

**HOW TO MAKE TRADITIONAL TENURE SYSTEMS MORE FLEXIBLE AND
EFFECTIVE WHILE STILL PROVIDING PROFESSORS WITH THE
PROTECTIONS THEY DESERVE**

By: Megan Gordon

**Education Law and Policy
Dean Kaufman
Spring 2009**

INTRODUCTION

It is estimated that in the United States, 99% of all public institutions and 91% of all private universities offer some form of tenure.¹ However, even with the overwhelming majority of higher education institutions extending tenure protections to their professors, the practice of tenure has been under increasing attack. Proponents of tenure portray the university professor as one who is diligent in teaching and brilliant in publication, yet who expresses controversial opinions in class or supports unpopular causes which are troublesome to the administration and, whose contract, without tenure to protect his exercise of academic freedom, would not be renewed.² On the other hand, opponents of tenure portray the university professor as one whom, having achieved tenured status, lapses into a prolonged period of under-productivity, whose research and teaching stagnates, yet with whom the university is economically saddled until the professor chooses to retire.³

Because of this and various other critiques of tenure, many alternatives to the traditional tenure system have been proposed. After reviewing many of these proposed reforms, the approach that not only assists in eliminating some of the drawbacks of tenure but also continues to ensure the protections intended by the traditional tenure system is the implementation of a new pre and post-tenure review process. This new tenure modification would be based on a two-step reform that first approaches the process of granting tenure in a different light and second, monitors the continued development of professors after they have received tenure. While general post-tenure review programs have been previously proposed, the approach discussed in this article creates a new post-tenure review process that focuses not simply on peer review but on a combination of peer and student reviews.

¹ Constance Hawke, J.D., Tenure's Tenacity in Higher Education, 120 Ed. Law Rep. 621, 623 (1997).

² Hawke, *Supra*, note 1 at 621.

³ Id.

This article begins by addressing the evolution and history of tenure as well as its legal status and development. Part II will examine the various arguments against the traditional tenure system and explain why modifications may be necessary. Part III will briefly discuss various previously proposed alternatives to tenure and then focus on an in-depth discussion of the proposed student and peer focused pre and post-tenure review process. Finally, Part IV will approach the issue of tenure from a professor's perspective and shed some light on how different tenure systems affect the academic environment at institutions of higher education.

PART I: THE HISTORY AND LEGAL BACKGROUND OF TENURE

The Evolution of Tenure

The concept of tenure dates all the way back to the twelfth century and evolved from the German concept of academic freedom which recognized the rights of teachers and professors to instruct students without interference from outside groups or other influences.⁴ The tenure concept was not officially introduced into the American higher education system until the early twentieth century by the American Association of University Professors (AAUP).⁵ In 1915, the AAUP published a General Report on Academic Freedom and Tenure which identified three elements of academic freedom: the freedom of inquiry and research; freedom of teaching within the university; and freedom of extramural utterance and action.⁶ Later, in 1940, the AAUP articulated a new set of principles focusing not just on academic freedom, but on two additional rationales, namely (1) security of employment and (2) that all dismissals must be for cause and reviewed through a trial-type procedure.⁷

⁴ Hawke, *Supra* note 1, at 622.

⁵ *Id.*

⁶ James J. Fishman, Tenure and Its Discontents: The Worst Form of Employment Relationship Save All Others, 21 *Pace L. Rev.* 159, 168-69 (2000).

⁷ Fishman, *Supra* note 6 at 168.

The system that emerged from these principles is what is today known as academic tenure. Academic tenure is defined as a permanent employment contract conferred upon a teacher or professor after a probationary period which is intended to guarantee intellectual freedom and independence as well as shield faculty members from being terminated for arbitrary or doctrinal reasons.⁸ It is the product of a bargain between academic institutions and faculty to create an exception to the general rule that indefinite employments are terminable at will.⁹

Once a teacher has achieved tenure it is nearly impossible for that teacher to be removed without “cause.”¹⁰ There are a few recognized categories of behavior that will constitute “cause” under most tenure statutes, including (1) financial exigency; (2) extreme incompetence; (3) insubordination; (4) illegal activity; (5) moral turpitude specifically related to the teaching function; and (6) sexual harassment.¹¹ Accordingly, even if a teacher is unsatisfactory, generally incompetent, or fails to meet the standards of performance established by the school district or the state, tenure will protect that teacher from being dismissed.¹²

A Legal Approach to Tenure:

Before discussing any ways in which the tenure system should be modified, it is first necessary to understand the legal nature of tenure. Tenure is a matter of state law or “custom” and is regulated through state statutes.¹³ Today, almost every state in the United States has some form of tenure statute.¹⁴ Because tenure is created through statute, it can therefore be

⁸ Hawke, *Supra* note 1, at 622.

⁹ Harry F. Tepker, Jr., Good Cause and Just Expectations: Academic Tenure In Oklahoma’s Public Colleges and Universities, 46 Okla. L. Rev. 205, 208 (1993).

¹⁰ Michael J. Kaufman, J.D. with Sheryln R. Kaufman, J.D., M.A. in Teaching, Education Law, Policy, and Practice, 824 (2005).

¹¹ Kaufman, *Supra* note 10, at 824; Fishman, *Supra* note 6, at 200.

¹² Kaufman, *Supra* note 10.

¹³ Id.

¹⁴ Id.

modified or eliminated by state law.¹⁵ However, there are two major road blocks that stand in the way of altering tenure statues, namely, the two constitutional rights conferred on tenured professors. First, tenure statutes can create a contractual relationship between the university and the professor and when that is the case, subsequent legislation cannot alter a professor's contractual right in violation of Article I, Section 10 of the Constitution.¹⁶ Second, tenure confers a property interest that cannot be taken away from a tenured professor without complying with the requirements delineated in the Constitution's Due Process Clause.¹⁷ Accordingly, before altering its tenure system in any way, a university must be sure it is not infringing upon either of these constitutional rights.

Tenure as a Property Right

The first cases to address tenure as a property right which cannot be taken away without due process were the companion cases of Board of Regents v. Roth and Perry v. Sinderman. In Roth, a first-year faculty member, who was informed that he would not be rehired the following year without being given a reason for the decision nor an opportunity to challenge the decision, filed an action for violation of due process.¹⁸ The Court determined that, as a non-tenured probationary faculty member employed under a one-year contract, the plaintiff could not prove deprivation of a property or liberty interest and therefore, he was not entitled to the due process safeguards of the Fourteenth Amendment.¹⁹ Alternatively, in Sinderman, the plaintiff had been employed as a college professor in a state system for over ten years before he was suddenly dismissed without a reason nor an opportunity to be heard.²⁰ The Court found in this case that

¹⁵ Id.

¹⁶ Kaufman, *Supra* note 10.

¹⁷ Id. at 825.

¹⁸ Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

¹⁹ Id.

²⁰ Perry v. Sinderman, 408 U.S. 593, 603 (1972).

even where there is no explicit contractual grant of tenure, a faculty member might possess a “legitimate claim of entitlement to continued employment” (and thus a property interest) in light of the policies and practices of the institution.²¹ Read together, these two cases have been viewed to firmly establish that academic tenure constitutes a legally recognized property right of which a faculty member cannot be deprived of without due process.²²

The type of due process that must be afforded to faculty members was established by a later decision, Cleveland Board of Education v. Loudermill, which held that an individual with a constitutionally protected property interest in continued employment must be given an opportunity for “some kind of hearing” prior to the discharge which affords the employee notice and the opportunity to respond.²³ Since the recognition of tenure as a property interest, most university policies as well as state tenure statutes have been drafted to ensure that a member of the faculty of any public university cannot be dismissed or removed except for cause and after a hearing.²⁴ When such procedures are followed, courts will uphold modifications to tenure policies which result in the dismissal of tenured faculty so long as there is adequate cause.²⁵

Tenure as a Contract Right

Both public and private institutions must also be aware of potential violations of the Constitution’s Contract Clause before making any modifications to tenure law and policy. Under the precedent established by United States Trust Company of New York v. New Jersey, a state may not impair state or private contracts unless such impairment is both “reasonable and necessary to serve an important public purpose.”²⁶ Therefore, the general rule is that for a

²¹ Id.

²² Hawke, *Supra* note 1, at 626.

²³ Cleveland Board of Education v. Loudermill, 470 U.S. 532, 532 (1985).

²⁴ Hawke, *Supra* note 1, at 627.

²⁵ Id.

²⁶ United States Trust Company of New York v. New Jersey, 431 U.S. 1 (1977).

contract right to be revoked or modified by subsequent statute or rule there must be either (1) a provision for such changes or modifications in the contract made by the parties, or (2) the changes or modifications proposed must satisfy the requirements of the Contracts Clause.²⁷

When examining this rule as it pertains specifically to tenure statutes, the United States Supreme Court held in Indiana ex rel Anderson v. Brand, that an Indiana law which negated tenure rights in public school teachers was an unconstitutional impairment of their employment contracts.²⁸ If however, as was the case in Gardiner v. Tschechtelin, the abrogation of tenure and dismissal of faculty is shown to be “necessary to serve an important public purpose,” then such action can be taken without violating the Contracts Clause.²⁹ While past precedent has shown that in some circumstances tenure modifications have succeeded in complying with the requirements of the Contracts Clause, what is imperative if such an attempt is to be made is that the state be able to enunciate reasons why the desired impairment or modification of the contractual tenure right is reasonable and necessary and that state legislatures be fortified with appropriate statistics to bolster their claims of an important public purpose.³⁰

PART II: THE ATTACKS ON THE TRADITIONAL TENURE SYSTEM

There are three major categories that the various attacks on academic tenure typically fall into.³¹ The first is the financial cost of tenure on academic institutions.³² Almost all institutions in higher education today face a constant financial struggle.³³ Universities are always looking to cut costs in order to prevent tuition increases. Often, the easiest way of doing so is cutting highly

²⁷ Id.

²⁸ Indiana ex rel Anderson v. Brand, 303 U.S. 95 (1938).

²⁹ Gardiner v. Tschechtelin, 765 F.Supp. 279 (D.Md. 1991).

³⁰ Hawke, *Supra* note 1, at 630.

³¹ Id. at 624-25.

³² Id. at 624.

³³ Fishman, *Supra* note 6, at 170.

paid, under-performing professors from the teaching staff.³⁴ However, as a majority of the highest paid professors are protected by tenure, these universities are restricted from taking such action and therefore find themselves in a serious economic dilemma.³⁵ There is of course a flip side to this critique in that proponents of tenure argue that tenure is actually an economically efficient institution as the benefits of tenure are the reason universities are able to pay lower salaries overall while still attracting qualified and distinguished professionals.³⁶

The second argument for limiting tenure is that many claim it is no longer necessary to protect academic freedom because of the First Amendment protections in place and available to improperly terminated professors.³⁷ Opponents of tenure argue that a professor who is disciplined or dismissed for expressing certain views in the classroom has legal recourse regardless of whether he or she has the statutory protection of tenure and therefore, the drawbacks of the traditional tenure system outweigh the now unnecessary tenure protection of academic freedom.³⁸ On the other hand, proponents of tenure argue that this reasoning is flawed as First Amendment protections are only available once a faculty member has been deprived of his or her rights and that therefore, academic tenure is necessary to promote the social climate of free speech and open debate that is vital to the academic environment.³⁹

The final and most important justification for limiting or modifying tenure is to make professors accountable for their performance after achieving tenure.⁴⁰ Opponents of tenure maintain that it encourages complacency and mediocrity among faculty because they are no

³⁴ Id.

³⁵ Id.

³⁶ Fishman, *Supra* note 6, at 181-82.

³⁷ Hawke, *Supra* note 1, at 625.

³⁸ Id.

³⁹ Id. at 625.

⁴⁰ Id.

longer accountable to their employers once tenure is achieved.⁴¹ They claim that the system of tenure transforms previously energetic, gifted and promising faculty into deadwood professors because they lose interest in the hard, frustrating, and time-consuming work that teaching and scholarship entail.⁴² Some have gone so far as to claim that tenure is “a shield for indifference and neglect of scholarly duties” and a practice which “grants faculty members a freedom from accountability that would be unacceptable for any other profession.”⁴³

PART III: WHAT SHOULD BE DONE TO REFORM TENURE?

While the majority of tenured professors are highly-qualified, dedicated and productive individuals who appreciate their tenured appointment and work hard to deserve it, there are still those professors who, as a result of the job security that accompanies tenure status, fail to continue providing substantive benefits to the institution or its students and should therefore be subject to dismissal.⁴⁴ However, history has shown that it has been nearly impossible to fire tenured faculty.⁴⁵ Each year there are approximately 50 formal dismissals out of the roughly 300,000 tenured professors in the United States.⁴⁶ As one author interestingly notes, in over 300 years Harvard University has never stripped a professor of tenure, including a professor who murdered a colleague and was sentenced to death, eventually being sent to the gallows with his tenure intact.⁴⁷

There are many alternatives and tenure reforms that have been proposed by critics of the traditional tenure system that could prevent the existence of “deadwood” professors and permit

⁴¹ Robert C. Cloud, Evaluating and Revising Tenure in Higher Education: Implications For Practitioners, 128 Ed. Law Rep. 931, 931 (1998).

⁴² Fishman, *Supra* note 6, at 188.

⁴³ Hawke, *Supra* note 1, at 623.

⁴⁴ Cloud, *Supra* note 41, at 937.

⁴⁵ Fishman, *Supra* note 6, at 173.

⁴⁶ Id.

⁴⁷ Samuel Eliot Morrison, *Three Centuries of Harvard* 282-86 (Harvard University Press, 1936).

universities to take action by replacing underperforming faculty. The most drastic is to simply eliminate tenure programs for incoming professors.⁴⁸ Another approach is to extend initial, short-term contracts, to be followed by more lengthy contracts, which gradually diminish in length as the faculty member reaches advanced age.⁴⁹ This is known as term tenure and provides the benefit of job security while also providing an incentive to perform well as there is always the potential of non-reappointment.⁵⁰ A third alternative is to hire temporary, part-time instructors for specific classes who are paid per course, receive no benefits, and have no guarantee of future appointments.⁵¹ This grants the university complete flexibility in the hiring and firing of its faculty, however, offers no guarantee of economic security or academic freedom. Lastly, because the majority of tenured professors are senior faculty and because of the recent limitations and changes in the Age Discrimination in Employment Act, many universities have discussed implementing early retirement incentive programs.⁵²

While each of these alternatives may serve to create a more flexible environment in which universities can dismiss underperforming faculty, they do so at the cost of the deserving faculty who will be stripped of the protections tenure traditionally affords, namely economic security and academic freedom. For that reason, the benefits of each of the above alternatives fail to outweigh the costs. The only approach that has the potential to both protect deserving faculty as well as provide universities with a method of discovering and dealing with underperforming faculty is a reformed pre and post-tenure review process.

⁴⁸ Hawke, *Supra* note 1, at 636.

⁴⁹ A. Kenneth Pye, What's Wrong With Our Universities? An additional View, 14 Harv. J.L. & Pub. Pol'y 335, 350 (1991).

⁵⁰ Fishman, *Supra* note 6, at 194.

⁵¹ Hawke, *Supra* note 1, at 633.

⁵² *Id.* at 634.

Reforming the Pre-Tenure Process

The first step that should be taken to improve the workings of the tenure system is to reform the pre-tenure process.⁵³ Currently, the process of obtaining tenure is treated as a marathon where a finisher, who completes the specified requirements, throws himself over the finish line with the expectation of a reward and often without the expectation of continued training and hard work.⁵⁴ While the benefits of tenure are clear and typically much deserved, tenure should not simply be viewed as a reward for hard work completed in the past. It should include both recognition of the professor's past work as well as a renewed commitment to ongoing development and continued success. The institution's focus in granting tenure should be on the professor's ability to grow and contribute to the university.⁵⁵ It should consider how the professor will exceed the standards set for achieving tenure, not simply whether the work completed up to that point meets some sort of bottom line. Creating such a system of aspirations and expectations in the pre-tenure process could vitalize some professors the way the insecurity engendered by non-tenured systems do.⁵⁶

Reforming the Post-tenure Process by Implementing a Post-tenure Review System

The second step that should be taken is to implement a student and peer post-tenure review process. Traditional post-tenure review or "interruptible tenure" is the alternative approach receiving the most attention by legal scholars and is the process best equipped to cure certain problems with the tenure system.⁵⁷ Post-tenure review is the process of periodically reviewing a tenured professor's performance and, in the case of unsatisfactory reviews, interrupting the tenure status thereby allowing the university to dismiss the underperforming

⁵³ Fishman, *Supra* note 6, at 186.

⁵⁴ Fishman, *Supra* note 6, at 187.

⁵⁵ *Id.*

⁵⁶ *Id.* at 189.

⁵⁷ Hawke, *Supra* note 1, at 637.

professor.⁵⁸ Many have accepted this alternative because it continues to afford professors the protection of academic freedom, the spirit of tenure, while at the same time continuing to motivate professors after they have obtained tenure by monitoring their level and quality of work and requiring a steady and continuing standard of excellence.⁵⁹

Many universities around the country have implemented a system of post-tenure review including The University of Hawaii, The University of Wisconsin, The University of Kentucky, The University of Colorado, and Virginia Polytechnic Institute.⁶⁰ The major problem with the systems in place at these universities, and with virtually all post-tenure review programs traditionally proposed, is that the reviews are being conducted solely by administrators and peers. None of the programs at these universities incorporate a formal system of student review into the post-tenure review process. A modified post-tenure review process that focuses on both student and peer review is the best way to continue providing tenure protections to deserving professors while also protecting universities and students from the underproductive and underperforming faculty which can develop through the traditional tenure system.

Why Students Should Play a Role in Post-tenure Review

While many institutions allow their students to evaluate their professors at the end of each course, there is typically no real action taken as a result of those evaluations. Of course, some professors take the critiques and praises of their students to heart and focus on implementing suggested modifications and continuing effective and desired techniques. However, that is not always the case and without a program in place where the administration joins in reviewing those student evaluations and assists the professors in reforming ineffective

⁵⁸ Id.

⁵⁹ Hawke, *Supra* note 1, at 637.

⁶⁰ Ira P. Robbins, Exploring the Concept of Post-Tenure Review in Law Schools, 9 *Stan. L. & Pol'y Rev.* 387, 393-93 (1998).

aspects of their teaching, student evaluations are rendered meaningless. Additionally, students are aware of this fact and therefore, often do not put the serious consideration and effort into the evaluations that they would if they knew their suggestions could somehow make a difference.

Creating a system where students play an active role in the post-tenure review process is imperative because it is the students who should be deriving the most benefit from a staff of talented, inspiring and qualified professors. Also, it is the students who will suffer the greatest loss when professors fail to live up to a continuing standard of excellence as a result of the fact that they have grown too comfortable since obtaining tenure. Student evaluations are also important as students will likely be more honest than a group of the professor's colleagues and friends. Additionally, students have a better understanding of a professor's performance in the classroom as they, unlike other professors, are present in class.

Arguments Against Post-tenure Review and Potential Problems with Student Review

The main argument against post-tenure review is that it is an inefficient use of resources as faculty and administrators are asked to expend their valuable time to review and evaluate their peers.⁶¹ First, taking some time to review the work of your fellow professors in an attempt to assist in bettering their individual professional path as well as create a stronger, more productive team of professors dedicated to teaching students and advancing the ideals of the academic field hardly seems like a burden far too heavy for professors to bear. But even more importantly, this criticism serves to demonstrate another reason that it would be beneficial to get students involved in the post-tenure review process. Allowing hundreds of students to assist professors in shouldering the responsibility for helping improve the academic community at an institution will lessen the burden on the faculty as well as add a necessary perspective to the review process.

⁶¹ Robbins, *Supra* note 60, at 390.

An additional problem with the majority of the post-tenure review programs in place today is that the focus of the review is mostly on what the professor has done as far as professional development and work outside the classroom.⁶² This is due mostly to the fact that it is a professor's peers, not students, who are completing the reviews. While the scholarly enterprise is definitely an integral part of a professor's career and is often very important to the university, it is vital not to ignore what is going on in the classroom. Including students in the review process will split the focus of the reviews between the teaching process and professional development. After all, should not a driving force behind measuring the quality of a professor and the university as a whole be ensuring that the students are provided with the most valuable education their high-priced tuition can buy?

While it is without a doubt crucial to reform the traditional post-tenure review process to include student reviews, there are of course some potential problems with allowing students to wield any substantial power over the job security of a professor. First and foremost is the fact that typically, a student's number one concern is his or her grades. Therefore, it would quite obviously be important to administer the evaluations before grades are determined. This would assist in keeping students from avenging a poor grade by attacking the professor responsible for it and focusing only on the effectiveness of the professor's teaching methods, the content of the professor's course and ways in which each could be improved.

A second potential problem with incorporating students into the review process is that students may be just as likely as members of the administration to target a professor for expressing views or practicing teaching methods contrary to what the student believes is proper. However, even if this were to occasionally occur, such baseless negative reviews by a few students would not carry the weight necessary to threaten the tenure status of the professor. This

⁶² Robbins, *Supra* note 60, at 391.

is unlike the danger faced when a select few members of the administration decide to target a professor because in that case, even a single administrator with enough power in the post-tenure review process could cost the professor his or her job. Alternatively, with student reviews, in order for a professor's tenure status to be at risk, the post-tenure review system would require that a majority of the students in a class deliver negative reviews focused on issues such as teaching ability, attention to students, content of the course, and the like. There would also need to be a pattern of these negative reviews over the course of a few teaching cycles in order to ensure that drastic action is not taken prematurely. When, however, a professor does receive extremely poor evaluations from a majority of the students over an extended period of time, that professor should be subject to dismissal under a post-tenure review process worked into the university's policies and state tenure statute.

PART IV: TENURE FROM A PROFESSOR'S PERSPECTIVE:

To this point, this article has addressed the issue of tenure and the arguments for and against modifying the tenure system from a legal perspective. But clearly, aside from law school professors, it is not lawyers who will experience the effects of any changes made to the tenure system. Therefore, it seemed pertinent to lastly approach the tenure issue from a professor's perspective. The professor interviewed is a doctoral professor of psychology who has personally seen the benefits and pitfalls of the tenure system through working for the last 25 years at two institutions of higher education, only one of which offered its faculty tenure.⁶³ The professor stated that the difference in the academic environment at the two institutions was drastic. At the institution that did not offer tenure, the professors were persistently coerced by the administration. The professor stated that she and her colleagues worked in an environment of

⁶³ The name of the professor as well as the names of both institutions are being kept nameless at the request of the professor interviewed.

fear and possessed absolutely no level of academic freedom. The administration targeted professors who constituted what the provost considered a threat or who expressed alternative ideas or approaches to teaching and research. During her ten years at this university, over 30 professors were replaced by “friends” of the administration. The professor described a level of systematic corruption and harassment that, without tenure protection, the professors were forced to either endure or find a new job. This professor found a new job.

While there were likely additional issues which contributed to the unstable and corrupt academic environment at the first institution, the professor stated that the lack of tenure protection played a major role. She strongly feels that such an environment could not survive at an institution which provided their professors with tenure. The professor explained that this is mainly due to the fact that tenure not only permits, but it requires people in power positions to be morally responsible for their actions. To her, tenure is not just about job security and, academic freedom is not just about teaching and researching what you wish. It is about working in an environment where you are able to stand up for what you believe in without working in constant fear of being coerced and controlled by the administration. This professor stated that now, as a tenured professor, she feels empowered to not only teach and work on what she believes in but also, to stand up for herself. The environment at her current institution focuses on promoting creativity and productivity and is a night-and-day change from the institution without tenure.

Finally, when asked about reforming or limiting tenure, the professor stated that she is definitely behind instituting a system of ongoing monitoring or evaluation that would make sure tenured professors continued to be engaged and prolific in their work. She believes students should play an integral role in any evaluation system as she views student feedback as the most

valuable since they will make sure to focus on how to better their education as opposed to how to better aspects affecting faculty or administration.

CONCLUSION

Regardless of whether one is of the belief that the higher education system should or should not provide professors with the protections and benefits of tenure, the vital importance of and purpose behind tenure cannot be denied. The great majority of tenured professors are special people, with extraordinary talents, providing invaluable services to our society and they are therefore entitled to economic and professional security through the traditional tenure system or something like it.⁶⁴ Accordingly, the answer is not to do away with tenure but to reinvigorate it by vitalizing faculty responsibility through creating incentives to maintain commitment and hard work after tenure status has been achieved.⁶⁵ The approach proposed in this article, unlike other proposed tenure reforms, focuses not on forcing professors to relinquish their well-earned rights but rather, on the responsibility of the university's administrative and student bodies to create an environment of expectations and incentives for tenured faculty and encouraging professors, through this modified pre and post-tenure review process, to exercise the responsibilities that accompany their tenured status.⁶⁶

⁶⁴ Cloud, *Supra* note 41, at 937.

⁶⁵ Fishman, *Supra* note 6, at 202.

⁶⁶ *Id.* at 161-62.