between seniority rights and Title VII illustrates the tenacity of this issue. *United Steelworkers v. Weber*[39] was decided more than a decade after this issue first reached the courts. The issue in *Weber* involved eligibility for training based on dual seniority lists. The case was brought by a white worker who was not admitted to the training program, whereas black workers with less seniority were admitted. The training program was part of Kaiser Aluminum's affirmative action plan; it was negotiated with the union and became part of the parties' collective bargaining agreement. The Supreme Court upheld the affirmative action plan because it was voluntary, temporary, and adhered to the rightful place doctrine.[40]

In the fall of 1981, the Ninth Circuit Court of Appeals was faced with the question of whether an affirmative action program adopted as part of a collective bargaining agreement violated Title VII in its modification of an existing seniority system to reduce or eliminate the system's adverse impact on minorities and women.[41] In this case, Wackenhut was awarded a government contract and began actively to recruit minorities to correct a substantial underutilization in their workforce. The collective bargaining agreement required that layoffs be in inverse order of seniority. Following a federal review of the company's affirmative action plan, the company was found in substantial non-compliance with Executive Order 11246 because of the disparate impact of layoffs by inverse seniority on minorities and females. During the 1972 collective bargaining negotiations, Wackenhut sought an affirmative action clause that would override the seniority system when female and minority representation decreased below certain percentages. Although the union initially resisted these changes, the union ultimately accepted the seniority override provisions sought by the company. *Tangren v. Wackenhut* was brought by a group of non-minority employees who alleged the seniority override provision of the agreement violated Title VII by giving a preference to minorities and females because of their race and sex. Citing *Weber* for the principle of voluntary affirmative action plans that accord racial preference in order to achieve reasonable minority representation in the workforce, the court held the seniority override provisions valid. The court discussed the nature of seniority, describing it as "merely an economic right which unions may elect to bargain

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Rights, 2 UTAH L. REV. 249, 259-263 (1978).

[39] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[40] *Id.* at 208.

[41] *Tangren v. Wackenhut Services, Inc.*, 658 F.2d 705 (9th Cir. 1981).

away."[42] The court went on to state that "seniority rights are not vested property rights and that those rules can be altered to the detriment of any employee or group of employees by a good faith agreement between the company and the union."[43]

Clearly companies and unions may take voluntary action to ensure the rights of female and minority workers. Commentators have suggested that the problem is not simply one of balancing the competing interests of females and minorities against those of white males. The analysis must include the employer who must assume the ultimate responsibility for initial discrimination in hiring.[44] The employer individually or through collective bargaining is well advised to tailor layoff priorities that conform to the judicial mandates.[45] In addition to seniority provisions ensuring members of protected groups their rightful place and provisions apportioning layoffs to minimize their impact on members of protected groups, companies may deal with layoffs through incentives: early retirement; layoffs of the most senior employees first in situations where these employees have contractual retirement or unemployment benefits to compensate them for their loss of employment; attrition; restrictions on overtime, subcontracting, or hiring of new employees; worksharing accomplished through reduction in hours, division of work, and/or rotation of employment.[46] These alternatives can be included in negotiated agreements between unions and management and in an affirmative action plan. Utilization of these alternatives prior to layoffs of workers will minimize the impact of the layoffs on members of protected groups.

II

The immediate outcry from the gurus of higher education is that colleges and universities are unique and that both the problems facing a manufacturing plant in times of financial crisis and the solutions to that crisis are far different from the problems and solutions

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[42] *Id.*

[43] *Id.*

[44] 424 U.S. 744, 778-9; (1976).

[45] Westerfield, *supra* note 21.

[46] For discussions of alternatives to layoffs, *see* Note, 5 MEMPHIS S. U. L. REV. 553, 569-70 (1975); Craft, *supra* note 6; Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times*, 28 RUTGERS L. REV. 1082 (1975); Sheeran, *Title VII and Layoffs under the "Last Hired, First Fired" Seniority Rule: The Preservation of Equal Employment*, 26 CAS W. RES. L. REV. 409 (1976); Summers & Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U. PA. L. REV. 893 (1976); Comment, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 WIS. L. REV. 791; Note, 43 GEO. WASH. L. REV. 947 (1975).

facing higher education in the 1980's. Substantial differences exist, of course, between institutions governed in a collegial manner by tenured faculty engaged in teaching and research and companies engaged in assembly line manufacture of widgets. Industry, however, has run a preliminary gauntlet from which higher education may glimpse the worlds to come if accommodations are not made in plans for program and faculty reductions[47] that consider affirmative action and preserving a demographically heterogeneous faculty.

Just as the traditional and contractual touchstone of industrial employment is seniority, so is tenure at the heart of the employment relationship between faculty members and academic institutions. Academic tenure, an arrangement that has come into its own in the 20th century,[48] is the continuous appointment of faculty members who may be dismissed only for cause[49] and only after notice and a hearing that comports with due process.[50] Although nothing in the concept of tenure precludes firing, tenure widely is regarded as a near bar to dismissal or reassignment.[51] Tenure policies and procedures, like seniority, are set up by institutional by-laws, contracts, state statutes or state constitutions.[52] The constitutional approach is limited to state institutions, however, contractual relationships between faculty members and the institution will exist at nearly every institu-

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[47] This article considers both program and faculty reduction because elimination of certain programs may adversely affect members of protected groups. Female faculty members, for example, are likely to be clustered in the humanities and social sciences, minorities in the social sciences. Program reductions in these areas may affect females and minorities disproportionately as would program reductions in ethnic and womens studies. The University of Missouri's *Criteria for Modification of Activities and Programs* includes among the stated considerations "impact of the program on the University's affirmative action commitment," SPECTRUM, Dec. 23, 1981 at p.3. The importance of including affirmative action considerations among such criteria takes on added significance when significant institutional reductions or changes are accomplished during a financial crisis without a formal declaration of financial exigency. Such changes were accomplished in Mississippi when the governing board limited each of the institutions to specific academic missions and cut nine programs. CHRONICLE OF HIGHER EDUCATION, Dec. 16, 1981 at p. 10. For a discussion of reductions in services and programs made at several institutions, see CHRONICLE OF HIGHER EDUCATION, Dec. 2, 1981 at p. 1.

[48] For a discussion of the roots of tenure in academic institutions since the Middle Ages, see Metzger, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATION BY THE COMMITTEE ON ACADEMIC TENURE IN HIGHER EDUCATION 93-159 (1973).

[49] Dismissal for adequate cause refers to "demonstrated incompetency or dishonesty in teaching or research, to substantial and manifest neglect of duty, and to personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities." FACULTY TENURE: A REPORT AND RECOMMENDATION BY THE COMMITTEE ON ACADEMIC TENURE AND HIGHER EDUCATION 256 (1973).

[50] Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

[51] Silber, *Tenure in Context*, in THE TENURE DEBATE 42 (1973).

[52] SHAW, ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION 23-24 (1971).

tion.[53] Tenure systems require that candidates serve a probationary period prior to being considered for tenure; during this time, faculty members are employed under a series of short term contracts.[54] Once a faculty member has been granted tenure, the resulting expectation of continued employment constitutes a property right, and the faculty member is entitled to both procedural and substantive due process.[55]

Tenure policies and procedures are either automatic or evaluative. Automatic acquisition of tenure occurs when a faculty member has completed a specified period of continuous service or when the faculty member is appointed or promoted to a specific faculty rank.[56] Evaluative acquisition is based upon a formal decision of the governing board after the recommendation of the administration. Evaluative tenure is not tied to a specific rank but is recognition of the faculty member's competence in such areas as research, teaching, and service to the institution and community. A faculty member has evaluative tenure only after being officially notified of the governing board's action.[57]

Tenure is a characteristic of academic life in nearly all institutions of higher education. A 1972 survey conducted for the American Council on Education revealed that tenure policies and procedures are in effect in all public and private universities and public four-year colleges, in 94 percent of private colleges and in more than two thirds of two-year colleges, public and private. About 94 percent of all faculty members in institutions of higher education are serving in institutions that confer tenure.[58]

Tenure, as we know it today, is embodied in the 1940 Statement of Principles on Academic Freedom and Tenure developed by the Asso-

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[53] *See* Comment, *Financial Exigency as Cause of Termination of Tenured Faculty Members in Private Post-Secondary Educational Institutions*, 61 IOWA L. REV. 481 (1976).

[54] Employment contracts constitute a property right for the period of time stated in the contract; dismissal without cause prior to the termination of the contract may be a breach of contract. The institution has no obligation, however, to renew such employment contracts once the term has expired.

[55] *See* Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Board of Regents of State College v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Weathers v. West Yuma County School Dist. R-J-1, 530 F.2d 1335 (10th Cir. 1976). "Substantive due process" requires that one can be deprived of property right only for reasons that have a rational basis. "Procedural due process" requires notice of reasons for non-renewal and an opportunity to refute those charges in a hearing.

[56] *See* Shaw, *supra* note 52.

[57] *Id.* at 23-27.

[58] Furniss, *Faculty Tenure and Contract Systems—Current Practice*, in ACE SPECIAL REPORT 1 (1972).

ciation of American Colleges and the American Association of University Professors (AAUP).[59] That document was derived from a statement entitled *A Declaration of Principles* endorsed by the AAUP in 1915.[60] The *Declaration* was developed at a time "when the public was hostile to and intolerant of evolutionists, secularists, economists, psychoanalysts, sociologists, or indeed of any professor whose views differed from local public opinion."[61] During these years the academic community was fighting "for the freedom to teach and to learn according to sound principles of intellectual inquiry" and against the "destruction of teaching and research capabilities through enforced conformity to the dominant views of local communities, no matter how ignorant or prejudicial."[62] Tenure became a means of ensuring freedom for teaching and research as well as an economic incentive sufficient to attract scholars of ability. Tenure creates an atmosphere favorable to academic freedom for the entire academic community; it contributes to institutional stability.[63]

Tenure, however, like seniority, has disadvantages. Tenure may foster mediocrity and "deadwood" at the expense of recruiting and retaining young faculty; tenure historically has favored majority group males at the expense of females and racial minorities.[64] Tenure may diminish emphasis on quality, perpetuate established specialities at the expense of new approaches; tenure may provide a cloak for irresponsible political activity,[65] and tenure may limit freedom of the institution in a manner that may not be economically efficient.[66]

These characteristics of tenure parallel those of seniority already discussed: both are a means of allocating employment opportunities; both lend stability to the workforce, perhaps at the expense of merit; both provide economic incentives for employees; both protect employees from arbitrary and capricious action by the company or institution. The major difference between the two systems is that, whereas seniority provides an objective means of allocating employ-

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[59] AMERICAN FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 33-39 (L. Joughin ed. 1969).

[60] *1915 Declaration of Principles, American Counsel on Education Conference Statement on Academic Freedom & Tenure,* AAUP BULLETIN 99-101 (1925).

[61] *Id.* at 44.

[62] *Id.* at 44.

[63] *Academic Tenure Today,* in FACULTY TENURE: A REPORT AND RECOMMENDATION BY THE COMMITTEE ON ACADEMIC TENURE IN HIGHER EDUCATION 15-16 (1973).

[64] Wagner, *Tenure and Promotion in Higher Education in Light of* Washington v. Davis, 24 WAYNE L. REV. 98-101 (1977).

[65] *Id.* at 113-14.

[66] For a judicial discussion of tenure accompanied by numerous citations, see AAUP v. Bloomfield College, 129 N.J. Super. 259, 322 A.2d 846 (1974).

ment opportunities, tenure decisions are characterized by their subjectivity and application of professional judgment by academic colleagues.

For all of their similarity, seniority and tenure have been treated in a qualitatively different manner by the courts. Seniority, though regarded as a fringe benefit rather than a property right,[67] has been upheld when the system does not discriminate against members of protected groups. Tenure, regarded as a property right by the Supreme Court in *Roth*[68] and *Sindermann*,[69] has been afforded less respect than seniority in cases that do not involve academic freedom. This view by the courts conforms to the general rules adhered to historically in cases involving academic employment decisions: institutional decisions have been upheld by the courts when they are reached by fair procedures and supported by substantial evidence. "The courts have treated academic institutions with a reverence not reserved for employers of any other category."[70] Likewise, in the financial exigency cases, the courts have upheld virtually any plan applied by academic institutions for reduction of faculty that appears rational even though the plan allows non-tenured people to be retained and tenured people to be dismissed.[71]

Financial exigency is a new term, spawned to describe situations in higher education when the financial problems are sufficiently serious that tenured faculty are dismissed. Financial exigency may be the result of a decline in enrollment or in private gifts for small private colleges. For a public institution, declining state or federal support may cause a financial crisis. In the *1976 Recommendations for Institutional Regulations and Academic Freedom and Tenure*, the AAUP defined financial exigency as "an imminent financial crisis which threatens the survivial of the institution as a whole, and which can-

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[67] *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1981).

[68] Board of Regents of State College v. Roth, 408 U.S. 564 (1972).

[69] Perry v. Sindermann, 408 U.S. 593 (1972).

[70] For a comparison of judicial treatment of discrimination against protected groups in employment in academe, industry and the professions, see Note, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 J. URBAN L. 165 (1976); VanderWaerdt, *Higher Education Discrimination and the Courts*, 10 J. L. & ED. 480 (1981). Cases applying the philosophy of judicial nonintervention in academic employment decision include Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973); Peters v. Middleburg College, 409 F. Supp. 857 (D. Va. 1976); Keadie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976); and Faro v. New York Univ., 502 F.2d 1229 (2nd Cir. 1974).

[71] Bignall v. North Idaho College, 528 F.2d 243 (9th Cir. 1976); Brenna v. Southern Colorado State College, 589 F.2d 475 (10th Cir. 1978).

not be alleviated by . . . means [less drastic than the termination of tenured faculty]."[72]

Although financial exigency is clearly more than a temporary or minor shortage, the courts have not required that an institution's fiscal crisis threaten either bankruptcy or the imminent collapse of the institution. The financial crisis need not be university-wide nor extend to the capital assets of the institution. In *Browzin v. Catholic University of America,* Catholic University's dismissal of tenured professors in the School of Engineering and Architecture was upheld by the Judge Skelly Wright when the school was faced with severe budget reductions.[73] The administration reviewed the institution's current programs and made reductions in "areas in which the University had no great strength and could not hope to achieve strength under the new budgetary limitations."[74]

In a case brought against Creighton University, the fiscal crisis centered upon the School of Pharmacy which had operated at a deficit for five previous years.[75] After making reductions in expenses for travel, equipment and office supplies as well as in several staff positions, four faculty members were terminated when their positions were abolished following a review of the programs and courses offered in the School of Pharmacy.[76] The court, relying on *Browzin,* specifically held that the term " 'financial exigency' as used in the contract for employment herein may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole."[77]

The courts have required, however, that the institution demonstrate that its actions were in good faith. The most well known case wherein the court ordered dismissed tenured faculty reinstated was *AAUP v. Bloomfield College.*[78] Bloomfield College, a small commuter institution founded by the Presbyterian Church in 1807, attracted a student body from the lower middle economic strata with a low academic profile and large minority group representation. Three-fourths of the school's income was derived from enrollment income. The college had annual cash deficits for several years and experienced a substantial decline in enrollment. The financial difficulties had affected

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[72] AAUP BULLETIN, Summer 1976.

[73] Browzin v. Catholic University of America, 527 F.2d 844-845 (D.C. Cir. 1975).

[74] *Id.*

[75] Scheuer v. Creighton University, 199 Neb. 618, 260 N.W. 2d 595 (1977).

[76] 260 N.W.2d at 596.

[77] *Id.* at 601.

[78] AAUP v. Bloomfield College, 129 N.J. Super. 259, 322 A.2d 846 (1974); *aff'd.,* 136 N.J. 442, 346 A.2d 615 (1975).

the school's liquidity.[79] In fact Bloomfield College was on the verge of bankruptcy.[80]

The decision in Bloomfield College was based on the existence of alternatives to the dismissal of tenured faculty that would be equally effective in balancing the budget[81] and on the college's hiring of a number of new and untenured teachers during the same period of time as the tenured plaintiffs were dismissed.[82] The court believed the true reason for the dismissal was the abolition of tenure, "not the alleviation of financial stringency."[83]

The bad faith evidenced by the college and its failure to demonstrate the financial consequences of the hiring of the 12 new faculty members ("whether they resulted in a savings to the college")[84] proved its undoing. Other institutions have made showings of financial exigency accepted by the courts or stipulated to by the plaintiffs. Declining enrollment, for example, may result in a surplus of teachers.[85] Other indicia include substantially decreased revenues[86] and repeated deficits in operating funds.[87]

As previously discussed, a primary judicial requirement for reductions during financial crisis is good faith.[88] Good faith is evidenced by a genuine fiscal crisis,[89] by faculty consultation,[90] by a plan providing for uniform treatment of terminated faculty[91] and for minimal due process,[92] and by consideration of factors that appear to be rational

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[79] 129 N.J. Super. at 262-4, 322 A.2d at 849-51.

[80] Following the trial court decision in this case, the college filed a Chapter XI petition in federal bankruptcy court.

[81] Bloomfield College owned a 322 acre tract of land known as the Knoll, consisting of two golf courses, two club houses, a swimming pool, and a few residences. The trial judge indicated that the sale of this property would solve the institution's cash flow problems.

[82] AAUP v. Bloomfield College, 129 N.J. Super. at 262, 267; 322 A.2d at 849, 856.

[83] 322 A.2d at 858.

[84] *Id.* at 856.

[85] Lumpert v. University of Dubuque, 255 N.W. 2d 168 (1977); Bignall v. North Idaho College, 528 F.2d 243 (9th Cir. 1976); Rose v. Elmhurst College, 67 Ill. App. 3d 824, 379 N.E. 2d 791 (1978); Steinmetz v. Board of Trustees, 68 Ill. App. 3d 83, 385 N.E.2d 745 (1978).

[86] Cherry v. Burnett, 444 F. Supp. 324 (D. Md. 1977); Klein v. Board of Higher Education, 434 F. Supp. 1113 (S.D.N.Y. 1977); Johnson v. Board of Regents of University of Wisconsin System, 377 F. Supp. 277 (W.D. Wis. 1974); *aff'd.*, 510 F.2d 975 (7th Cir. 1975).

[87] Krotkoff v. Gaucher College, 585 F.2d 675 (4th Cir. 1978); Scheur v. Creighton University, 199 Neb. 618 (1977).

[88] *See* text accompanying notes 104-107 *infra.*

[89] *See* text accommpanyig notes 72-77 *supra.*

[90] *See also* Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoffs and Tenured Faculty,* 4 J. COL. UNIV. L. 193 (1977). The author discusses the amicus brief filed by the AAUP in Lumpert v. University of Dubuque, 255 N.W. 2d 168 (Iowa 1977).

[91] *See* text accompanying note 104 *infra.*

[92] *See* text accompanying note 107 *infra.*

upon examination[93] including utilizing remedial measures short of dismisal of faculty members.[94] Such a plan should provide sufficient safeguards to prevent financial exigency from becoming the means by which an institution rids itself of unwanted teachers.[95] Many of these elements are contained in the American Association of Colleges guidelines on measuring good faith in cases of dismissal.[96]

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[93] *Id.*

[94] AAUP v. Bloomfield College, 129 N.J. Super. 259, 322 A.2d 846 (1974).

[95] Browzin v. Catholic Univ. of America, 527 F.2d at 847 (D.C. Cir. 1975).

[96] The American Association of Colleges' guidelines on program curtailment which might serve as a standard against which to measure good faith in cases of dismissal are as follows:

> In situations where curtailment or elimination of educational programs may be necessary for reasons of financial exigency the following guidelines may be useful:
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> 1. Consultation. Early in the process of making recommendations or decisions concerning program reduction, administrators and faculty policy groups should consult widely with their colleagues, students, and others in the college community. It is especially important that faculty members whose education programs or positions may be adversely affected have an opportunity to be heard by those who will make the final decision or recommendation.
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> 2. Data and Documentation. Every effort must be made to determine the nature of the fiscal limitations and within those constraints to establish appropriate educational priorities. Careful documentation of the evidence supporting a staff reduction decision is essential. Appropriate financial information, student-faculty ratios, qualitative program and course evaluations, enrollment data, and other pertinent information should be used to support a case of financial exigency. Except for confidential material of a personal nature this information should be widely shared among the college community.
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> 3. Timing. Institutions should provide as much lead time as possible in making financial exigency decisions. In cases where faculty appointments are to be terminated, timely notice of termination or nonreappointment must be given. In extreme situations, if timely notice cannot be given, financial compensation to the faculty member proportional to the lateness of the notice may be an appropriate substitute for full notice.
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> 4. Academic Due Process. When program reductions in response to financial exigency involve termination of faculty appointments special care must be taken to insure fairness and to protect and honor accepted procedures and rights appropriate to a faculty member's tenured or probationary status. Faculty members must have an opportunity to be heard by those who will make the staff reduction decisions and those decisions must be subject to review by the highest institutional authority. Care should be taken not to confuse termination because of financial exigency with a proceeding that might lead to dismissal for cause.
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> 5. Elimination of a Faculty Position. If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the release faculty member has been offered reappointment and a reasonable time within which to accept or decline it.
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> 6. Preferential Treatment. Tenured members of the faculty should normally be retained in preference to probationary appointees. This preferential status should include wherever possible an opportunity to transfer or readapt to other programs within the department or institution. If retention is not possible the institution

In matters of financial crisis, the key questions become whether a bona fide financial exigency exists and how the institution determines the programs and the identities of the persons to be terminated. Financial exigency usually requires a formal declaration by the institution's board of trustees. The Trustees of Franconia Collece declared a financial exigency and terminated all faculty contracts at the end of the academic year.[97] Similar declarations were made by the Regents of the University of Wisconsin System,[98] by Bloomfield College,[99] by the University of Washington, Washington State and Western Western Washington Universities.[100] In these cases, the declaration triggered procedures developed to deal with reductions in faculty and programs.

In many institutions, the financial crisis will not extend to a declaration of financial exigency but will be limited to specific programs within the institition. Creighton University, for example, contended successfully that financial exigency existed only in the College of Pharmacy.[101] In many of the financial exigency cases, plaintiffs have stipulated that such a crisis existed.[102] Only in Bloomfield College was the issue of whether a crisis existed or not successfully challenged.[103]

Several courts have restricted their review to the procedures applied to the dismissals, focusing upon their uniformity and their provision of due process. At North Idaho College, the president had formulated guidelines and considered the evaluations of department

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should assume responsibility for assisting the faculty member in securing other employment. Preferential retention of tenured faculty should not, however, leave a reduced academic unit in the highly undesirable situation of lacking any probationary faculty. In some cases, tenured and probationary faculty may both have to be reduced.

7. Alternatives. Early retirement and transfer from full-time to part-time service may be acceptable alternatives to termination in some situations of financial exigency. However, such decisions should be governed by the same guidelines and procedure safeguards as those which result in termination.

ASSOCIATION OF AMERICAN COLLEGES, STATEMENT ON FINANCIAL EXIGENCY AND STAFF REDUCTION (1971).

[97] Bellak v. Franconia College, 118 N.H. 313, 386 A.2d 1266 (1978).

[98] Graney v. Board of Regents of University of Wisconsin, 92 Wis. 2d 745, 286 N.W. 2d 138 (1979).

[99] AAUP v. Bloomfield College, 129 N.J. 259, 322 A.2d 846 (1974).

[100] CHRONICLE OF HIGHER EDUCATION, Nov. 11, 1981, at p.5.

[101] Scheuer v. Creighton University, 199 Neb. 618, 260 N.W.2d 595 (1977).

[102] Bellak v. Franconia College, 118 N.H. 313, 386 A.2d 1266 (1978); Browzin v. Catholic Univ. of America, 527 F.2d 844 (D.C. Cir. 1975).

[103] AAUP v. Bloomfield College, 120 N.J. Super. 259, 322 A.2d 846 (1974). *See also* CHRONICLE OF HIGHER EDUCATION, Nov. 25, 1981 at p. 9.

heads as well as the needs of the school.[104] In the University of Wisconsin System, procedures stated that the Chancellor of each campus would decide who was to be laid off and would provide notice to those faculty members.[105] Faculty members who required it were provided with written notice of the reason of the layoff; the faculty member could then request in writing a reconsideration proceeding which would be limited to whether the evidence for the layoff was sufficient and whether there were material deviations from the institutional guidelines.[106] In *Johnson v. Board of Regents of University of Wisconsin System,* the court held that under circumstances of financial exigency, "minimal" due process was sufficient and that a tenured faculty member was not entitled to the amount of due process required when dismissal is for cause.[107] The minimum procedures required by the fourteenth amendment after the decision had been made to lay off a particular tenured faculty person include: furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to layoff; furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at; making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and providing each plaintiff the opportunity to respond.[108]

Although the judiciary's primary concern has been with the procedural aspects of faculty dismissal during financial crisis, the courts have reviewed the institutional actions to determine whether or not

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[104] Bignall v. North Idaho College, 528 F.2d 475 (9th Cir. 1976).

[105] Johnson v. Board of Regents of University of Wisconsin System, 377 F. Supp. 277 (W.D. Wis. 1974), *aff'd.*, 510 F.2d 975 (7th Cir. 1975).

[106] For other cases in which the courts examined and upheld the procedures adopted by the institution, see Levitt v. Board of Trustees of Nebraska State College, 376 F. Supp. 945 (D. Neb. 1974), in which criteria to be used in the evaluation process and criteria to be used retaining essential faculty members was upheld as a fair process based on facts and honest convictions. *See also* Brenna v. Southern Colorado State College, 589 F.2d 475 (10th Cir. 1978), wherein the court stated that the fourteenth amendment does not require any particular selection process so long as the procedure chosen is reasonable. The court further held that tenured faculty need not be preferred over non-tenured faculty.

[107] Johnson v. Board of Regents of University of Wisconsin System, 377 F. Supp. 277 (W.D. Wis. 1974), *aff'd.*, 510 F.2d 975 (7th Cir. 1975).

[108] *Id.* The rationale of *Johnson* was applied in Klein v. Board of Higher Education of the City of New York, 434 F. Supp. 1113 (S.D.N.Y. 1977). In *Klein,* a thousand faculty members at City University were laid off due to budgetary reductions. The court upheld the board guidelines even though the faculty neither participated in retrenchment plans nor were given pretermination hearings. The court upheld a 30-day notice prior to dismissal and post-termination hearings provided for in the guidelines.

they have been applied on a rational basis.[109] Even using so conservative a standard, the courts have found institutional actions unreasonable. Bloomfield College, for example, was required to show that a financial crisis motivated the dismissal of tenured faculty.[110] Institutions' evidence of good faith may also be examined by the court. Bloomfield's failure to utilize less drastic remedial measures, the hiring of twelve new faculty members without adequate justification, the failure to consult the faculty regarding new program development and internal memoranda indicating an anti-tenure motive and written by Bloomfield's president contributed to a judicial finding against the college.[111] Perhaps it was Bloomfield's seemingly blatant insensitivity to tenured faculty that resulted in the court's finding that the administrative actions by the college "overflowed the limits of its authority as defined by its own policies, and therefore failed to constitute a legally valid interruption in the individual plaintiffs' continuity of service."[112]

Tenure does not provide immunity from dismissal if a bona fide financial crisis exists. Courts have found that termination during financial exigency is an implied or inherent power[113] that can be ap-

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[109] The courts historically have professed a lack of expertise in evaluating specialized academic qualifications and an obvious reluctance to interfere with the judgment of the plaintiff's professional peers. *See, e.g, Levitt,* 376 F. Supp. 945. Yurko lists other justifications for this unusual treatment of academic personnel decisions in addition to the judiciary's professed incompetence to evaluate accademic qualifications: the "unavoidably subjective" nature of employment decisions in academia and the "floodgates of litigation" argument. He suggests that each overstates the case, that much of modern litigation requires complex, sophisticated analysis, and that subjective decision-making signals the need for *heightened* scrutiny because of the greater opportunity for bias. The institution's actions, under the low scrutiny approach, is presumed correct unless the plaintiff is able to show that the decision was arbitrary, capricious or unreasonable—a standard normally applied to decisions of independent administrative agencies—not to one of the litigant in a legal proceeding. "Under this standard the faculty member would be required to show either that the College had acted in bad faith or that no condition of exigency existed." Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency,* 51 IND. L.J. 417, 429-31 (1975). *See* Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation,* 60 BOSTON U.L. REV. 473 (1980). *See also supra* note 70.

[110] AAUP v. Bloomfield College, 129 N.J. Super. 259, 322 A.2d 8466 (1974).

[111] *Id.* at 268-72, 322 A.2d at 856-7.

[112] *Id.* Other cases in which courts have invalidated dismissal of tenured personnel where fiscal reasons were show to be a subterfuge include Walker v. Wildwood Board of Education, 120 N.J.L. 408, 199 A. 392 (S.Ct. 1938); Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 68 A.2d 768 (1949); Downs v. Hoboken Board of Education, 13 N.J. Misc. 853, 181 A. 688 (S.Ct. 1935); Wall v. Stanly County Board of Education, 378 F.2d 275 (4th Cir. 1967); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (4th Cir. 1966).

[113] Graney v. Board of Regents of Univ. of Wisc., 92 Wis. 2d 745, 286 N.W.2d 138 (1979); Levitt v. Board of Trustees of Nebraska State College, 376 F. Supp. 945 (D. Neb. 1974); Krotkoff v. Gaucher College, 585 F.2d 675 (4th Cir. 1978).

plied to previously tenured faculty[114] and is supported by statutory provisions,[115] contractual provisions,[116] and institutional policies.[117] The Fourth Circuit Court of Appeals focused upon the values traditionally protected by tenure and stated:

> No case indicates that tenure creates a right to exemption from dismissal for financial reasons . . . Tenure's "real concern' is with arbitrary dismissals based on an administrator's or trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting . . . Dismissals based on financial exigency . . . are impersonal: they are unrelated to the views of the dismissed teachers.[118]

In spite of the apparent carte blanche afforded administrators of institutions of higher education, institutions are advised to avoid wholesale terminations of faculty without careful consideration of numerous factors. The final section of this article analyzes the factors to be considered—among them the institution's commitment to affirmative action—in the development of a plan for reductions of programs and people that will survive legal scrutiny.

III

Equal employment opportunity became a legal responsibility of institutions of higher education in 1972 when Congress amended the Civil Rights Act of 1964, removing the exemption that had applied to higher education during the intervening years. Although Congress specifically exempted bona fide seniority agreements in 1964, no comparable provision was made for tenure in 1972. During that same year affirmative actions plans for institutions receiving federal funds were mandated by executive order.

Education had not acted to correct historical disparities in the proportion of females and racial minorities they employed prior to congressional mandate. The result is that a decade after the 1972 Education Amendments, minority and female representation remained clustered in the lower untenured faculty ranks.[119] Institutions of

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[114] Steinmetz v. Board of Trustees, 68 Ill. App. 3d 83, 385 N.E.2d 745 (1978); Rose v. Elmhurst College, 62 Ill. App. 2d 824, 379 N.E.2d 791 (1978).

[115] Browzin v. Catholic University of America, 527 F.2d 844 (D.C. Cir. 1975).

[116] *Id.;* DiLorenzo v. Carey, 62 A.D.2d 583, 405 N.Y.S.2d 356 (1978).

[117] Brenna v. Southern Colorado State College, 589 F.2d 475 (10th Cir. 1978); Schuer v. Creighton University, 199 Neb. 618, 260 N.W.2d 595 (1977).

[118] Krotkoff v. Gaucher College, 585 F.2d 675 (4th Cir. 1978).

[119] Data from the National Center for Education reported in the CHRONICLE OF HIGHER EDUCATION, Sept. 29, 1980 at p. 8, indicates that women comprise 9.8% of the total full-time professors (9 month appointments), 19.4% of the associate professors, 33.9% of the assistant professors, and 51.8% of the instructors. Data also showed that in 1979-80, tenure was granted to

higher education in financial crisis, which will result inevitably in reductions in programs and in faculty, face decisions regarding affirmative action similar to those faced by industry during the recession of the early 1970's. Reductions in faculty by tenure status, by rank, and by seniority within rank will effectively decimate the representation of members of protected groups on college and university faculties just as industry's layoffs based on inverse seniority decimated the ranks of newly hired minorities and females a decade ago. Thus, just as industry faced the conflict between seniority and affirmative action, higher education faces the conflict between tenure and affirmative action. The most politically powerful faction on campus is likely to be the tenured faculty, a group with which the administration must consult on matters such as program and faculty reduction. The self interest of this group will undoubtedly focus upon making reductions based on rank and seniority within rank, a system adversely affecting females and racial minorities. Several factors, however, mitigate toward institutions making reductions on bases other than tenure status, rank, and seniority within rank: institutional interest in diversity among faculty members, compliance with the institution's affirmative action plan, and reducing programs and faculty in a manner that is legally defensible.

Balance or diversity among faculty by tenure status and by academic rank is desirable for economic reasons as well as for qualitative reasons. The most senior members of a department, usually full professors, are likely to carry the lowest teaching loads and receive the highest salaries, an economically inefficient arrangement, unless their research productivity is significantly higher than that of their colleagues at the lower ranks who are likely to have higher teaching loads and lower salaries.[120] Many institutions employ lecturers or instructors who are rarely tenured and whose reponsibility it is to teach rather than to do research. These faculty members, nationally over half of whom are women, are generally the lowest paid faculty members in their departments but teach more sections and usually have more students per semester than their colleagues in the ranks above them. Many institutions also employ part-time faculty whose salary

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more than 68% of the males and to only 48% of the females on college and university faculties.

[120] *See* Katz, *Faculty Salaries, Promotions, and Productivity at a Large University*, 63. 469-77 (1973); Doering, *Publish or Perish; Book Productivity and Academic Rank at Twenty Six Elite Universities*, 7 AM. SOC. 13 (1972); Stallings & Singhal, *Some Observations on the Relationships Between Research Productivity and Student Evaluation of Courses and Teaching*, 5 AM. SOC. 141-143 (1970); Bridgewater, Walsh, & Walkenbach, *The Productivity of Tenured Professors*, PSYCHOLOGY TODAY, January, 1982 at p. 4.

per course taught is a fraction of that of full-time faculty members. The recent growth in part-time faculty, particularly in two-year institutions, has occured largely for economic reasons.[121] If faculty reductions are made based upon such factors as tenure status, rank, and seniority within rank, severe dislocations may occur within departments in which the remaining faculty members are forced to refocus their professional activities from research and publication to teaching. Although this change may cause personal inconvenience to the faculty member affected, the loss of knowledge resulting from research efforts which are terminated and from those which are not initiated cannot be calculated. Hence the retention of some untenured faculty may be an attractive alternative both for the institution and for the department.

Diversity also is a means of avoiding the parochialism that results from a homogeneous faculty. Some institutions do not hire graduates of their own doctoral programs and some departments avoid hiring a disproportionate number of graduates of the same institutions. Both of these practices result in faculty members of varying geographic and academic backgrounds enriching the thoughts, approaches and scholarship of one another. Unfortunately ethnic and gender diversity has not been regarded by institutions and departments within those institutions as comparable in importance. In fact, anti-nepotism policies, consciously adopted, affect the careers of many married female scholars whose geographic and academic backgrounds may provide additional departmental and institutional heterogenity. The growth of ethnic and women's studies and mainstreaming into traditional disciplines the results of ethnic and feminist scholarship demonstrate the value of these perspectives to such areas as history, literature, and psychology. The 1970's spawned a veritable explosion of research on the contributions of females, immigrants and ethnic minorities to traditional disciplines, enriching immeasurably the scholarship in these areas.[122]

Diversity enriches students' experiences because of the scholarship produced and the less parochial atmosphere provided by a heterogeneous faculty. At the elementary and secondary educational level, some states, recognizing the importance of sex and ethnic equity, formally have mandated changes in teacher training and in classroom materials.[123] A demographically diverse faculty also is more likely to

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[121] *The Status of Part-Time Faculty*, ACADEME, at p. 29-39 (Feb.-Mar. 1981).

[122] THE NEW YORK TIMES, Nov. 23, 1981, § 1 at p.1.

[123] For information about state efforts, see BEBEMEYER, BIAS REVIEW PROCEDURE (1979) (Michigan); GUIDE TO IMPLEMENTING MULTICULTURAL, NONSEXIST CURRICULUM PROGRAMS IN

provide much needed role models for students who are not majority group males. Role models provide important psychological support for members of protected groups and improve the learning environment for students of both sexes and all races.[124] As ethnic minorities, females, and other nontraditional students occupy increasing proportions of the student bodies of colleges and universities, the institutional interest in a demographically diverse faculty increases.

The second major factor for institutional consideration of demographic diversity in developing plans for program and faculty reduction is the institution's affirmative action plan. Revised Order 4, which mandates the contents of the affirmative action plans of institutions receiving federal funds, requires that employment practices such as hires, transfers, promotions, and layoff policies and practices be examined for their adverse impact upon females and minorities.[125] Institutions to which Revised Order 4 may not apply may, nevertheless, wish to adopt an affirmative action plan because the implementation of such a plan may be a defense against individual and class actions brought under Title VII. Such a voluntarily adopted plan is in keeping with the purpose of that act.[126] If any of the institution's employment practices result in a disparate impact upon racial minorities or females, the institution must take affirmative action to correct the imbalance. If the imbalance occurs in utilization,[127] the affirmative action will be in hiring and promotional goals. If the institution's policies or practices for layoffs create a disparate impact, the required affirmative action is a plan for layoffs that will lessen their impact on members of protected groups. Such a plan has the imprimatur of the courts.

In *United Steelworkers v. Weber*,[128] the Supreme Court allowed a

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IOWA SCHOOLS (1979) (available through the Urban Education Section of the Iowa Department of Public Instruction).

[124] *See* Stake & Granger, *Same-sex and Opposite-sex Teacher Model Influences on Science Career Commitment Among High School Students*, 70 J. OF ED. PSYCH. 180-186 (1978) and Stake, *The Educator's Role in Fostering Female Career Aspirations*, 45 J. OF NAWDAC 3-10 (1981).

[125] *Federal Contract Compliance Manual*, § 2-A-12. *See also* 43 Fed. Reg. 204 (1978) § 60-2.1-2.26, also known as Revised Order 4.

[126] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[127] "Underutilization" is a disparity between the employment of members of a protected class in a job or job group and their availability. Underutilization is determined by conducting an availability analysis. A "utilization analysis" is an analysis conducted by an institution to determine whether minorities and women are employed in each major job group at a rate consistent with the availability of qualified minorities and women in the relevant labor market for the positions covered by each job group.

[128] United Steelworkers v. Weber, 443 U.S. 193 (1979).

voluntarily adopted affirmative action plan without a showing of past discimination. Kaiser Aluminum negotiated the means of increasing representation of racial minorities in the craft classification with the union, under pressure from the Federal Office of Contract Compliance (OFCCP).[129] Colleges and universities with faculty unions may, through the collective bargaining process, include the institutional affirmative action plan as part of the retrenchment provisions in the collective bargaining agreement.[130] This action conforms with *Weber*[131] and with the Ninth Circuit's ruling in *Tangren v. Wackenhut Services, Inc.*[132] The collective bargaining process indeed may provide a better mechanism for job security during financial exigency than does tenure.

Institutions that are non-union should provide for faculty consultation on program reduction and faculty layoffs, even though such consultation has not been required by the courts.[133] Faculty consultation is a valuable part of the process for developing plans for dealing with financial crisis, though such consultation should involve representative faculty, not only the ranked or tenured faculty. In fact, to exclude faculty members from participation may result in formation of faculty unions with whom the administration subsequently will be compelled to bargain collectively over these issues. Studies show that faculty members' interest in unions correlates positively with salary dissatisfaction and distrust in organization decision-making.[134]

The ultimate responsibility for planning for program and faculty reduction as well as for affirmative action, however, lies with the administration and when the final plans are adopted, the special interests of the senior tenured faculty must be balanced with the institutional interest in retaining faculty members in conformity with the

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[129] The Office of Federal Contract Compliance Programs is the federal agency charged with reviewing the affirmative action plans of government contractors.

[130] This has occured at Central Michigan University and Temple University. *See* Lussier, *Academic Collective Bargaining: Panacea or Palliative for Women and Minorities?* 27 LAB. L. J. 568 (1976). *See also* Note, *Economically Necessitated Faculty Dismissal as a Limitation on Academic Freedom,* 52 DEN L. J. 911 (1975) in which the author discusses financial exigency as a fiction for weeding out dissident faculty members.

[131] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[132] Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1981).

[133] Levitt v. Board of Trustees of Nebraska State College, 376 F. Supp. 945 (D. Neb. 1974); Graney v. Board of Regents of Univ. of Wis., 92 Wis. 2d 745, 286 N.W.2d 138 (1979); Johnson v. Board of Regents of Univ. of Wis. System, 377 F. Supp. 277 (W.D. Wis. 1974), *aff'd.*, 510 F.2d 975 (7th Cir. 1975).

[134] Driscoll, *Attitudes of College Faculties Toward Unions: Two Case Studies,* MONTHLY LAB. REV. May, 1978 at p. 42-45, adapted from a more complex IRRA paper entitled, *Analyzing Attitudes Toward Unions: Two Case Studies in Higher Education. See also, Lussier, supra* note 130, at 565-72.

affirmative action plan. In higher education, as in industry, the problem is not merely one of balancing the competing interests of protected groups against those of the majority group males who comprise the bulk of ranked faculty members.[135] The institution faces the OFCCP's requirement that employment practices that adversely impact on members of protected groups be changed. Both Kaiser Aluminum and Wackenhut Services[136] were responding to federal findings of substantial noncompliance when they bargained collectively with the unions to include special treatment for minorities in the collective bargaining agreement. In *Tangren,* the issue is particularly germaine to the problem of retrenchment in higher education. Wackenhut had been cited for substantial noncompliance with Executive Order 11246 because the layoff procedures had a disparate impact on minorities and females. During negotiations with the union, Wackenhut sought an affirmative action clause providing for seniority override when female and minority representation decreased below certain percentages. The court upheld the agreement because it was "carefully contoured to accomplish its limited objective—insuring that any reductions in force do not disproportionately impact on minorities. As seen it is an appropriate response to the problem inherent in a reverse seniority layoff system and does not violate Title VII."[137]

Whether the administration bargains collectively with a faculty union or engages in consultation with faculty in the traditonal manner, the institution's commitment to affirmative action is an essential part of a plan for financial crisis. Because women and minorities are less well represented among tenured faculty than majority group males, a plan basing layoffs primarily on tenure status may contradict the institutional commitment to affirmative action. A preference for tenured faculty may be inherently incompatible with maintaining a demographically heterogeneous faculty, however the judicial inclination to date has been to disregard the importance of tenure during financial crisis[138] and to uphold affirmative action plans.

The third factor leading instititions to include demographic diversity in retrenchment policies and procedures is utilizing a plan that is legally defensible. Although the courts historically have declined sub-

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[135] *See* text accompanying note 44 *supra.*

[136] United Steelworkers v. Weber, 443 U.S. 193 (1979); Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1981).

[137] 658 F.2d at 707.

[138] *See* text accompanying note 104-107 *supra.*

stantive examination of employment matters arising in academia,[139] a line of cases is emerging in academic decisions affecting faculty members. The line is led by *Sweeny v. Keene State College*,[140] a case twice before the Supreme Court, wherein the First Circuit Court of Appeals expressed misgivings about the "hands off" approach the courts had applied to university personnel decisions, stating that although these decisions are subjective in nature, "we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress."[141] If this approach develops, the courts are likely to examine more fully not only institutional claims of financial crisis but also the basis upon which program and faculty reductions are made.

As courts begin to examine personnel actions of academic institutions substantively as well as procedurally, we may expect the judiciary to examine the reasonableness of the criteria used for determining what faculty and programs are terminated. The institution must be prepared to make a business necessity defense if faculty or program reductions are challenged. Business necessity is a classic defense used in employment discrimination cases in which the plaintiff has made a prima facie case that a practice is discriminatory under Title VII. The defense requires the employer to show that the practice is essential to the job.[142] This business necessity defense has been a part of numerous cases in the industrial setting; the courts have interpreted the concept narrowly and have applied the following test:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or ac-

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[139] *See* text accompanying notes 70 and 109 *supra*.

[140] 569 F.2d 169 (1st Cir. 1978), *vacated and remanded*, 439 U.S. 24 (1978).

[141] *Id.* at 176. For other cases in this line, see Jepson v. Florida Board off Regents, 610 F.2d 1379 (5th Cir. 1980); Kunda v. Muhlenberg College, 463 F. Supp. 294 (E.D. Pa. 1978); Davis v. Weidner 596 F.2d 726 (7th Cir. 1979), Powell v. Syracuse University, 580 F.2d 1150, (2d Cir. 1978), *cert. denied*, 439 U.S. 984 (1978); *see also* Yurko, *supra* note 109, at 531-35; Liberman v. Gant, 474 F. Supp. 848 (D. Conn. 1979); In re Dinnan, 661 F.2d 426 (5th Cir. 1981).

[142] A secretary, for example, must be able to type. A requirement that apprentices in a pilot training program be the sons of Mississippi riverboat pilots, however, is not job related. The employer has a business necessity for requiring that secretaries type but not that apprentice pilots bear a familial relationship to other pilots.

complish it equally well with a lesser differential racial impact.[143]

The key is whether there is an alternative practice that would accomplish the employer's purpose with less discriminatory impact.

The issues of business necessity arose in several of the seniority cases. Although industrial defendants argued that departmental or job progression seniority systems were necessary to the continued efficient operation of the business, the courts held that seniority was not a business necessity. The following rationale for seniority as a business necessity were tendered by industrial defendants and rejected by the courts: avoidance of union pressure, labor unrest or even strike threat,[144] lowered employee morale because of frustrated expectations,[145] retention of the best qualified employees,[146] and increased costs in changing the practice.[147] The courts have clearly stated that "when a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the scope and efficient operation of the business."[148]

The courts, examining the adverse impact upon women and minorities of program and faculty reductions at colleges and universities, have ample precedent before them to require proof of business necessity in cases brought by minority and female faculty members laid off or dismissed because of financial exigency. A rational plan for retrenchment becomes synonomous with a plan that can survive the business necessity test. Such a plan should not only state a means for maintaining demographic diversity among faculty members, it also should provide for other means of budgetary savings prior to layoffs and dismissal of faculty. Increased judicial scrutiny and application of the business necessity test may require institutions to demonstrate that the financial crisis is bona fide,[149] that measures other than faculty layoffs and dismissals cannot overcome the financial crisis, and that sufficient reductions in force cannot be made through attrition, reassignment or other work sharing arrangements. The plan devised at the Michigan State University, for example, allowed faculty

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[143] Robinson v. Lorrillard, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1971).

[144] *Id.* at 791, 799; United States v. Local 189, United Papermakers and Paperworkers Union, 416 F.2d 980 (5th Cir. 1969); *cert. denied,* 397 U.S. 919 (1970).

[145] United States v. Bethlehem Steel Corp., 466 F.2d 652, 663 (2d Cir. 1971).

[146] Jacksonville Terminal, 451 F.2d 418, 452 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); *Watkins,* 369 F. Sup. at 1232 n.8.

[147] *Robinson supra* note 143, at 791, 799 n.8.

[148] Jones v. Lee Way Motor Freight, 431 F.2d 245, 249 (10th Cir. 1970).

[149] For a discussion of considerations allowing the university some flexibility during financial crisis, *see* Note, 51 IND. L.J. 424-5 (1976).

members whose positions were affected by budget reductions to volunteer "to leave the university immediately with two years salary, work during the 1981-82 academic year and leave with an additional 18 months' salary, accept part-time tenured status, or request assignment to other positions within the institition."[150]

The Carnegie Commission on Higher Education suggests such long range approaches from reducing the size of the student body to merging of institutions.[151] Short range actions include freezes on hiring and on raises, reductions in summer school expenditures, and reductions in areas not directly related to the academic functions of the institution. The AAUP urges alleviation of fiscal crisis by less drastic means than reductions in force:

> Termination of permanent or long-term appointments because of financial exigencies should by sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumstances.[152]

Industrial practices might be applied to both long and short-range institutional needs. Work sharing, for example, would spread the burden of the financial crisis among many faculty instead of ask-

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[150] CHRONICLE OF HIGHER EDUCATION, June 22, 1981 at p.2.

[151] The Commission suggests:

(1) Reducing the number of students by (a) accelerating programs and (b) by reducing the number of reluctant attenders. We believe that the former will reduce operating costs by at least 10 and perhaps 15 percent, and capital costs, in the 1970's, by one-third.

(2) Making more effective use of resources in relation to the students in attendance. We suggest particularly:

- Halting creation of any new Ph.D. training and federally supported research in fewer institutions.
- Achieving minimum effective size for campuses now below such size; and for departments within campuses, particularly at the graduate level.
- Moving toward year-round operation so that more students can move through the same capital facilities.
- Cautiously raising the student-faculty ratio . . .
- Reexamining the faculty teaching load.
- Improving management by better selection and training of middle management, by giving more expert assistance to the college president, and by improving the budgetary process.
- Creating more alternatives off campus through "open" universities; credit by examination; and so forth—saving capital expenditures and increasing competition with traditional approaches.
- Establishing consortia among institutions; and also merging some.

CARNEGIE COMMISSION ON HIGHER EDUCATION—THE MORE EFFECTIVE USE OF RESOURCES, 16-18 (1972).

[152] *1925 Conference Statement on Academic Freedom and Tenure* (revised in 1968), 58 AAUP BULL., 428-33 (1972).

ing only a few to bear the burden; reducing teaching loads and salaries is the academic equivalent to industry's shorter work week.[153] Other alternatives include voluntary early retirement, phased retirement, rotational layoffs, elimination of extra duties (which compares to overtime in industry), transfers to other responsibilities, retraining, bonuses, and layoffs instead of terminations.[154]

In short, the burden of retrenchment is best borne by those who volunteer because of incentives and by spreading the burden among the many rather than allowing those dismissed to bear the dominant share of the burden. If non-voluntary faculty and program reductions must be made, the institution's commitment to affirmative action must be considered and reductions made in a manner that does not impact adversely upon members of protected groups. Although tenure, rank, and seniority within rank are attractive because of the relatively objective standard they provide, these traditional criteria are probably the least valid in determining reductions in force. Such factors as merit, the need to retain accreditation, substantive sub-specialties of departmental members, making more effective use of resources,[155] and maintaining demographic diversity in keeping with the institution's commitment to affirmative action play far more significant roles in implementation of a legally defensible plan for retrenchment.

Conclusion

The legal mandates for higher education seem clear: tenure does not protect faculty members from termination during financial crisis as long as the institution can provide a rational basis for retaining some faculty at the expense of other faculty. Institutions receiving federal monies are expected to develop affirmative action plans designed to improve representation of minorities and females in departments in which they are underutilized. If tenure, rank, and seniority within rank are criteria by which faculty reductions are made, the impact upon minorities and females will be adverse—a violation of Executive Order 11246. Clearly, institutions of higher education

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[153] *See* Note, 43 GEO. WASH. L. REV. 967-69 (1975); Westerfield, *supra* n.21, at 141; Fine, *supra* n.21, at pp.107-113; Summers & Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession,* 124 U. PENN. L. REV. 917 (1976).

[154] Layoffs rather than non renewals or terminations may allow faculty members to retain tenure and other accrued benefits. *See* Johnson v. Board of Regents, 377 F. Supp. 277 (W.D. Wis. 1977), *aff'd.*, 510 F.2d 975 (7th Cir. 1975); Graney v. Board of Regents, 92 Wis. 2d 745, 285 N.W.2d 138 (1979).

[155] *See* text acccompanying note 52 *supra.*

should develop plans for financial exigency which prevent members of protected groups from bearing the disproportionate brunt of financial exigency and program reductions. The implementation may be an academic version of "seniority override" when minority or female representation decreases through reductions beyond a certain and specifically stated point. Plans of this nature respond to legal mandates as well as to institutional self interest in the form of demographically diverse faculty.

The 1980's will see increasing financial crises; institutions that prepare for the impending reductions in a rational manner, considering not only the most powerful faculty factions on campus but also the institution's legally mandated affirmative action responsibilities, will be positioned to better defend their actions when faced with the inevitable legal challenges in the years to come.