

Part 5: Change in institutions of higher learning

Part 5 is divided into four parts:

- 1) Challenges and obstacles
- 2) Institutional change
- 3) The need for change
- 4) Court decisions relating to faculty

1) Challenges and obstacles

What does change in the practices and policies for recognizing and evaluating work by faculty in film and digital media at institutions of higher learning entail? Times are a'changin' and change is in the air. Boyer (1990) wrote: "It is time to end the suffocating practice in which colleges and universities measure themselves" (p. xiii). Change refers to the transition that occurs from sameness to difference. For example, water in the liquid state is not the same as water in the frozen state; thus, the water experienced a transition from sameness to difference. An alternative view or strategy about change in organizations or institutions, change that benefits those of us at the borders, is not easily or overtly found in the literature, nor is it easily accomplished in traditional and conventional university settings. Scholarly inquiry about change has not overtly examined the issue of (non-) recognition and (unfair) evaluation of faculty work in the field of film and digital media. Therefore, change can only be advocated from bits and pieces that have emerged, directly or indirectly. The process of inquiry has led to an untested theory that is emerging from the integration of data that I have collected; and change will only be determined through comparison of characteristics that determine the relative sameness or difference over time.

2) Institutional change

Institutionalization of Boyer's four domains is an important theme in a range of literature relating to *change* in the ways that the evaluation of research by faculty occurs. Braxton, Luckey and Helland (2002) and Glassick, Huber, and Maeroff (1997) emphasize the importance of achieving institutionalization of Boyer's four domains, advocating institutionalization on three levels: structural, procedural, and incorporation. To achieve institutionalization of the four domains, the criteria for defining and rewarding scholarship should match Boyer's formulations, and should be consistent with the institution's mission statement (Braxton, Luckey and Helland, 2002). The guiding definition of institutionalization as used by Braxton, Luckey and Helland (2002), based upon Clark (1971, P. 75) is:

...institutionalization, more broadly conceived, is the process whereby specific cultural elements or cultural objects are adopted by actors in a social system...to the point at which an innovative practice loses its special project status and become part of the routine behavior of the system (p. 5).

Scholars that advocate institutionalization of Boyer's four domains unanimously agree that lasting change entirely depends on innovation becomes institutionalized (Braxton, Luckey and Helland, 2002). Braxton, Luckey and Helland (2002) identify many factors about the traditional research template that impede institutionalization of Boyer's four domains, including: prevailing processes used to discourage innovative approaches to research, the imposition of irrelevant criteria to assess creative or alternative forms of scholarship by faculty, and the failure of institutional processes to acknowledge the forms and domains of scholarship other than discovery (Braxton, Luckey and Helland, 2002).

Diamond (1993c) writes: “In order for institutional change to be successful, those directing the process must have a plan that develops ownership in the final system by everyone who will be involved in or affected by its implementation” (p. 3). But how is paradigmatic change to be achieved? According to Diamond (1993c), change in the processes for recognizing and evaluating faculty work in the field of film and digital media involves five basic steps:

- Development of an institutional mission statement
- Development of departmental and divisional mission statements in concert with the institutional statement.
- Development of departmental and divisional promotion and tenure guidelines and procedures based on the goals in those mission statements.
- Institutional review and approval of both mission statements and the faculty reward guidelines.
- Change requires a commitment from all participants in the process, but most institutions of higher learning continue to be structured hierarchically, like a pyramid.

The locus of power is concentrated and held by a few at the top point, supported by lesser levels of power in the ranks of followership as the pyramid descends downward toward the base.

Diamond (1993c) lists three recommendations as a framework for change:

- Re-conceptualization of faculty priorities requires a genuine commitment to change.
- The entire academic community must be actively involved in the change process.
- The difficulty of the process of changing promotion and tenure criteria will vary across academic areas and faculty.

It is essential, as explained in Chapter 5, that administrators take full responsibility for providing the guidelines, general procedures, and defining the roles and time line that frame the

process (Diamond, 1993c). It also must also be noted that nothing from the top will change unless everyone from top to bottom buy into the change. Any modification that is anticipated in an institutional system for performance evaluation of faculty work should be clearly articulated and understood by all participants in the process---administrators, committee members and faculty applicants.

3) The need for change

Boyer (1990) has opened up an alternative paradigm for defining faculty scholarship, one that ultimately allows for the prioritization and recognition of artistic, scholarly and professional work in film, digital media, and in many other academic fields (Braxton, Luckey and Helland, 2007; Glassick, Huber and Maeroff, 1997; Diamond, 1993; Diamond, 1999; Lincoln and Guba, 1985). The contribution of Boyer (1990) and others (Rice, 1988; 1995) have facilitated a higher level of respect and status for the full range of faculty work and activities relating to the trilogy of teaching, research and service, and has compelled higher education to demonstrate the imagination and creativity to support and reward both scholars uniquely gifted in performing the processes of (conventional and unconventional) research, and those who excel in other uses of knowledge (Glassick, Huber and Maeroff, 1997). Boyer (1990) has developed a panoramic, socially involved and socially responsible view for institutional and community-based service, and a meaningful model that equally values and prioritizes the full range of scholarship of activities that are performed by faculty members. However, change is needed and should not be assumed.

As institutions of higher learning have “grown more and more complex, the disciplines have become increasingly divided, and academic departments frequently are disconnected from

one another...evidence abounds that many professors are ambivalent about their roles” (Boyer, 1990, p. 2). The result has been that some, perhaps many, faculty members (including myself) suffer from a lack of intrinsic motivation in the workplace because conflicting priorities “demoralizes the professoriate, erodes the vitality of the institution, and cannot help but have a negative impact on students” (Boyer, 1990, p. 2-3). Intrinsic motivation, and the underlying human need for competence and self-determination, cannot be realized in a negative environment of conflicting priorities (La Pelle, 1997; Deci and Ryan, 1985).

As I began my search of literature, I was unable to define the plethora of problems that face faculty members that enter the seemingly simple process of applying for a promotion of academic rank on the basis of artistic, scholarly or professional work in film and digital media. I intuited problems through my own personal experience, but after reading a range of literature about the process of academic performance evaluation I became more able to systematically understand the scope and nature of the problem situation. Inconsistencies and ambiguities became apparent in my own workplace as performance evaluation processes were being conducted without written criteria pertaining to work by faculty in film and digital media, and the depth of the problem was affirmed in the literature that I was beginning to find and read. The first scholarly writing that I was fortunate to read, found luckily through a random search of the Fielding database of doctoral dissertations that used grounded theory methods (Glaser, 1976), was a doctoral dissertation written by La Pelle (1997). La Pelle (1997) provides a useful description about a lack of intrinsic motivation that can occur as the result of a performance evaluation:

When people are intrinsically motivated, they will be involved in an ongoing cyclical process of seeking out or creating optimally challenging situations and then attempting to

conquer those situations. They will direct their attention to those activities that require them to learn or stretch their abilities a small amount. Activities that are too challenging or too easy/boring will be abandoned. An intrinsically motivated activity is one that would be undertaken without any apparent external reward, where the reward is said to be in the activity itself (p. 10).

Recognizing the significance of intrinsically motivated work, in contrast to and distinct from extrinsically motivated work, magnifies the most important purpose of this dissertation--- developing a model (in Chapter 5) for performance evaluation that can increase personal satisfaction and intrinsic motivation; and reinforce the perception that individuals and groups have control over their self and their actions.

What will happen if change is not forthcoming, or if faculty succumb (or are forced to succumb) and thus abandon the principles the possibilities offered by change? Wait and Hope (2009) offer five probable results for faculty in the arts based on observations of what has already been happening, and what potentially will be the long-term results:

First, we will be placed in an evaluation environment that is alien to the pursuit of our particular goals, an environment that attacks any attempt to solidify the validity of our goals.

Second, our precious time will be requisitioned for purposes not consistent with the nature of our work. Because time is a finite resource, our ability to be productive in our fields is lessened.

Third, the illusion has already been created and will be furthered that assessment requires no expertise in the thing being assessed, but only expertise in assessment. A way-station to this goal is the splintering of wholes into parts and then focusing on the parts that are easy

to evaluate in a technical way and magnifying them to obscure or deny the existence of the whole.

Fourth, these three results will lead to a loss of control in curriculum, teaching, individual approaches, and evaluation. Control passes from the field to external, usually centralized bodies that make judgments on the basis of images created by numbers, rather than real achievement in the discipline.

Finally, an abandonment of our principles and ways of working will reduce our productivity as our time and energy are spent either fighting for the working room we need to be productive, or answering assessment requirements that are not based on the nature of what we do (p. 10-11).

4) Court decisions relating to faculty

Litigation and decisions that emerge in courts of law are potentially powerful facilitators of change. There is a changing legal landscape as society, including faculty, becomes more litigious. There are laws, legal protections and court decisions that are applicable to faculty, colleges and universities that are related to the inquiry of this dissertation. In theory, institutional change can emerge from conflicts that are resolved through litigation in the court. Conflicts and litigation emerge from disagreements about the (mis-) application of institutional processes, rules and regulations; from alleged breaches of oral or written contractual agreements pertaining to faculty appointment and contractual renewal (or tenure), from perceived irregular deviations from academic customs, from disagreements about the merits of a rendered decision, and (where applicable) from disputes arising from collective bargaining agreements. In an effort to determine the extent that faculty have found relief from their conflicts through legal litigation in

courts of law, I have searched legal briefs and other documents pertaining to court proceedings and disputes in law at the levels of the state and supreme court, to consider the scope and nature of judicial decisions concerning faculty in higher education.

Faculty in many fields have been terminated, professionally marginalized, or prejudiced in their academic workplace as a consequence of negative performance evaluations, and lawsuits have ensued (See Appendix M). Faculty members have sought remedy and relief, successfully and unsuccessfully, from the court in matters involving negative performance evaluations which have resulted in the denial of tenure, denial of promotion of rank, or a perceived breach of contract; lodging legal complaints on alleged violations of academic freedom, discrimination on the basis of gender/sex, and negative perceptions about collegiality (*Fisher v. Vassar College*, 852 F. Supp. 1193 (S.D.N.Y. 1994), rev'd, 6 F.3d 379 (2d Cir. 1995), aff'd, 114 F.3d 1332 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998); *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989); *Kunda v. Muhlenberg College*, 621 F.2d 532 (2d Cir. 1980)).

Courts have long adhered to a rule that college and university tenure decisions are presumptively correct and entitled to deference. This is derived from the common-law rule of academic abstention protecting colleges and universities from judicial reconsideration of the merits of tenure decisions and from contemporary principles of institutional autonomy. It is a fundamental precept of American higher education law that courts should refrain from reviewing the merits of tenure and promotion decisions. There is a long history of case law and judicial opinions that support the doctrine of institutional autonomy, protecting the tenure and promotion processes of colleges and universities. The rule has been uniformly applied to insulate colleges

and universities from judicial reconsideration of the merits of faculty tenure and promotion decisions.

Byrne (1989) describes academic *abstention* as: “the traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration’s good faith performance of its core functions.” Such core functions include the decision whether to promote a faculty member in rank or to a tenured position. There are essentially two reasons that justify judicial deference:

- Tenure decisions involve complex, subjective assessments of scholarship—a task that courts are generally not equipped or willing to make.
- Institutional autonomy promotes academic freedom by insulating colleges and universities from the potential effects of external intrusion in the performance review process that are not necessarily related to the merits of particular case.

On three occasions the United States Supreme Court has explicitly endorsed the principle of academic abstention with respect to a university’s core academic decision making---Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985), and Grutter v. Bollinger, 539 U.S. 306, 328 (2003). The general rule is articulated in *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264, 1270 (M.D. Pa. 1976):

[A reviewing] court is powerless to substitute its judgment for that of the University as to whether plaintiff’s academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an

academic committee's decision. The courts will not serve as a Super-Tenure Review Committee.

Over the last three decades, courts have consistently applied the doctrine of academic abstention and declined reconsideration of the merits of institutional tenure and promotion decisions. The historical context in which the courts' strong reluctance to intrude in tenure and promotion decisions have been consistently reflected the courts of the United States (p. 1270).

The most efficient way to find legal cases is through the fee-based data base service of Lexis/Nexis (www.lexisnexis.com), though it only highlights appellate cases. For jurisdictions in the United States, a free site for some legal information is FindLaw.com, and a google.com search can also be fruitful in locating basic information and linkages to additional resources. I also found excellent data bases of legal briefs and analytical writings about higher education law at the websites for the American Council on Education (www.acenet.edu/bookstore) and the American Association of University Professors (www.aaup.org). For my research to be comprehensive in scope, if I were examining the breadth of legal issues and court decisions pertaining to faculty performance evaluation in a particular state or nationally, I would also have to decide what jurisdictions are to be focused upon, and to look for cases that might not have necessarily been appealed or tried, neither of which did I find it necessary to do for this inquiry. Pure legal research sources are not likely to highlight professor vs. non-professor plaintiffs and college vs. non-college employers, so it would also be extremely difficult to locate such cases to determine relevance to this inquiry.

In order for a claim to proceed in a court of law it must be based upon a breach of expressed or implied contract, or upon some other form of unlawful employment practice (hostile environment, retaliation, wrongful termination, defamation; or upon a form of

discrimination that violates statutory or Constitutional protections. The latter would have to involve a protected class or characteristic under the Human Rights Act, Civil Rights Act, American with Disabilities Act (ADA); and involve claims such as discrimination on the basis of age, speech protections, disability, sexual preference, race, or religion.

I have read and reviewed at least twenty-five court decisions about faculty claims of wrongful termination, arbitrary dismissal, violations of constitutional protections, and other concerns that relate to performance evaluation in higher education. I have observed that in a large number of cases the faculty claim does not prevail, particularly at the appellate court level, probably because the threshold for proving discrimination that coincides with the claim of employment termination is extremely difficult to meet to the satisfaction of the court. Alleging that a decision to not-renew a contract or not award tenure is unfair or baseless is not enough to satisfy the court, there must also be a provable case of discrimination that coincides with the employment issue.

The emerging conclusion from my reading and review of legal cases, as further discussed in Chapter 4, is that an aggrieved faculty member in the academic field of film and digital media cannot expect change or to find solace or resolution in the court by filing a claim about disputed performance evaluation decisions or processes. The gauntlet of faculty performance evaluation is backed up by a litany of institutional rules upon rules, reinforced by local, state and federal labor laws and other legal protections that are enjoyed by an employer; with the case being argued by an army of lawyers who are on the university's payroll. Colleges and universities are protected by a long history of legal precedent for academic absentism, while faculty have few ways to overcome this legal and theoretical threshold. For a faculty to find relief in the court, opposing a university or college, would be (at best) a David v Goliath battle, one that is argued in

a setting that might be willing or inclined to intervene in institutional matters, nor be willing to facilitate change through its rendering of judicial opinion.

Therefore, this dissertation places great emphasis upon the imperative for establishment and implementation of clear, written, fair and relevant criteria, emerging from a broad-based consensus of opinion that includes all concerned parties (including faculty) about what constitutes the expectations of faculty and faculty work, particularly in the academic field of film and digital media. This pro-active effort will preclude a quagmire of conflict and litigation in the future.