

## OLD SCHOOL? O.K.: NO NEED TO RETURN TO MANDATORY RETIREMENT IN HIGHER EDUCATION

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*In 1967, Congress passed the Age Discrimination in Employment Act (ADEA), which provided in part that “[i]t shall be unlawful for an employer . . . to discharge any individual . . . because of such individual’s age.” However, from 1978 until 1994, Congress included an amendment which excluded tenured faculty at higher education institutions from protection under the ADEA. This Note examines the increasing age of the professoriate at American institutions of higher education since the amendment expired and whether these institutions should again be permitted to utilize mandatory retirement policies. This Note also discusses the effectiveness of current alternative methods to mandatory retirement used by some higher education institutions to incentivize retirement among the aging professoriate, including phased retirement, buyouts, and post-tenure review. The author ultimately determines that it would be a mistake to allow for mandatory retirement in higher education institutions because older professors offer talent and experience that is disappearing at institutions of higher education that heavily rely on adjunct professors. Additionally, prohibiting mandatory retirement has been beneficial in that it has forced institutions of higher education to experiment with programs that make the transition of faculty into retirement more comfortable.*

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## I. Introduction

In 2006, Mildred S. Dresselhaus, a professor at the Massachusetts Institute of Technology (MIT), was juggling professional obligations, such as advising one of her seven Ph.D. students and pursuing and publishing research in the field of carbon-based nanotechnology.<sup>1</sup> The content and demand of her work, while evidence of her exceptional capabilities, seem ordinary and expected for a professor in her field, until one takes into account that she was seventy-five in 2006.<sup>2</sup> Mildred is among an increasing number of older professors in higher education.<sup>3</sup>

Before 1994, MIT could have requested that Mildred retire at age seventy, and she would have had no choice but to comply.<sup>4</sup> However, fifteen years ago, a law prohibiting institutions of higher education from imposing mandatory retirement upon their faculty took effect<sup>5</sup> despite warnings that the professoriate would age dramatically.<sup>6</sup> As the example of Mildred and her peers demonstrates, these predictions have become a reality; since 1994, the average age of the professoriate has increased.<sup>7</sup> This trend raises questions such as, “What, if any, have been the adverse impacts on institutions of higher education?” as well as the predictable follow-up, “If a serious problem exists, what solutions are desirable?” The Nobel Prize-winning economist Gary Becker recently advocated abolishing the law prohibiting mandatory retirement policies at institutions of higher education as the most effective way to curb the graying of America’s faculty.<sup>8</sup>

This Note considers Becker’s proposal as part of a broader evaluation of the decision to statutorily deny institutions of higher educa-

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1. Curt Fischer, *Still Hanging Around: Profs Put Off Retiring*, TECH, Apr. 28, 2006, at 1, available at <http://tech.mit.edu/V126/N21/agingfaculty.html>.

2. *Id.*

3. See *Oh No—They Won’t Go*, TIMES HIGHER EDUC. SUPPLEMENT, Feb. 2, 2007, at 10, available at <http://www.timeshighereducation.co.uk/story.asp?StoryCode=207671&sectioncode=26>.

4. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-236, sec. 3, § 12(d), 92 Stat. 189, 190 (permitting compulsory retirement for tenured faculty).

5. See Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, sec. 6(b), 100 Stat. 3342, 3344 (enacting prohibition of compulsory retirement in higher education).

6. U.S. DEP’T OF LABOR, 97TH CONG., ABOLISHING MANDATORY RETIREMENT (IMPLICATIONS FOR AMERICA AND SOCIAL SECURITY OF ELIMINATING AGE DISCRIMINATION IN EMPLOYMENT) 25–26 (COMM. PRINT 1981).

7. *Oh No—They Won’t Go*, *supra* note 3, at 10.

8. Posting of Gary Becker to TheBecker-PosnerBlog, [http://www.becker-posner-blog.com/archives/2008/07/the\\_graying\\_of.html](http://www.becker-posner-blog.com/archives/2008/07/the_graying_of.html) (July 6, 2008, 21:48 CST).

tion the ability to impose mandatory retirement on their faculty and ultimately determines that there is no need for the law to be repealed and that in a way, it enables the preservation of academic quality. Part II recounts the passage of the original Age Discrimination in Employment Act, how the law's protection eventually encompassed faculty at higher education institutions, and the pros and cons according to the contemporaries of the debate surrounding that extension. Part III examines the current academic setting, where faculty demographics have validated a central concern of these arguments. In determining whether these developments indeed are problematic, it is important to define exactly the interests of the involved parties that the law should mind and then assess the relative effectiveness of current methods higher education institutions have fashioned in response to the law and an aging professoriate versus mandatory retirement. Part IV argues that it would be a mistake to abolish this law. Older professors offer talent and experience that is disappearing at institutions of higher education that heavily rely on adjunct professors. Moreover, prohibiting mandatory retirement actually has been beneficial in that it forces institutions of higher education to experiment with programs that make the transition of faculty into retirement more comfortable.

## II. Background

To help frame the criteria in evaluating legislation, it is important to have an understanding of how the law came to be, the competing concerns of its contemporary advocates and opponents, and how the law has shaped the relevant landscape. Therefore, Part II begins by tracing the struggle for faculty rights that paralleled the evolution of the Age Discrimination in Employment Act. It then describes the arguments advanced by those resisting the law's coverage of professors in higher education as well as the ultimately victorious claims from those who supported this protection. Finally, Part II surveys the current academic setting as this law has affected it.

### A. Relevant Law

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA),<sup>9</sup> which provided in part that “[i]t shall be unlawful for an employer . . . to discharge any individual . . . because of such individ-

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9. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–631 (2000).

ual's age."<sup>10</sup> According to the Congressional Statement of Findings and Purpose, the law specifically was designed "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment"<sup>11</sup> based on findings that, among other things, it was increasingly common for employers to use mandatory retirement programs that significantly disadvantaged older workers.<sup>12</sup> In its original incarnation, the ADEA only protected individuals younger than sixty-five.<sup>13</sup>

Over a decade later, Congress extended the age cap to seventy.<sup>14</sup> However, the amended ADEA contained a provision stating that [n]othing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education.<sup>15</sup>

In 1986, Congress once more amended the Act to remove the maximum age limitation entirely,<sup>16</sup> but yet again prolonged the window for institutions of higher education to administer mandatory retirement.<sup>17</sup> The 1986 amendment, however, would be the last time Congress would exclude tenured faculty at higher education institutions from protection under the ADEA because the amendment also provided that the section permitting mandatory retirement by higher education institutions would expire on December 31, 1993,<sup>18</sup> and Congress never renewed that section.

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10. § 623(a)(1).

11. § 621(b).

12. See § 621(a)(2).

13. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 603, 607.

14. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-235, sec. 3, § 12(a), 92 Stat. 189, 190.

15. § 12(d).

16. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, sec. 2(c), § 12, 100 Stat. 3342, 3342.

17. Sec. 6(a), § 12.

18. Sec. 6(b).

## B. The Arguments for and Against Sanctioning Mandatory Retirement

The prohibition of mandatory retirement in higher education institutions was not without controversy, as demonstrated by the fact that this goal was not achieved until 1994, twenty-seven years after the passage of the original ADEA.<sup>19</sup>

### 1. ARGUMENTS IN FAVOR OF MANDATORY RETIREMENT

In 1981, the Department of Labor submitted a report that, while impartial, provided empirical support for the argument against lifting mandatory retirement.<sup>20</sup> Given demographic trends, and given, too, the fact that the faculty of higher education institutions tend to be healthier and enjoy longer life spans than their peers in the general population, the professoriate was bound to gray in the coming decades if Congress abolished mandatory retirement in academia.<sup>21</sup> Because older faculty received salaries that were roughly double those of newly hired faculty, higher education institutions also would bear heavier compensation costs.<sup>22</sup>

Surprisingly, a representative of the American Association of University Professors (AAUP), Harvard Law Professor John T. Dunlop, raised additional concerns in his testimony before the Senate Subcommittee on Labor in 1982.<sup>23</sup> Dunlop identified two major problems with eliminating mandatory retirement. The first was that allowing faculty to remain employed indefinitely would continue to limit already reduced opportunities for prospective faculty.<sup>24</sup> In the 1950s and 1960s, there was a large increase in the hiring of professors as part of an education expansion effort causing many professors to be concentrated in the same age bracket.<sup>25</sup> In 1982, there was a projected decrease in student enrollment, meaning that higher education institutions would have no need to hire new professors until the “bulge”

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19. *Id.*

20. See generally U.S. DEP'T OF LABOR, *supra* note 6.

21. *Id.* at 25–26.

22. *Id.* at 248.

23. *Prohibition of Mandatory Retirement and Employment Rights Act of 1982: Hearing Before the Subcomm. on Labor of the S. Comm. on Labor and Human Resources*, 97th Cong. 140–47 (1982) [hereinafter *Hearings*] (statement of John T. Dunlop, Lamont University Professor, Harvard University).

24. *Id.* at 142.

25. *Id.* at 142–43.

succumbed to attrition.<sup>26</sup> With no mandatory retirement to unclog the system, faculty fresh out of graduate school would have limited opportunities, which would deprive higher education institutions of the innovative ideas and perspectives that younger minds tend to provide.<sup>27</sup> Fewer positions also would be available for women and minorities, who had been considerably underrepresented among the professoriate.<sup>28</sup>

Dunlop also feared the possible unintended consequence of an assault on tenure by higher education institutions as a substitute for mandatory retirement.<sup>29</sup> Tenure is a status which provides that "no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause."<sup>30</sup> Justified causes for overriding tenure status include neglect of duty, incompetence, and professional and personal misconduct.<sup>31</sup> The purpose of tenure is to protect academic freedom by shielding faculty from termination for holding unpopular or controversial views.<sup>32</sup> According to Dunlop, in the absence of mandatory retirement, professors undeserving of dismissal for cause could remain employed as long as they pleased, and higher education institutions would possibly feel forced to revoke tenure for faculty over seventy or eradicate tenure entirely as an alternative means of achieving turnover and maintaining quality.<sup>33</sup> Indeed, it appears that these combined threats were so unnerving as to spur an alliance between organizations representing both faculty and administrations in favor of keeping mandatory retirement.<sup>34</sup>

Given the significant societal role of institutions of higher education, perhaps the most fundamental argument in favor of mandatory retirement is that an institution with an aging faculty is less able to maintain high academic standards because there exists an inverse rela-

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26. *Id.* at 143.

27. *Id.* at 143-44.

28. *Id.* at 143.

29. *Id.* at 144-45.

30. THE CASE FOR TENURE 3-4 (Matthew Finkin ed., 1996) (quoting William Van Alstyne, *Tenure: A Summary, Explanation, and Defense*, 57 AM. ASS'N U. PROFESSORS BULL. 329 (1971)).

31. Donna R. Euben, *Tenure: Perspectives and Challenges*, AM. ASS'N OF UNIV. PROFESSORS, Oct. 2002, <http://www.aaup.org/AAUP/protect/legal/topics/tenure-perspectives.htm>.

32. *Hearings*, *supra* note 23, at 144-45 (statement of John T. Dunlop, Lamont University Professor, Harvard University).

33. *Id.* at 145-46.

34. *See id.* at 140-41.

tionship between age on one hand and mental acuity and productivity on the other.<sup>35</sup> The faculty would “grow increasingly ineffective but unremovable because of the tenure system.”<sup>36</sup>

## 2. ARGUMENTS AGAINST MANDATORY RETIREMENT

Although Dunlop was in part representing the AAUP, it is not entirely accurate to infer that most faculty in higher education were comfortable with mandatory retirement. The Labor Department Report found that sixty percent of all faculty members favored or strongly favored eliminating mandatory retirement.<sup>37</sup> In fact, by 1993, when the grace period for higher education institutions was about to expire, the AAUP recanted its position from over a decade earlier in its congressional testimony.<sup>38</sup>

Opponents of mandatory retirement eventually prevailed with the following arguments. The National Academy of Sciences Committee on Mandatory Retirement in Higher Education, which was commissioned after the 1986 amendments and composed of tenured faculty and administrators, presented its findings and reached the conclusion that removing mandatory retirement would be viable.<sup>39</sup> The committee found that even if faculty were given the option to continue working past seventy, most would not, with the exception of those at a few research institutions, where faculty tended to retire later than their colleagues at other schools.<sup>40</sup> The committee also concluded that higher education institutions would not target tenure in the absence of mandatory retirement as a means of removing deadwood because there would be no need; the evidence did not affirm the popular belief that older faculty had a significantly reduced capacity for teaching and research compared to other age groups.<sup>41</sup> As with any underperforming faculty, institutions of higher education could use other means, such as post-tenure review, to maintain the institution’s stan-

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35. See NAT’L RESEARCH COUNCIL, COMM. ON MANDATORY RETIREMENT IN HIGHER EDUC., ENDING MANDATORY RETIREMENT FOR TENURED FACULTY: THE CONSEQUENCES FOR HIGHER EDUCATION 49, 55 (1991).

36. *Id.* at 1.

37. U.S. DEP’T OF LABOR, *supra* note 6, at 239.

38. See *Hearing on Age Discrimination in Employment Act [ADEA]: Hearing Before the Subcomm. on Select Education and Civil Rights of the H. Comm. on Education and Labor*, 103d Cong. 49 (1993) [hereinafter *Hearing on ADEA*] (testimony of Dr. Mary Gray, Professor, American University).

39. *Id.* at 14 (testimony of Dr. Donald Hood, Professor, Columbia University).

40. *Id.* at 15.

41. *Id.* at 18.

dards in a procedurally fair and nondiscriminatory manner.<sup>42</sup> In light of these findings, Congress recognized that permitting higher education institutions to continue mandatory retirement was unjustified, and that right ceased to exist after 1994.<sup>45</sup>

### C. Fifteen Years Later

Since 1994, faculty in institutions of higher education have continued to gray.<sup>44</sup> According to a study by the University of California in Los Angeles Higher Education Research Institute, “[t]he percentage of full-time faculty aged 70 years or older has tripled in the past ten years. A third of US faculty are now aged 55 or older, compared with fewer than a quarter in 1989. . . . The proportion of those aged under 45 years has fallen from 41 per cent to 34 per cent in the same period.”<sup>45</sup> The average age of retiring faculty members also appears to be increasing.<sup>46</sup> According to a 2007 telephone survey conducted by TIAA-CREF, a corporation that provides retirement planning assistance to faculty, “faculty members appear to be retiring at 66, on average, and that age is drifting upward . . . [with] about one-third of those responding expected to retire at age 70 or later.”<sup>47</sup> Another study of 104 institutions of higher education showed retirement rates at age seventy to have decreased by forty-five percent and thirty-seven percent at age seventy-one.<sup>48</sup> A recent survey suggested that faculty intend to maintain this trend, with almost one-third of respondents expressing the desire to stay employed until age seventy and almost forty percent of respondents realistically envisioning themselves retiring at or past age seventy.<sup>49</sup> Also, the aging of the faculty undercuts the fact that,

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42. *See id.*

43. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, sec. 6(b), 100 Stat. 3342, 3344.

44. *Oh No—They Won’t Go*, *supra* note 3, at 10.

45. *Id.*

46. David L. Wheeler, *Colleges Explore New Ways to Manage Retirements*, 54 CHRON. HIGHER EDUC., June 13, 2008, at A1 (2008).

47. *Id.*

48. ROBERT L. CLARK, CHANGING FACULTY DEMOGRAPHICS AND THE NEED FOR NEW POLICIES 8 (2004).

49. PAUL J. YAKOBOSKI, DO ALL GREAT MINDS THINK ALIKE? FACULTY PERSPECTIVES ON CAREER AND RETIREMENT 8 (2007).

according to demographic figures, women and minorities constitute the majority of younger faculty.<sup>50</sup>

Contrary to the predictions of those who testified in favor of lifting mandatory retirement,<sup>51</sup> a substantial portion of the faculty have chosen to take advantage of their choice to remain employed past seventy,<sup>52</sup> and the dreaded crusade to do away with tenure in response never materialized.<sup>53</sup> However, higher education institutions that want to encourage their older professors to retire earlier are not without options. The Committee on Mandatory Retirement in Higher Education predicted that professors at primarily research-oriented higher education institutions would retire later once Congress lifted mandatory retirement, and it recommended several voluntary incentive programs these institutions could use to mitigate the harmful effects of an aging professoriate.<sup>54</sup> Heeding this advice, higher education institutions began to experiment with these programs in the late 1980s.<sup>55</sup>

In 2007, the AAUP published a survey of 567 public and private institutions of higher education that identified trends in faculty retirement policies.<sup>56</sup> Thirty-eight percent of responding institutions reported that they offered a retirement incentive program.<sup>57</sup> Also known as buy-outs, retirement incentive programs are offers by the institution to pay faculty to retire.<sup>58</sup> Usually, these offers are available to any faculty who meet minimum age and years of service requirements.<sup>59</sup> The amount of most buy-outs did not exceed the equivalent of nine months of salary.<sup>60</sup>

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50. AM. COUNCIL ON EDUC. CTR. FOR POLICY ANALYSIS, *TOO MANY RUNGS ON THE LADDER?: FACULTY DEMOGRAPHICS AND THE FUTURE LEADERSHIP OF HIGHER EDUCATION 1* (2008).

51. *Hearing on ADEA*, *supra* note 38, at 15 (testimony of Dr. Donald Hood, Professor, Columbia University).

52. Wheeler, *supra* note 46, at A1.

53. *Hearings*, *supra* note 23, at 145–46; JOHN PENCAVEL, *FACULTY RETIREMENT INCENTIVES BY COLLEGES AND UNIVERSITIES 5* (2004).

54. *Hearing on ADEA*, *supra* note 38, at 15–18 (testimony of Dr. Donald Hood, Professor, Columbia University).

55. David W. Leslie & Natasha Janson, *Easing the Exit*, *CHANGE*, Nov./Dec. 2005, at 40, 42.

56. VALERIE MARTIN CONLEY, *SURVEY OF CHANGES IN FACULTY RETIREMENT POLICIES 1–2* (2007).

57. *Id.* at 8.

58. *Id.* at 8–9.

59. *Id.* at 8.

60. *Id.* at 9.

Higher education institutions also have offered phased retirement programs in lieu of mandatory retirement.<sup>61</sup> Phased retirement programs allow tenured faculty to work part-time (either by working every other semester or according to a flat reduced time throughout the entire period) and receive prorated pay (for example, half-pay for half-time) for usually three to five years in exchange for relinquishing tenure and agreeing to retire completely at the end of that period.<sup>62</sup> Thirty-two percent of surveyed institutions reported offering a phased retirement program.<sup>63</sup> Similar programs allow retired faculty to work part-time for the same pay as other part-time faculty if they surrender tenure status.<sup>64</sup>

Finally, post-tenure review, also introduced in the 1990s and alluded to as a possible tool by the Committee on Mandatory Retirement in Higher Education, is now conducted by public universities in thirty-seven states, although not as a catalyst for retirement.<sup>65</sup>

### III. Analysis

This section begins by defining the measuring standards and the interests the law must further. With the defined goal as a backdrop, Part III next lays out the advantages and disadvantages of programs of universities that have introduced post-mandatory retirement, as well as the merits of mandatory retirement itself, and establishes the empirical foundation for concluding whether Congress should repeal the law outlawing mandatory retirement.

#### A. Defining Success

One cannot draw a comparison between mandatory retirement and its alternatives in terms of efficacy without first identifying the interests of the major parties affected by the law. Of course, faculty would like to control the decision to retire in order to make the transition as smooth as possible, to continue pursuing their passion as long as they are able and willing, and to feel uninhibited to express their

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61. *Id.*

62. *Id.*; see Leslie & Janson, *supra* note 55, at 43.

63. CONLEY, *supra* note 56, at 9.

64. *See id.* at 10.

65. *Hearing on ADEA, supra* note 38, at 18 (testimony of Dr. Donald Hood, Professor, Columbia University); Gabriela Montell, *The Fallout from Post-Tenure Review*, CHRON., Oct. 17, 2002, available at <http://chronicle.com/article/The-Fallout-From-Post-Tenure/46063>.

perhaps controversial views. On the other hand, institutions of higher education have very important social obligations including maintaining high quality academic environments for their students as well as producing groundbreaking research in some cases. As with so many laws, the name of the game is balance. The optimal legal regime should be able to advance the mission of higher education institutions in a manner that is fair and respectful toward the professoriate; to the extent that professors indeed do grow significantly more unproductive or desolate of new ideas as they age and for this or other reasons become a burden to the institution's academic objectives, the institution somehow should be able to remove them. However, if this assumption about older faculty is exaggerated, then institutions lose their justification and have an obligation under the tenure system to retain faculty absent some legitimate cause. These interests should be the context of the evaluation.

## B. The Options

When assessing the effectiveness of a program that incentivizes early retirement, it is important to understand what encourages faculty to retire or deters them from retiring. As is true in any profession, retirement would appeal to faculty who experienced health problems and fatigue with age, no longer enjoyed work, wanted to devote more time to themselves and families, or had the financial ability to retire comfortably.<sup>66</sup>

However, many faculty may be reticent to retire for several reasons. One motivation to remain employed is that one's job can be a very significant aspect of his or her identity, which retirement can abruptly strip away.<sup>67</sup> The psychological effect on faculty could be more damaging because they are likely to view their vocation as especially worthwhile; according to a survey "of 300 full-time faculty members at four-year institutions . . . 53 percent of professors were 'very satisfied' with their jobs, compared with 42 percent of all workers."<sup>68</sup> The current recession certainly will make retirement less appealing and may encourage some professors to take advantage of their unique job

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66. Leslie & Janson, *supra* note 55, at 41.

67. *Id.*

68. Wheeler, *supra* note 46, at A1.

security until the economic conditions are more favorable.<sup>69</sup> Professors also may find it difficult to give up their employee health benefits.<sup>70</sup>

#### 1. PHASED RETIREMENT

Campus administrators can smooth the edges of retirement by offering a phased retirement option. Instead of severing their attachment to campus in one act, faculty still can enjoy social interaction with their colleagues and prepare themselves for retired life through partial exposure.<sup>71</sup> Some arrangements allow for faculty to discontinue their administrative duties (i.e., serving on committees and boards) in favor of teaching and research.<sup>72</sup> Although there may be aspects of phased retirement that faculty dislike, such as reduced access to accommodations like offices or lab space or losing certain voting privileges that come with tenure, many probably would recognize the relative gentleness compared to instant retirement.<sup>73</sup>

Whether phased retirement makes financial sense for a professor depends on his or her preexisting situation as well as what type of pension plans the institution offers.<sup>74</sup> A defined benefit plan determines a fixed annual pension benefit based on the recipient's salary and other factors (e.g., years of service).<sup>75</sup> In a defined contribution plan, both the institution and the professor contribute a fixed amount (typically a percentage of annual salary) to a fund over a certain period of time, which is then invested into securities.<sup>76</sup> When the professor retires, he or she receives the fund as an annuity.<sup>77</sup> Defined contribution plans can induce faculty to keep working for additional full years in hopes of receiving an increased annuity by tacking on another year of contributions and continuing to earn returns on the securities into which the fund is invested.<sup>78</sup>

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69. Scott Jaschik, *Will Professors Delay Retirements?*, INSIDE HIGHER ED, Sept. 18, 2008, <http://insidehighered.com/news/2008/09/18/retire>.

70. *Id.*

71. Leslie & Janson, *supra* note 55, at 42.

72. *Id.*

73. *Id.* at 46.

74. See STEVEN G. ALLEN, THE VALUE OF PHASED RETIREMENT 4 (2004); Leslie & Janson, *supra* note 55, at 45.

75. PENCAVEL, *supra* note 53, at 7.

76. See CONLEY, *supra* note 56, at 2.

77. PENCAVEL, *supra* note 53, at 7.

78. *Id.*

Yet a faculty member who participates in a defined contribution plan may, anticipating possible market volatility, decide in favor of phased retirement in order to capitalize on a favorable present market, begin receiving income from the pension fund, and still continue working part-time.<sup>79</sup> In fact, institutions offering defined contribution plans are more likely also to encourage phased retirement for this reason.<sup>80</sup> By contrast, defined benefit plans better weather the ebbs and flows of the market by themselves.<sup>81</sup>

Although sometimes phased retirement may not be the most financially sound option for a particular faculty member,<sup>82</sup> phased retirees can get more bang for their buck than from maintaining a full-time capacity “whenever the sum of one-half of the academic salary [an assumed prorated pay for hypothetical purposes] and all pension income exceeds the regular academic salary (or equivalently, if pension income exceeds one-half the academic salary).”<sup>83</sup> However, some faculty may opt to continue working full-time even when this is the case because annuity income substantially increases as faculty approach the age where they can receive partial or full benefits under Social Security or a defined benefit pension.<sup>84</sup>

Institutions of higher education can benefit through recovering the salary difference between a full-time faculty member and one who has elected for phased retirement.<sup>85</sup> Academic management also has more certainty in planning by securing a commitment from a professor to retire at a specified time.<sup>86</sup> Moreover, despite prevailing negative assumptions regarding the teaching and research ability of older professors, they can guide developing professors by drawing on the wealth of their experiences.<sup>87</sup>

Whatever the intuitive benefits of phased retirement and the positive reviews from those who have chosen it, few professors actually have taken advantage of phased retirement.<sup>88</sup> According to a study published in 2005, only four percent of all tenured faculty at sampled

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79. ALLEN, *supra* note 74, at 3–4.

80. See PENCANEL, *supra* note 53, at 16–18.

81. See Jaschik, *supra* note 69.

82. See Wheeler, *supra* note 46, at A1.

83. ALLEN, *supra* note 74, at 3.

84. *Id.* at 3–4.

85. Leslie & Janson, *supra* note 55, at 46.

86. *Id.*

87. *Id.*

88. *Id.*

four-year institutions participate in phased retirement, with those over sixty-four especially unlikely to partake.<sup>89</sup> Also, phased retirement is more popular at institutions whose faculty focus on teaching as opposed to ones that are more research oriented, the latter of which already are more inclined to retire after sixty-five.<sup>90</sup> However, surveys gauging receptiveness toward phased retirement are promising, with one finding that forty percent of respondents would be very likely to accept such an offer.<sup>91</sup>

In addition, phased retirement systems do pose disadvantages for the institutions implementing them.<sup>92</sup> First, in addition to the fact that few faculty actually elect to phase their retirements,<sup>93</sup> the data are inconclusive as to whether these programs result in faculty ultimately retiring earlier than they would have otherwise.<sup>94</sup> For example, although a professor may decide to phase before the time he or she planned to retire completely, thus entering into an agreement to leave the institution eventually, the actual phased retirement period may extend beyond the date he or she would have otherwise retired permanently.<sup>95</sup> Although phased retirees may enjoy the freedom from full-year commitments such as committee work, other faculty may have to assume those obligations because individual departments may be unable to hire a new faculty member until a phasing professor's retirement becomes permanent.<sup>96</sup> Also, salary compression has reduced the worth of the recouped salary from a faculty member entering phased retirement in paying new hires.<sup>97</sup>

Keeping in mind that one of the goals defined above was for these programs to encourage the retirement of faculty who become insufficiently productive with age (if that is indeed the case), one criticism of incentive programs in general is that they have an adverse selection effect; the most talented faculty members are likely to accept phased retirement, perhaps as a springboard for another position at a different education institution or outside of education.<sup>98</sup> The counter-

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89. *Id.* at 43.

90. *Id.*

91. YAKOBOSKI, *supra* note 49, at 11.

92. Leslie & Janson, *supra* note 55, at 46.

93. *Id.* at 43.

94. ALLEN, *supra* note 74, at 5.

95. *Id.*

96. Leslie & Janson, *supra* note 55, at 46.

97. *Id.*

98. Posting of Gary Becker, *supra* note 8.

argument is that phased retirement would appeal to less productive faculty who may have fewer options when negotiating a post-retirement part-time salary without these incentive programs or outside of the institution.<sup>99</sup> Studies tend to support the counterargument that faculty who are less valuable are more likely to opt for phased retirement.<sup>100</sup> Research also demonstrates that phased retirement programs encourage faculty, who in the absence of such plans would have remained employed in a full-time capacity, to retire, thus suggesting that phased retirement could increase faculty retirement figures.<sup>101</sup>

Overall, phased retirement may represent a beneficial option from the perspective of faculty, depending on a particular professor's financial situation.<sup>102</sup> Although phased retirement has not been overwhelmingly popular, perhaps once faculty see how their colleagues benefit, participation will increase. However, it is not clear that phased retirement is ideal for institutions of higher education. While phased retirement provides those managing retirements in higher education with greater certainty, one cannot positively conclude from existing data how much money phased retirement actually saves these institutions or the extent to which it slows the graying of the faculty. In addition, when the institution accommodates older faculty with a reduced load, other faculty must shoulder any orphaned responsibilities.

## 2. BUYOUTS

Institutions of higher education view successful buyouts as a swift means of removing older faculty because these offers typically are only available for a limited window.<sup>103</sup> If the institution is lucky, the incentive can be relatively modest and still appeal to faculty, thus resulting in appreciable savings for the institution.<sup>104</sup>

However, the main drawback is that faculty can negate a buyout with a holdout.<sup>105</sup> In other words, if a buyout is unsatisfactory to facul-

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99. ALLEN, *supra* note 74, at 5–6.

100. Robert L. Clark & Madeleine B. D'Ambrosio, *Recruitment, Retention, and Retirement: Compensation and Employment Policies for Higher Education*, 31 EDUC. GERONTOLOGY 385, 396 (2005).

101. *Id.*

102. See ALLEN, *supra* note 74, at 4; Leslie & Janson, *supra* note 55, at 46.

103. PENCANEL, *supra* note 53, at 21.

104. *Id.*

105. *Id.* at 5.

ty, they can ignore it and force a better offer, which may be less cost-effective for the institution.<sup>106</sup> A recent survey showed that only twenty-two percent of respondents would be very likely and that forty-four percent would be somewhat likely to accept a buyout,<sup>107</sup> and bargaining strategy may be the cause of this reluctance. Of course, institutions could shift excess costs to students by raising tuition, but the steady increase in tuition costs is an already unpopular reality.<sup>108</sup> Also, as is the concern with phased retirement, buyouts risk adverse selection whereby the highest quality faculty are more likely to accept the offer in order to pursue another career opportunity.<sup>109</sup>

A case study tested for these disadvantages.<sup>110</sup> The study examined the buyout program that the University of California implemented in order to hasten the retirement of tenured faculty given sudden budgetary restraints in the early 1990s.<sup>111</sup> Ultimately, approximately twenty percent of the tenured faculty in 1990 accepted the buyout.<sup>112</sup> University administrators, despite having no formal cost-benefit analysis to support their conclusion, reported that the initiative was a success in that it achieved significant reductions in faculty, especially older faculty.<sup>113</sup> The University claimed to have avoided the problems of adverse selection and severe depletion of pension funds.<sup>114</sup> Although one case study cannot entirely assuage doubts, these findings encourage hope that buyouts can have some positive results for all interested parties.

### 3. POST-TENURE REVIEW

Post-tenure review has been a controversial, albeit anticlimactic, method designed to hold tenured faculty accountable for their performance.<sup>115</sup> Institutions can administer post-tenure review periodically or if a professor triggers it by receiving unsatisfactory marks on a

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106. *Id.*

107. YAKOBOSKI, *supra* note 49, at 11.

108. Posting of Richard Posner to TheBecker-PosnerBlog, [http://www.becker-posner-blog.com/archives/2008/07/aging\\_professor.html](http://www.becker-posner-blog.com/archives/2008/07/aging_professor.html) (July 6, 2008, 21:33 CST).

109. PENCAVEL, *supra* note 53, at 22.

110. *Id.*

111. *Id.* at 22–23.

112. *Id.* at 23.

113. *Id.* at 29.

114. *Id.* at 30.

115. See Montell, *supra* note 65.

certain number of annual reviews.<sup>116</sup> Organizations such as the AAUP are wary of post-tenure review for several reasons.<sup>117</sup> Post-tenure review appears redundant amidst traditional evaluation methods such as reviews determining salary, promotion, appointment to committees and administrative positions, and the awarding of grants, as well as peer and student reviews.<sup>118</sup> A possible unintended consequence of post-tenure review would be that it reduces academic quality by pressuring faculty to focus on quantity to boost their records instead of concentrating on producing well-researched, valuable contributions to their fields.<sup>119</sup> Another concern is the potential for abuse; under post-tenure review, faculty bear the burden of satisfying the institution, whereas they enjoy a favorable presumption under the classic tenure system.<sup>120</sup> As is the case with any merit review system, administrators could manipulate post-tenure review to target and purge faculty with controversial or unpopular views.<sup>121</sup>

Such is the suspicion of one of the few professors to be discharged as a result of an unfavorable post-tenure review, Steven Wiest, formerly of the Kansas State University horticulture department.<sup>122</sup> Wiest maintained that his involvement in the removal of a prior head of his department, not substandard performance, was the basis for his dismissal.<sup>123</sup>

Despite the fears that post-tenure review would usurp the protections of tenure, few tenured faculty actually fail or even receive substandard marks under post-tenure review and get fired as a result, and not many faculty feel the need to cry foul.<sup>124</sup> Nevertheless, inactivity does not mean that post-tenure review is ineffective in ensuring the performance quality of professors. Many administrators prefer to use post-tenure review to help faculty who are underperforming to outline an improvement plan and shore up their weaknesses, and many professors have testified that the system has helped them realize their

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116. *Id.*

117. See AM. ASS'N OF UNIV. PROFESSORS, POST TENURE REVIEW: AN AAUP RESPONSE 60–61 (1999), <http://www.aaup.org/NR/rdonlyres/BBF5E3D5-5A39-4265-B1B9-FD59FE4AC70C/0/PostTenureReviewAnAAUPResponse.pdf>.

118. *Id.*

119. Montell, *supra* note 65.

120. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 117, at 61.

121. Montell, *supra* note 65.

122. *Id.*

123. *Id.*

124. *Id.*

full potential.<sup>125</sup> It also may be that the extent of the fire which post-tenure review was designed to extinguish, deadwood faculty, was overstated.<sup>126</sup> Thus, it is possible for post-tenure review to serve its purpose of ensuring faculty quality without deteriorating into a witch hunt or a contest for superficial recognition.

#### 4. THE ADVANTAGES OF MANDATORY RETIREMENT

How does mandatory retirement compare to the combination of incentive and accountability mechanisms applied above under the same standards? First, it is important to note that the way in which institutions of higher education managed mandatory retirement policies was not as rigid as one may imagine. Institutions of higher education only maintained a presumption against future employment, but retirement was not the predestined fate for all faculty members.<sup>127</sup> Institutions tended to enforce mandatory retirement, which allows faculty to negotiate with the administration for a one-to-five year extension, not compulsory retirement, which affords no room for negotiation.<sup>128</sup> Thus, universities had the flexibility to retain exceptional faculty. Gary Becker cited two colleagues, the Nobel Prize-winning economists George Stigler and T.W. Schultz, who were able to remain employed past eighty years of age by virtue of their previous accomplishments and future potential to contribute.<sup>129</sup> Mandatory retirement enables institutions of higher education to maintain their academic standards by clearing the decks of older faculty who are assumedly less productive in favor of new hires but still make exceptions so as not to lose outstanding professors. Such a system also upholds a level of fairness (albeit drastically less generous than the alternatives to mandatory retirement described above) by sparing faculty who have demonstrated their superior worth to the institution.

Obviously, mandatory retirement saves costs for institutions of higher education that only have to pay a professor's salary up to a certain age. The institution can use the recovered funds to hire new professors, which, again, ensures a steady flow of new ideas.<sup>130</sup> More than any other system, mandatory retirement enables institutions to man-

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125. *Id.*

126. *Id.*

127. See U.S. DEP'T OF LABOR, *supra* note 6, at 28.

128. *Id.*

129. Posting of Gary Becker, *supra* note 8.

130. *Id.*

age the retirement of its professoriate with certainty, especially considering that alternative programs could completely lose their allure during a severe market downturn.<sup>131</sup> In fact, testimony that professors in 2000 and late 2008 (both difficult economic times) postponed retirement despite the availability of options such as buyouts or phased retirement is evidence that a sufficiently troubled economic climate easily can neutralize the effect of these programs.<sup>132</sup> For these reasons, from the perspective of a higher education institution, mandatory retirement without doubt is a relatively efficient system, unlike incentive-based alternatives that have yet to prove that they can spur faculty retirement and save institutions money to an equivalent extent as mandatory retirement.<sup>133</sup> Given the goals articulated above, whether mandatory retirement's default rule against older faculty is justified by its efficiency thus depends on how hefty a burden an aging professoriate is on institutions of higher education.

### C. Weighing the Millstone of Older Faculty

During the debate on lifting mandatory retirement, many supporters of the status quo warned that America's education system would suffer if the government allowed the faculty to remain employed indefinitely.<sup>134</sup> A long-term study that directly examined whether any causal relationship exists between the aging of the faculty and the quality of America's education system would go a long way toward confirming this fear, but this research has not yet been done, forcing current observers to inspect indirect evidence of the quality of older faculty.

Although there is no doubt that the faculty aged dramatically in concurrence with the ban on mandatory retirement,<sup>135</sup> several indicators show that the consequences have fallen short of seriously problematic. First, one would assume that if the performance of faculty significantly declined with age, then institutions would respond aggressively with tools to circumvent tenure for older professors, such

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131. Jaschik, *supra* note 69.

132. *Id.*

133. See *supra* notes 71–102 and accompanying text.

134. See, e.g., *Hearing on Age Discrimination in Employment Act Amendments: Hearing Before the Subcomm. on Employment Opportunities of the H. Comm. on Education and Labor*, 98th Cong. 73 (1984) (statement of Allen Calvin, Henry Clay Professor, University of San Francisco).

135. *Oh No—They Won't Go*, *supra* note 3, at 10.

as post-tenure review.<sup>136</sup> However, as noted above,<sup>137</sup> post-tenure review has not resulted in mass firings or even unsatisfactory ratings, and the explanation from campus administrators has been that, contrary to common suppositions, “the number of faculty members who are deadwood was greatly exaggerated.”<sup>138</sup> As articulated by Elizabeth Ervin, vice provost for academic personnel at the University of Arizona, in 2002,

[w]eak professors are weeded out at tenure time [and] . . . “[w]hen you have a bunch of people who’ve been hired through nationally competitive hiring processes, and who, on top of that, have achieved tenure, you’re dealing with the cream of the crop . . . so you wouldn’t expect many of them to be horrible or even mediocre,”<sup>139</sup>

even as age takes its toll.

What also may be overestimated is the impact of age itself.<sup>140</sup> As time progresses, the brain “shrinks, Swiss cheese-like holes grow, connections between neurons become sparser, [and] blood flow and oxygen supply fall . . . [causing] trouble with short-term memory and rapidly switching attention, among other problems.”<sup>141</sup> However, although short-term memory becomes less reliable, recent neuroscience research shows that for a healthy brain (i.e., one that does not suffer from neurodegenerative diseases), semantic memory, which is the ability to enhance vocabulary and retrieve facts and figures, withstands aging well, as does crystallized knowledge, which is expertise acquired over years of experience.<sup>142</sup>

As is the case with the general population, professors cannot avoid the inevitable impact of age on mental abilities such as rapidly processing information. However, faculty in higher education tend to rely primarily on those cognitive functions that can resist aging. Selective attention, the capacity to maintain focus in a potentially distracting environment (a critical factor in determining a professor’s productivity), also is indifferent to age.<sup>143</sup> Furthermore, although older individuals lose the ability to maintain endurance throughout pro-

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136. *Hearings, supra* note 23, at 145–46 (statement of John T. Dunlop, Lamont University Professor, Harvard University).

137. *Montell, supra* note 65.

138. *Id.* (quoting Myles Brand, President, University of Indiana).

139. *Id.*

140. Sharon Begley, *The Upside of Aging*, WALL ST. J., Feb. 16, 2007, at W1.

141. *Id.*

142. *See id.*

143. *Id.*

tracted mental exercises, elderly professors can bypass many cognitive steps by summoning their experience to spot important issues, thus making reduced mental stamina less problematic by compressing the process.<sup>144</sup> Empirical evidence also supports the hypothesis that a brain that is constantly intellectually engaged has a better chance of overcoming the detrimental cognitive consequences of age, which, if true, obviously works in favor of professors.<sup>145</sup>

A major concern of those opposing mandatory retirement is that older professors are barren of new ideas, and thus must make way for fresh outlooks that new academics can offer.<sup>146</sup> Although not directly supported by the preceding discussion, a logical argument is that the abilities professors can preserve and even enhance as they continue to reel in the years also assist them in providing innovative research contributions. Being a professor usually means having an expertise in one or more narrow fields, and the familiarity that likely accompanies a professional lifetime of careful study may mean that a professor can use his or her heightened understanding to skip material already covered that younger scholars would have to labor over in order to understand a particular area in which the professor is trying to forge new ground. Certainly anecdotal evidence exists for this hypothesis; some great minds do not reach the pinnacles of scholarly achievement until the later stages of their lives. For example, Eric Kandel was sixty-nine when he received the Nobel Prize in medicine for his neuroscience research.<sup>147</sup> In 2002, the average age of the Nobel Prize winners in physics was seventy-eight.<sup>148</sup> The nature of some fields may be such that arriving at a breakthrough realization may actually require a lifetime of trial and error.<sup>149</sup> The point of these examples is that faculty may be able to use their expertise to make significant contributions in their respective research fields throughout their lives.

A final advantage of aging that is relevant to a professor's teaching and advising responsibilities is the enrichment of one's emotional

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144. *See id.*

145. Arthur P. Shimamura et al., *Memory and Cognitive Abilities in University Professors: Evidence for Successful Aging*, 6 PSYCHOL. SCI. 271, 276 (1995).

146. *Hearings, supra* note 23, at 143–44 (statement of John T. Dunlop, Lamont Professor, Harvard University).

147. *See* Begley, *supra* note 140, at W1.

148. Peter Rodgers, *Sharing Out the Nobel Prize: Should the Nobel Prize for Physics Be Awarded to More Than Three People?*, PHYSICS WORLD, Nov. 1, 2002, at 15, available at <http://physicsworld.com/cws/article/print/11351>.

149. *Id.*

wisdom, the ability to respond to the emotions of others and in doing so, view the situation through the other's perspective.<sup>150</sup> Although generational gaps may make it more difficult for older faculty to keep current with, for example, the cultural references of their students, enhanced emotional wisdom enables the gray to better interact with and guide the green (students and new faculty), duties that are central to their roles as teachers and members of the academic community.<sup>151</sup>

Not only do older professors not appear to be an impediment to quality education as assumed, they have become all the more important in light of another trend. As the professoriate has aged, fewer faculty are either tenured or candidates for tenure, due to a growing practice among higher education institutions of hiring adjunct professors, meaning those who work part-time or per the terms of a finite contract instead of toward eventual tenure.<sup>152</sup> In the past thirty years, the proportion of adjuncts has increased twenty-seven percent so that they now constitute seventy percent of the entire professoriate.<sup>153</sup> This hiring shift is not necessarily motivated by the frustrations that institutions of higher education may have with older professors, but rather by those with the constraints of tenure in general; adjuncts are cheap and unprotected by tenure, thus allowing the university to be more frugal and flexible when scheduling and staffing courses.<sup>154</sup> Pinpointing the spur behind this trend is key to showing that the surge in adjuncts does not validate the apprehension of those who warned that administrators would attack tenure in reprisal for losing mandatory retirement. Again, the worry was that institutions of higher education would revoke tenure across the board in order to dismiss old professors.<sup>155</sup> Hiring more adjuncts now admittedly circumvents tenure, but does nothing to get rid of older professors.<sup>156</sup> Therefore, we have no assurance that reviving mandatory retirement would abate the hiring of adjuncts.

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150. Begley, *supra* note 140, at W1.

151. Lennard J. Davis, *Where Did I Put My 'Foucault'?*, 54 CHRON. HIGHER EDUC. B22 (2008); Begley, *supra* note 140, at W1.

152. Alan Finder, *Decline of the Tenure Track Raises Concerns*, N.Y. TIMES, Nov. 20, 2007, at A1.

153. *Id.*

154. *See id.*

155. *Hearings, supra* note 23, at 144–45 (statement of John T. Dunlop, Lamont University Professor, Harvard University).

156. *See* Fischer, *supra* note 1, at 1 (“As a result of tenure, [professors] can remain as full-time faculty even after their research and teaching output begins to wane.”).

It is not that adjuncts are inherently less capable than their colleagues who are working toward tenure or that they have nothing valuable to offer.<sup>157</sup> In fact, part-time adjuncts can bring their professional experience to the classroom,<sup>158</sup> which is uniquely beneficial when the traditional professorial career path remains within the academic system. However, “adjuncts are less likely to have doctoral degrees.”<sup>159</sup> Adjuncts also teach more classes than other professors, which means that they have less time to guide students outside the classroom, administer challenging exams as opposed to more basic tests that are easier to grade, or prepare for class.<sup>160</sup> Not only does time pressure allow adjuncts to scrape only the surface of subjects, but also without tenure, adjuncts may be dismissed per their contract terms and thus must be careful when challenging students with unpopular or unconventional views.<sup>161</sup>

The prevalence of adjuncts correlates with a measurable decline in graduation rates.<sup>162</sup> Studies also show that the likelihood of freshmen dropping out increases with higher enrollment in classes taught by adjuncts.<sup>163</sup> The purpose of this Note is not to address the problems that too many adjuncts pose for institutions of higher education, but the situation does demonstrate that older professors, who comprise a significant portion of tenured faculty,<sup>164</sup> are crucial to helping these institutions withstand the drawbacks of an adjunct-dominated faculty.

#### IV. Recommendation

This Note addresses the question of whether the effects of repealing mandatory retirement are so adverse to all parties involved that the best solution is to resurrect it. The foregoing analysis should make clear that the answer is no. The consequences of abolishing mandatory retirement in higher education were not as dire as predicted and perceived by the proponents of mandatory retirement, certainly not to the extent as to warrant reversal. In fact, older professors have become a cornerstone of experience and excellence amidst an in-

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157. See Finder, *supra* note 152, at A1.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See *Oh No—They Won't Go*, *supra* note 3, at 10.

flux of temporary or part-time professors.<sup>165</sup> Therefore, mandatory retirement should not play a role in the management of the faculty at institutions of higher education.

Although, in light of the value older professors have to offer, higher education institutions may want to rethink the policy of selling these professors on incentive programs that were designed to replace mandatory retirement, if academic management remains convinced that older professors need to go, further research is necessary to assess the definite impact of these programs upon faculty retirement rates and also to figure out ways to address their weaknesses. Again, however, older professors do not need to go, and institutions of higher education should promote these programs for their ability to ease, not speed, the transition into retirement.

#### A. Future Research Regarding Retirement Incentive Programs

Institutions of higher education introduced programs such as phased retirement and faculty buyouts in an attempt to serve in effect as a perfect, legal substitute for mandatory retirement. There are two perspectives through which to evaluate these initiatives. On one hand, had it not been for the abolition of mandatory retirement, higher education institutions would have had little incentive to develop these programs, which have sought to make retirement more palatable for professors who are heavily responsible for the academic standing on which these institutions pride themselves. Higher education institutions may not have developed programs such as phased retirement if they had been allowed to retain mandatory retirement. Yet phased retirement makes the entire transition easier for faculty, who can gradually become accustomed to a life of reduced professional obligations rather than abruptly breaking formal ties with the institution.<sup>166</sup> As is the case with phased retirement (under the right conditions),<sup>167</sup> buyouts can leave faculty in a better financial position than had they retired in the traditional fashion.

On the other hand, the evidence, although still incomplete itself, does not indicate that these programs have been successful in achieving their original purpose, which was to entice older professors to retire in order to compensate for the lost tool of mandatory retirement.

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165. See Finder, *supra* note 152, at A1.

166. ALLEN, *supra* note 74, at 4.

167. *Id.* at 3.

Faculty who participate in phased retirement have not conclusively been shown to retire earlier than they would have otherwise, and research also suggests that not many faculty actually participate in the first place.<sup>168</sup> Therefore, higher education institutions that desire to increase participation in phased retirement should explore marketing channels toward faculty. Yet ultimately, an administration can cheerlead only so much if, for example, faculty do not wish to begin the retirement process and leave the departure date to the mercy of future existing economic conditions, but would rather choose to leave during a good year. Either way, more empirical inquiry and improvements grounded in such findings are necessary.

Until research can establish the relationship between alternative programs and retirement rates with confidence, mandatory retirement must take first place in terms of efficiency because of its certainty for purposes of administrative planning, faculty turnover, and saving costs. However, this point loses its relevance when one remembers that the heart of the matter is that it may not be in the best interest of higher education institutions to remove older faculty in the first place.

#### **B. Why Mandatory Retirement Should Stay off the Table**

Whatever the success of incentive programs in spurring retirement, older professors are more capable and necessary to institutions of higher education than previously thought. Despite earlier concerns, while faculty have taken advantage of the opportunity to remain employed past seventy, the consequent graying of the faculty does not seem to have undermined the academic quality of America's higher education system. This is the appropriate point to recommend a study that directly addresses this issue. With the knowledge that the professoriate unquestionably has aged, the study could measure academic quality across the system in conjunction with the aging of the faculty. However, although it was possible to attribute a decline in academic quality as measured by indicators such as graduation and drop-out rates to the increase of adjunct professors,<sup>169</sup> it may be difficult to establish a causal relationship in addition to a mere correlation. Alternatively, the research could compare the quality of individual schools at present by average age of professor. Either way, this inves-

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168. See Leslie & Janson, *supra* note 55, at 43–44, 46.

169. Finder, *supra* note 152, at A1.

tigation is crucial to determining positively whether older professors pose a threat to excellence in higher education.

For now, however, indirect evidence provides the sole guidance. Perhaps the best evidence in support of the conclusion that this threat is either exaggerated or just does not exist is the absence of complaints; there is no inkling of a groundswell movement by higher education institutions to reinstate mandatory retirement.<sup>170</sup> In fact, a recent survey of institutions found that only 19% of respondents rated retiring older faculty as "very important," as opposed to 96% and 89% assigning the same significance to recruiting new faculty and retaining current faculty, respectively.<sup>171</sup>

If older faculty were such a burden, one would expect these institutions to place great importance on facilitating their prompt retirement. However, more tangible forms of circumstantial evidence are available. As detailed above, we have no reason to suspect that older professors have an appreciably reduced capacity to teach or produce research because their brains (assuming these brains are healthy) retain all the skills that are necessary to perform in the classroom and advance the general body of knowledge.<sup>172</sup> Assuming that post-tenure review has teeth, it is again important to note that it has not exposed a critical mass of chaff in the professoriate, once more suggesting the lack of a terrible problem.<sup>173</sup> Again, given that tenured professors clearly are in the minority, reinstating mandatory retirement likely would sabotage academic excellence.

One may assume that institutions of higher education that enforce mandatory retirement would take advantage of their financial liberation to hire younger, more energetic, and fresher tenure aspirants. But the reality is that higher education institutions by and large hire professors that do not come with the tenure that some administrators may view to be a financial and logistical encumbrance.<sup>174</sup> Studies indicate that when these institutions so choose to cut costs, education pays the price,<sup>175</sup> and it follows that academia would suffer even more if the most experienced contingent of tenured professors were forced to retire en masse.

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170. CONLEY, *supra* note 56, at 14.

171. *Id.*

172. Begley, *supra* note 140, at W1.

173. Montell, *supra* note 65.

174. Finder, *supra* note 152, at A1.

175. *Id.*

One of the strongest and yet more subtle arguments in favor of mandatory retirement is that it is not compulsory, meaning that institutions of higher education reserve the option to retain professors who they deem worthy.<sup>176</sup> Any economist would argue that it matters little which system is in place; if older professors are indeed so valuable for the reasons described above, higher education institutions that value their academic reputations will keep them.

Perhaps there would not be any difference if efficiency were the only goal, but it must be considered alongside appreciation for the faculty. Professors in general play such a special role in building and maintaining the reputation for institutions of higher education. If an individual professor is fit for duty (and the research supports no conclusions that by default older ones are not on the whole), then faculty members should be allowed to see their life's work to fruition and do what they love until they feel they cannot any longer.

Faculty clearly have benefited more so than not in a world without mandatory retirement. As noted above, higher education institutions never attempted to eliminate tenure in order to dismiss older faculty.<sup>177</sup> Instead, absent any cause for dismissal, faculty now are allowed to determine the duration of their own career plans. The objection that higher education institutions limit opportunities for minorities and women to join faculty ranks by retaining professors past the age of seventy, although valid, is not a sufficient reason to deny older faculty the privilege of continued employment. Granted, a female or minority new hire could fill a slot occupied by an older professor. However, depriving older faculty of their privileges is not the right way to advance the rights of women and minorities. The opportunity to remain employed absent cause and regardless of age would most likely be appreciated by female and minority professors as their careers reached fulfillment and they became quite attached to their lifestyle and professional calling.

## V. Conclusion

The professoriate has aged as a result of the ban on mandatory retirement in institutions of higher education, a development which, according to some observers, had the potential to precipitate an aca-

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176. U.S. DEP'T OF LABOR, *supra* note 6, at 28.

177. PENCAVEL, *supra* note 53, at 7.

demographic crisis. The programs that academic administrators instituted in order to stave this disaster, although accommodating to the professoriate as they retire, cannot yet claim success if their goal was to hasten retirement. However, research continues to support the notion that professors are quite capable of upholding exceptional performance standards into their golden years. Not only does the current system appear workable, but older professors are critical to maintaining academic quality if universities continue to enlarge the ranks of adjunct faculty. At the very least, it seems safe to say that mandatory retirement can remain an academic management tool of the past. Not many still ring the alarm that our tertiary school system needs mandatory retirement to save academia from an aging professoriate. However, the question forces further evaluation of substitute programs. Additionally, the knowledge that a law has performed its function without collateral adverse effects and the reminder that its beneficiaries are quite deserving are still worth disseminating.