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The undersigned are law professors who share a deep concern about racial diversity in legal education. We teach at ABA-accredited law schools across the country, and use an array of methods in our teaching and scholarship. We strongly urge the members of the ABA to reject the proposed changes by the ABA Council on Legal Education (“the Council”) to ABA Standard 405,¹ which would abolish the requirement that ABA-accredited schools maintain a system of tenure. We have no doubt that adoption of the proposal will lead to law schools opting not to offer tenure to professors. Although we agree that education reform is necessary to meet the evolving needs of the legal profession, elimination of the tenure system will be counterproductive and will not serve these purposes. Critically, the lack of tenure protection for professors will cause a negative impact on academic freedom, the creation of safe space for dissenting voices, and recruitment and retention of minority law professors.² The reasons offered for the proposed changes to Section 405 by Council members in public remarks are not sufficiently compelling to justify the potential damage to years of efforts to diversify the ranks of legal academia and the legal profession. Finally, we believe that an important proposal such as this one requires a more inclusive and diverse Council and broader input from the very beginning of the process.

Tenure and Academic Freedom

Academic freedom is critical for effective law teaching and scholarship. Notably, tenure facilitates meaningful academic freedom by protecting a law professor’s ability to engage freely in the teaching and writing of groundbreaking subjects.³ Indeed, we believe, for example, that

¹ American Bar Association Section of Legal Education and Admissions to the Bar, *Comprehensive Review of ABA Standards for the Approval of Law School Matters for Notice and Comment* (Sept. 6, 2013) available at: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf. See also, Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, National Law Journal, Aug. 12, 2013 http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202614832071&ABA_Panel_Favors_Dropping_Law_School_Tenure_Requirement&slreturn=20130814230539.

² Michael A. Olivas, *President’s Message: Academic Freedom and Academic Duty*, Association American Law Schools Annual Meeting, (Jan. 2011). http://www.aals.org/services_newsletter_presMarch11.php; Association of American Law Schools, “Statement in Support of Academic Freedom for Clinical Faculty,” (Jan. 3, 2001). http://www.aals.org/about_handbook_sgp_clin.php; Meghan Ryan, Teaching and Tenure, SMU Center for Teaching Excellence Blog (May 6, 2013), <http://blog.smu.edu/cte/2013/05/06/tenure-and-teaching>.

³ See e.g., Association of American Law Schools, *Statement in Support of Academic Freedom for Clinical Faculty*, (Jan. 3, 2001) http://www.aals.org/about_handbook_sgp_clin.php.

although much celebrated today, the Critical Race Theory literature that evolved from Derrick Bell, Richard Delgado, Mari Matsuda, Kimberlé Crenshaw, and other professors would not have been possible without a system of tenure protection.⁴ It is unrealistic to expect that the Council recommendation for a vague “form of security of position” will be adequate to protect outspoken, divergent voices within legal education whose work is important for advancing our understanding of, and possibilities for, the law.

Both teaching and scholarship require a professor to use her expertise and creativity to explore topics that foster students’ critical analytical skills. Educating our students to become effective advocates, public policy makers, and even teachers themselves, is an important mission of the profession. However, creativity and innovation in the classroom will be stifled if a teacher is overly concerned that her job may be jeopardized if she asks her students to tackle provocative topics.⁵

Tenure and the tenure-track system are fundamental for those teachers who engage in both traditional and nontraditional forms of scholarship. Without the protections of tenure and its underlying value of academic freedom, the ability to write about potentially controversial subjects, such as racial and intersectional discrimination, civil rights, criminal justice, affirmative action, structural inequities in the tax system, and the role of corporations in public life, without fear of reprisal will be threatened. In addition to writing and teaching, professors often publicly express views or engage in advocacy on behalf of unpopular causes. Without a system of tenure, these teachers and scholars could become subject to dismissal based solely on their views. This is the very antithesis of academic freedom.

Additionally, if we lose these teachers and scholars, the education of students of all backgrounds will suffer. Students will go through law school without exposure to diverse, exciting, and enlightening ideas. This is counter to the kind of innovative and diverse higher education we aspire to have for the lawyers of tomorrow. The disappearance of teachers with security of position through tenure would decrease the ability to educate students from diverse perspectives and backgrounds.

⁴ See DERRICK BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (BASIC BOOKS REPRINTED 1993); KIMBERLÉ W. CRENSHAW, NEIL GOTANDA, GARY PELLER, KENDALL THOMAS, EDs., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (THE NEW PRESS 1996); MARI J. MATSUDA, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (WESTVIEW PRESS 1993); RICHARD DELGADO & JEAN STEFANIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (NYU PRESS, 2001) and ADRIEN K. WING, ED., *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* (NYU PRESS 2000).

For a discussion of Professor Bell’s life and work, including his decision to resign from a tenured position at Harvard Law School in protest of its failure to hire women of color law professors, see *Derrick Bell, Law Professor, Dies at 80*, N.Y. TIMES (Oct. 6, 2011) available at: <http://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html?pagewanted=all& r=0>.

⁵ See e.g., SOCIETY OF AMERICAN LAW TEACHERS & GOLDEN GATE UNIVERSITY SCHOOL OF LAW, EDs., *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* (CAROLINA ACADEMIC PRESS 2011).

Tenure Protects Minority Voices from Employment Discrimination

Quite apart from the diversity of voices that tenure has promoted, it protects minority professors in another fundamental way: it makes the perpetuation of discrimination more difficult. Discriminatory discharge is the most frequently litigated claim under federal workplace antidiscrimination laws.⁶ Tenure's substantive and procedural safeguards are bulwarks against discriminatory dismissals. The ABA, as a body dedicated to "eliminat[ing] bias in the legal profession and the justice system,"⁷ should not make it easier for law schools to perpetrate bias against their own faculty members by eliminating tenure.

Neither of the Council's proposed substitutes for tenure will safeguard against racial, national origin, gender, sexual orientation, or disability bias. Alternative 1, in proposed standard 405(d), would simply require a litigation-breeding "form of security of position." Alternative 2 omits even this most minimal protection. Both are poor substitutes for traditional tenure because, under tenure systems, the burden of proof for dismissing a faculty member rests, in the first instance, with the university or the law school. The burden of proof in a discrimination claim, however, rests with the plaintiff. In eliminating a requirement of tenure, the Council has proposed a radical departure from a system of academic freedom that is entirely consistent with the ABA's mission of eliminating bias in the legal profession in favor of one that would deprive the most vulnerable category of teachers of the protections against bias.

Even though racial minorities and women have made slow and steady inroads into the ranks of tenure-track and tenured professors, white males continue to hold a substantial majority of the tenure-ranked positions in law schools.⁸ Indeed, white men have long enjoyed the security of tenure, well before there was a shadow of a minority presence in law schools. However, now that the minority presence is more visible, tenure has come under attack. As we address below, the arguments for its abolition as an accrediting requirement are thin. Crucially, to the prospective minority law professor, and to those currently in legal education, such arguments may matter less than the spectacle of attempting to weaken tenure protections just as such protections are beginning to accrue increasingly to nontraditional groups. This spectacle of retrenchment is particularly reprehensible in light of the efforts of other professional schools such as business schools to increase the tenured ranks of underrepresented groups.⁹ Sometimes appearances convey a more powerful message than can any proffered rationale.

⁶ See *EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year, 2012*, Equal Employment Opportunity Commission, <http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm> (According to the EEOC, "In fiscal year 2012, discharge was the most frequently-cited discriminatory action under all statutes . . .").

⁷ American Bar Association, *ABA Mission and Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

⁸ See Association of American Law Schools, *Statistical Report on Law School Faculty And Candidates for Law Faculty Positions*, <http://aals.org/statistics/2009dlt/security.html>.

⁹ Jodi Kantor, *Harvard Business School Case Study: Gender Equity*, NY TIMES (Sept. 7, 2013), <http://www.nytimes.com/2013/09/08/education/harvard-case-study-gender-equity.html?pagewanted=all>.

Lack of Compelling or Sensible Justifications for Targeting Tenure

Thus far, at least three reasons have been provided as justifications for the elimination of tenure as part of the accreditation process. The first focuses on the economic costs associated with tenure. As Dean Maureen O'Rourke explained in the *National Law Journal*, "[t]he biggest financial issues we have right now are our fixed costs, and our fixed costs come from tenured, salaried professors. . . . The solution is not to give everyone tenure, but to give no one tenure. Frankly, we don't need 200 law schools that look like Harvard Law School and value the same things as Harvard Law School. Somewhere down the line, the students got lost."¹⁰

With due respect, we find Dean O'Rourke's arguments unpersuasive. Every school that grants tenure currently has the ability to reduce its fixed costs by curtailing hiring or declaring a financial exigency, among other options. Fixed costs have nothing to do with the merits or utility of having tenure in the first place. Moreover, it should be noted that increased fixed costs due to salaries have as much to do with the longevity of service of a professor as they do with any system of tenure. In almost every profession, longevity of service correlates with a higher salary. Dean O'Rourke's comments, however, fail to take the relationship between longevity of service and salary into account. Instead, her comments seem to suggest that legal education would somehow be improved if law schools paid less to their most experienced teachers.

The second stated basis for the removal of tenure from the accreditation process reflects lack of clarity about the importance of tenure. Specifically, another member of the Council is reported to have justified his vote against requiring tenure by arguing that no one outside the academy understands why tenure exists and that this degree of job protection does not exist in other professions.¹¹ This is a rather curious argument to make in front of an Article III judge who chairs the Council and who enjoys lifetime tenure on the federal bench. More to the point, the fact that people outside the academy do not know why tenure exists is wholly irrelevant to a discussion about its utility and importance.

Core Values of Legal Education versus "Flexibility"

The third justification underlying the ABA's proposal to eliminate tenure as part of the ABA's accreditation process focuses on the needs of law school administrators to simply have greater "flexibility" to manage their schools and faculties.¹² We also find this argument unconvincing and, indeed problematic.

¹⁰ See also, Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, NAT'L L.J. (Aug. 12, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202614832071&ABA_Panel_Favors_Dropping_Law_School_Tenure_Requirement&slreturn=20130814230539

¹¹ *Id.*

¹² *Id.*

Specifically, we believe that Raymond Pierce’s comments¹³ are part of a larger debate between administrative officials who seek more “flexibility” and faculty who desire strong self-governing powers. The “flexibility” that Mr. Pierce is referring to is one that has long been craved by some career administrators in education—it is the flexibility to rid institutions of those professors who take faculty self-governance seriously. Given the very real and important goals of the mission of legal education as set forth in ABA standards, the consequences of “flexibility” in the University setting is not equivalent to those in the private sector, where some see short-term maximization of shareholder profit as the primary value. Legal education, indeed, higher education more broadly, has prioritized core values that include academic freedom and debate, intellectual curiosity and rigor, diversity and social justice. Too often, in faculty hiring and tenure decisions, “flexibility” has resulted in the exclusion of minority professors. “Flexibility” perpetuates the status quo of underrepresentation of minority professors in legal education. Racial diversity is a paramount value in legal education and it must be acknowledged and protected through the tenure system.

Need for More Diverse Representation on the Council

Finally, the decision to eliminate tenure as an accreditation requirement threatens law school tenure and, therefore, such a consideration requires meaningful participation by a broad cross-section of law professors. Such participation should have been undertaken during the earliest stages of deliberations. We question the absence of a more diverse representation among the Council members. The Council includes too few law teachers. It simply has not fully benefitted from the full participation of key stakeholders on the delicate and politically sensitive issue of abolishing tenure as a requirement of law school accreditation. Indeed, the work product of the committee itself proves this point. It is likely that throughout the legal academy and in circles beyond maintenance of the status quo of tenure enjoys considerable support. Yet, within the Council, there was not enough support to even vote out a recommendation that the current accreditation requirement of tenure be maintained.

Currently, the Council includes only one member of the Association of American Law Schools Section on Minority Groups. While the Council is certainly an esteemed group, the fact that the Council did not have a more diverse makeup is a process failure. The omission of important demographic groups from the Council’s decision-makers undoubtedly contributed to the short shrift it apparently gave to arguments that abolition of tenure will be particularly deleterious to underrepresented groups within the legal academy.

For all of the foregoing reasons, we respectfully oppose the Council’s recommendations.

List of Signatories

¹³ *Id.*