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James M. Donovan

*University of Kentucky College of Law*, james.donovan@uky.edu

Kevin B. Shelton

*Hofstra University Law Library*

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## Tenure and the Law Library Director

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# Tenure and the Law Library Director

James M. Donovan and Kevin B. Shelton

The status of librarians of any rank within a law school has been the subject of ongoing discussion.<sup>1</sup> The major fault line in the debate has been whether librarians are administrators, faculty, or one of those imperfect hybrids that anthropologist Mary Douglas noted makes everyone uncomfortable.<sup>2</sup> Depending on where a librarian lands, certain consequences follow. If he falls squarely within faculty, there are the added demands of performance and evaluation on tenure criteria, but also the benefits of full participation in the shared governance of the law school, an obvious value to the library. On the other hand, administrators are spared such heightened scrutiny, leaving them more time to run the library; again, in theory, a benefit to the organization. Reasonable people can disagree as to which choice better supports the mission of the institution.

Always simmering just below a boil, this disagreement has generated new heat due to a review of American Bar Association (ABA) accreditation standards that began in earnest in 2008. As it presently reads, Standard 603 requires that the director have tenure or tenure-like protections. Factions within the ABA, especially law school deans, view such rules as intrusive, depriving them of needed flexibility to determine the terms of employment for their librarians.

The first section of this article describes the current state of the Standard 603 review to identify the terms in which the discussion has been conducted and the positions of the major interested parties. Part II defends the present requirement that law library directors be appointed as tenure-track faculty on

**James M. Donovan** is Director of the University of Kentucky College of Law Library. The authors thank Carol A. Watson, Carol A. Parker, and Duncan Alford for helpful comments on earlier drafts.

**Kevin B. Shelton** is Reference and Government Documents Librarian at the Hofstra University Barbara and Maurice A. Deane Law Library.

1. See *e.g.*, James M. Donovan, Do Librarians Deserve Tenure? Casting an Anthropological Eye upon Role Definition within the Law School, 88 *Law Libr. J.* 382 (1986); Catherine Murray-Rust & Deborah A. Carver, Should Librarians Get Tenure?, 52 *Chron. Higher Educ. Bio* (2005); Spencer L. Simons, What Interests are Served When Academic Law Library Directors are Tenured Law Faculty? An Analysis and Proposal, 58 *J. Leg. Educ.* 245, 255 (2008).
2. Mary Douglas, The Abominations of Leviticus, in *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* 41-57 (Routledge & Kegan Paul 1966).

the grounds that doing so bolsters academic freedom and shared governance, twin goals that tenure historically supports. Academic freedom can be considered the intrinsic justification for tenure status. The question to be asked is whether the law library director requires this protection. If so, then the conclusion shall be that to deny tenure-track appointment to any class of persons who satisfy the asserted preconditions for tenure undermines the value and security of tenure for everyone.

The second argument looks at the second prong of the historical justification for tenure, the ability to share in the university's governance. Participation in shared governance may be deemed an extrinsic criterion for tenure, meaning that it is not a basis for the emergence of tenure, but rather an added functional application of tenure status after it has appeared. While the review of intrinsic factors looks at the qualifications and activities of the librarian, the extrinsic test examines the pragmatic value to the library when its director is present in key policy discussions that may determine the future direction of the institution. In other words, the director may need tenure in order to be accorded the access and respect to do his or her job for the library as much for the primary safeguards of academic freedom.

Either of these factors—protection of academic freedom and participation in faculty governance—warrants retaining the current version of 603 and pushing for its stricter enforcement. The evidence shows, however, that both conditions apply: The law library director both qualifies for tenure due to the intrinsic qualifications and responsibilities of the position, and, even were that not true, would still require tenure in order to fulfill the professional obligations incumbent upon him or her.

Given the strong case favoring tenure for law library directors, the position should be less controversial than it has proven to be. Part III recognizes the possibility that the threat to deprive directors of this needed protection may have arisen in part because today's directors have failed to keep their end of the social contract that is tenure, many neglecting to sustain a level of scholarly achievement comparable to that of their doctrinal colleagues. Some of those colleagues resent librarians for having won tenure "too easily" and, as a result, do not consider even tenured directors as peers. Such resentment, if pervasive among the faculty, could undermine the likelihood that successor directors will be granted a similar status.

Part IV focuses on this scholarship gap, comparing the scholarly impact of elite library directors with the average faculty member at their own schools. A strong pattern of underperformance here would support the view of deans who see library directors as untenureable, which may be fueling their insistence that the ABA's tenure requirement be removed. The appropriate response, however, should not be to deny all directors tenure, but to demand that directors perform at a higher level than has been expected in the past. A further investigation of newly appointed directors finds that this transition may already be underway, raising the question of whether the change comes in time to save the rule.

### I. The 603 Debate

On August 28, 2006, William R. Rakes, then chair of the ABA's Section of Legal Education and Admissions to the Bar, charged a newly-formed task force to "consider the relevant concepts and broad issues of accreditation...[without getting] bogged down in the details of the [s]tandards or in drafting."<sup>3</sup> The task force convened on January 5, 2007 at the Washington, D.C., Association of American Law Schools (AALS) meeting to hear from interested parties<sup>4</sup> and met again the following month at the mid-year ABA meeting in Miami, Florida.

Among those expressing their views was the American Law Deans Association (ALDA), which took direct aim "on the [s]tandards that require that specific employees of a law school or university have certain terms and conditions of employment."<sup>5</sup> Such rules, they argued, "impinge unnecessarily on the institutional autonomy of law schools and universities."<sup>6</sup> Consequently, they urged that standards requiring tenure for any law school employee (see Standards 206(c), and 405(b))—be they deans or doctrinal faculty—be eliminated. The deans also objected to the standards for legal writing faculty (405(d)), clinical faculty (405(c)) and librarians (603(d)) that required "security of position" described as "reasonably similar to tenure." In the case of librarians, at least, this broad phrase has been interpreted to refer to a "tenure or tenure-track appointment" (Interpretation 603-3).

On October 8, 2007, three new groups were constituted to examine outstanding questions from the task force report.<sup>7</sup> Among them, the Special Committee on Security of Position was charged to ask "what specific wording could be employed (in [s]tandards or [i]nterpretations or both) to protect" the interests that had been historically nurtured under the current rules.

To its credit, the special committee expanded the terms of the debate. Whereas in earlier exchanges both the task force and ALDA had limited the purpose of tenure to the protections of academic freedom, the special

3. William R. Rakes, Accreditation Policy Task Force 1 (Aug. 28, 2006), *available at* [http://taxprof.typepad.com/taxprof\\_blog/files/aba\\_accreditation\\_policy\\_task\\_force.pdf](http://taxprof.typepad.com/taxprof_blog/files/aba_accreditation_policy_task_force.pdf).
4. Accreditation Policy Task Force, Input Requested on Goals and Principles of Law School Accreditation (Dec. 6, 2006), *available at* [http://www.abanet.org/legaled/AC\\_Task\\_Force/Accreditation\\_Policy\\_Task\\_Force\\_Charge.doc](http://www.abanet.org/legaled/AC_Task_Force/Accreditation_Policy_Task_Force_Charge.doc).
5. ALDA Board Statement, Hearing of the ABA Accreditation Task Force 5 (Jan. 5, 2007), *available at* [http://www.americanlawdeans.org/images/ALDA\\_Board\\_Statement\\_\\_1-5-07\\_.pdf](http://www.americanlawdeans.org/images/ALDA_Board_Statement__1-5-07_.pdf) [hereinafter ALDA].
6. *Id.*
7. Memo to Special Committee Appointees and Interested Legal Education Organizations from Chief Justice Ruth McGregor, Chairperson, Legal Education and Admissions to the Bar (Oct. 8, 2007), *available at* <http://www.abanet.org/legaled/committees/SpecialCommitteeAppointment.doc>.

committee correctly noted that “there is a relationship between tenure and the role of faculty in governance.”<sup>8</sup> This observation led the special committee to propose three alternative standards that would achieve the objectives served by tenure without explicitly requiring tenure for accreditation.<sup>9</sup>

At this writing two alternatives are under formal consideration: The first removes job security for all faculty but offers guarantees of academic freedom and faculty governance, while a second requires that after a probationary period the faculty member be offered either tenure or a presumptively renewable contract of at least five years duration.<sup>10</sup> The current language does not require that all of a school’s faculty to be offered the same of the two alternatives.

Few would be surprised that both the American Association of Law Libraries (AALL)<sup>11</sup> and its relevant subgroup, the Academic Law Libraries-Special Interest Section<sup>12</sup>, have objected to any new language and lobbied for retention of the original standard. More telling is the conspicuous absence of any similar statement from the Society of Academic Law Library Directors (SALLD), a relatively new association formed in a January 2004 meeting at Fordham Law School. SALLD members must be library directors, and the organization is independent of both AALL and AALS.

SALLD could have been expected to be the most interested and vocal supporter of the present 603 language. We can offer only some cautious observations about its confusing silence. As a matter of record, not all library directors agree that the position they occupy should carry tenure rank.<sup>13</sup> But whereas those directors represent the minority of views within AALL, they

8. Special Committee on Security of Position 8 (May 5, 2008), *available at* <http://www.abanet.org/legaled/committees/subcomm/Security%20of%20Position.doc>.
9. *Id.* at 14.
10. Standards and Interpretations on Faculty—Terms and Conditions, July 3, 2011, *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july2011meeting/20110711\\_ch\\_4\\_faculty\\_terms\\_and\\_conditions\\_july\\_10\\_2011\\_discussion\\_draft.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110711_ch_4_faculty_terms_and_conditions_july_10_2011_discussion_draft.authcheckdam.pdf).
11. Barbara Bintliff, Statement to the American Bar Association Council on Legal Education and Admissions to the Bar on the Report of the Special Committee on Security of Position and on the Comprehensive Review of Standards and Interpretations (July 1, 2009), *available at* <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/AALL-ABA%20statement%20final%202009.pdf>.
12. Statement of the Academic Law Libraries Special Interest Section to the American Bar Association Council on Legal Education and Admissions to the Bar Standards Review Committee on the Comprehensive Review of Standards and Interpretations (Sept. 16, 2009), *available at* <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/AALL-ABA%20ALL-SIS%20Statement.doc>.
13. *See infra* Part III. For a basis of comparison, however, according to a SALLD survey of director status, 112 of 187 directors described themselves as currently on the law school tenure track. Forty-three held multi-year contracts, while 24 were on separate law library faculty tracks. Eight were categorized as university library faculty. Director Status Survey, SALLD Meeting January 5, 2011 (on file with authors).

may carry enough influence within SALLD to prevent the organization from defending the existing rule, a move that the group will not take unless 60 percent of the membership agrees on the necessary language.<sup>14</sup>

These debates demonstrate that tenure for law library directors is a contentious and unresolved matter. Either it will continue to be the norm, or deans will have the option to take advantage of a lower standard to migrate new appointments to a lesser status. Given the stakes, interested parties on both sides continue to voice their opinions in hopes of influencing the final outcome. The remainder of this paper advances a stronger defense of tenure status for law library directors than others have put forth.

## II. The Case for Library Director Tenure

Arguments to retain tenure protections for library directors within the ABA Standards must advance a recognized principle or goal of the accreditation process. These standards, in other words, are not a list of idealized criteria for an excellent law school, but something both less demanding and more practical—the enforceable means to ensure the quality of education offered in the accredited law school. Schools would be free to exceed the standards, but they cannot fall below them without risking censure.

Donald Polden, chair of the Standards Review Committee, has outlined those accreditation principles.<sup>15</sup> The concerns guiding his committee's work include: assuring educational quality; advancing the core mission of legal education; accountability; clarity and precision; and assessment of program quality and student learning. The statement continues with a list of "Goals of a Sound Program of Legal Education."<sup>16</sup>

There exist within this document conceptual pegs upon which the defense of librarian tenure can hang. The most direct arise when Polden points out that the

"[F]undamental goal of legal education is to provide a sound program... that prepares students for admission to the bar and effective and responsible participation in the legal profession." Those responsible for reaching this goal must, among other things:

- *Provide appropriate resources* to support the educational mission of the school and support students seeking to quality [sic] for admission to the practice of law and the legal profession.
- Articulate and advance *protections to academic freedom* of students and faculty.

14. E-mail from SALLD Executive Board (January 28, 2010) (on file with authors).

15. Donald J. Polden, Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education (May 6, 2009), available at <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Principles%20and%20Goals%20Accreditation%205%206%2009.pdf>.

16. *Id.* at 2.

- Instill in students an appreciation for the *roles and responsibilities* played by lawyers and the legal profession in our society and for the importance of *ethical behavior* in their work.<sup>17</sup>

These tenets reinforce one another: Academic freedom depends on the librarian being able to provide students with the appropriate resources for a broad educational experience. It means that librarians can recognize the wider implications of their work upon society and make the ethical choices expected of a professional as opposed to a mere technical functionary. Remove one, and the entire construct collapses, and of these the foundation stone is academic freedom.

We argue that Polden's goals are achieved most efficiently through the extension of tenure protections to the law library director and that this status can be fully justified by the practical objectives of the accreditation process.

While academic freedom holds pride of place in the defense of tenure, our argument also incorporates faculty governance. The flaw with limiting discussion only to academic freedom is that, even were it possible to ensure academic freedom with some status less than tenure, that achievement rarely translates into a right for nontenured faculty to participate in school governance. Without both, the library director will be disadvantaged relative to other interest groups within the law school, resulting in an inability to work as an effective advocate for the interests of the library and its staff, and ultimately for the students.

#### *Librarians Need Academic Freedom*

Polden explicitly recognizes the importance of academic freedom for students and faculty but he fails to include staff. Because staff are omitted, librarians will not achieve full academic freedom under the standards unless they have faculty status (a related but distinguishable question from the one pursued in this essay<sup>18</sup>). Otherwise, protections for librarians will be viewed as a local dispensation, rather than a basic requirement to achieve the ends of accreditation. As noted by Richard Danner and Barbara Bintliff, “[a]cademic freedom is typically granted to a university’s faculty and researchers and, almost always, to its students. It is not as routinely granted to librarians or other staff members unless they are involved in teaching or research.”<sup>19</sup>

17. *Id.* at 5 (emphasis in the original).

18. *But see generally* Jacalyn E. Bryan, *The Question of Faculty Status for Academic Librarians*, 56 *Libr. Rev.* 781 (2007). For the most part, our essay assumes that the director already holds some status recognized as “faculty,” and that the primary issue in contention centers on what privileges adhere to that rank.

19. Richard D. Danner & Barbara Bintliff, *Academic Freedom Issues for Academic Librarians*, 25(4) *Legal Ref. Serv. Q.* 13, 16 (2006).



According to Fritz Machlup's summary, the role of academic freedom is to eliminate "institutional sanctions for unpopular pronouncements."<sup>20</sup> "We want," he wrote, "the teacher and scholar to be uninhibited in criticizing, and in advocating changes of:

- (1) accepted theories,
  - (2) widely held beliefs,
  - (3) existing social, political, and economic institutions,
  - (4) the policies and programs of the educational institution at which he serves, and
  - (5) the administration and governing board of the institution at which he serves.
- (6) in addition, we want him to be uninhibited in coming to the aid of any of his colleagues whose academic freedom is in jeopardy.<sup>21</sup>

The question to ask is whether, in the course of their activities, law library directors—either as librarians or as directors—engage in activities that risk triggering one of these six conditions.

Preferably the action at issue would arise from the core responsibilities of running a library, and not out of added responsibilities they may undertake, such as classroom teaching. There are two reasons why classroom teaching would be a poor ground upon which to construct a defense of law librarian tenure. First, not all librarians teach, and therefore any defense that assumed that they did would exclude these professionals, and create a tiered system of librarian protections. Second, when they do teach, they tend to focus on legal research skills rather than substantive law topics.<sup>22</sup> Commentators have

20. Fritz Machlup, *In Defense of Academic Tenure*, 50 *AAUP Bulletin* 112 (1964), *reprinted in* *The Case for Tenure* 9, 23 (Matthew W. Finkin ed., ILR Press 1996).

21. *Id.* at 23-24.

22. Of 344 courses that directors reported they taught in 2006-2007, most are categorized as "Legal Research/Bibliography" (114) and "Legal Research & Writing" (86). The majority of substantive courses sensibly fall into the categories of "Intellectual Property" (15) and "Computers and Law" (14). The data do not allow disaggregation to identify how many different directors are doing this teaching. Simons, *supra* note 1, at 269-271. Michael Slinger's data, although twenty years earlier, provide a slightly different angle on this question. Of the then-173 accredited law schools, he obtained career information for 160 library directors; 136 (85 percent) taught "Legal Research and Writing," while 74 (46 percent) taught a course in "Other Law." While most teach (92 percent), his data support the generalization that teaching is not an activity necessarily expected of law library directors. Michael J. Slinger, *The Career Paths and Education of Current Academic Law Library Directors*, 80 *Law Libr. J.* 217, 228, 239 (1988).

argued that the first rationale offers a poor basis for tenure.<sup>23</sup> Consequently, the strongest case for director tenure will refer to actions arising directly from his or her expertise as a librarian, and not as a classroom instructor.<sup>24</sup>

The AALL response to the report by the Special Committee on Security of Position provides several examples of situations that demonstrate the need for just these protections:

The tenure-track, but untenured, director of a public law school's library was threatened with a negative reappointment vote by another faculty member who disagreed with a long-standing collection development policy. The library had been acquiring primary materials from a jurisdiction with political and legal practices that the faculty member felt was wrong; the reasoning behind the threat was that the library was supporting the jurisdiction through purchase of its materials.

The director of a public law school's library was challenged by an influential alumnus over a display of books. Some of the books contradicted the legal theories that alum advanced in a major case then being litigated. The alum threatened to call state legislators and have the law school's funding cut because the library had purchased those books.<sup>25</sup>

In both instances the director was threatened for performing ordinary library activities.

The situation can be even more complex. Danner and Bintliff wonder whether academic freedom issues may arise not only with the content chosen for the library's collection, but also the format.<sup>26</sup> David Mash has argued that forcing students to use digital products can raise academic freedom concerns: "The systematic de-emphasis of print media and the unique habits of mind they alone inculcate suppresses the spirit of inquiry because it foreshortens the horizon of ideas to which a student may be exposed and narrows the cognitive options for developing and exploring alternative ways of thinking.... [The]

23. *E.g.*, Brian Huddleston, Types of Employment Status for Academic Librarians, in *Beyond the Books: People, Politics, and Librarianship* 31, 38, 40 (Leslie A. Lee & Michelle M. Wu eds., Hein 2007).

24. For a reasonable suggestion concerning an appropriate way to include teaching activities in librarian evaluations, see Carol A. Parker, The Need for More Uniform and Consistently Rigorous Standards for Assessing Law Librarian Performance in Tenure and Continuous Appointment Policies, 103(1) *Law Libr. J.* 7 (2011).

25. Bintliff, *supra* note 11, at 3.

26. Danner & Bintliff, *supra* note 19, at 27-29. There is some a small irony in this argument. The lead author is a framer of the Durham Statement, which lobbies for the speedy transition to electronic-dominated library environments beginning with the complete elimination of print journals. See Durham Statement on Open Access to Legal Scholarship (Feb. 11, 2009), available at <http://cyber.law.harvard.edu/publications/durhamstatement>. An alternative approach—and one that would seem to be more in keeping with the cited article—would be to work to ensure that sufficient format varieties exist to allow the individual selector to choose the best option for local patrons, thereby respecting the academic freedom of both librarians and library users.

scorn of books in the name of information access is Orwellian; it constricts access, constrains the mind, and cheats our students.”<sup>27</sup>

The balance between print and electronic resources is an ongoing concern that has vexed librarians for years, and will continue to do so. But, as with any controversial decision, some will disagree, and thus we see here another, relatively new way in which academic freedom—the freedom to act in accord with one’s professional expertise—may be challenged.<sup>28</sup>

A different arena in which directors may appreciate protected academic freedom relates to the growing commodification of the university as a whole, and thus of library services in particular. John Budd points out that the rise of neoliberal or laissez-faire economics has subjected every aspect of our society to market-based evaluations. Institutions that formerly based their purpose in broader social values now seek to justify themselves according to market models, leading to calling patrons “customers” and favoring activities that can be quantified at the transactional, or exchange level.

If circulation equals transaction, and the goal is to maximize circulation, then a library’s *raison d’être* is *de facto* neoliberal. The why and how of library usage and community service fall by the wayside in favor of the what, defined as what “stock” moves off the shelves. Purpose itself is defined by this embrace of markets and abandonment of democracy.<sup>29</sup>

Symptomatic of this trend is the motto “Give ‘em what they want” made famous by the Baltimore County Public Library (BCPL), which, for Budd, “represents political betrayal in the guise of market sensitivity.”<sup>30</sup> More specifically, Budd believes the library has prioritized market sensibilities over social values. Although it gives the superficial impression of serving patron preference, in actuality “Give ‘em what they want” leads to the marginalization of minority voices within the user population. Most resources go to meet the wishes of the majority, who become defined as “the people” who are to be served to the exclusion of all others. While this strategy constitutes a profitable business plan, it undermines the traditional democratic and broad outreach mission of libraries. It also eviscerates a librarianship that should serve as “an alternative ideology for the organization of work in contrast to the dominant market-competition ideology.”<sup>31</sup>

27. S. David Mash, *Libraries, Books, and Academic Freedom*, 89(3) *Academe* 50, 54 (2003).

28. For a contrary view on whether collection development can raise academic freedom issues, see Simons, *supra* note 1, at 255 (“[G]iven the ABA mandate and general expectation that the library collection be developed in collaboration with the dean, it is somewhat difficult to see how an issue would arise.”).

29. John Budd, *Self-Examination: The Present and Future of Librarianship* 176 (Libr. Unlimited, 2008).

30. *Id.*

31. Neil Hamilton & Jerry Gaff, *Proactively Justifying the Academic Profession’s Social*

Academic law libraries are not shielded from similar pressure to emulate corporate practice models that give undue weight to patron demands at the possible expense of professional judgment and commitment.<sup>32</sup> The director may need to resist demands to convert the library into an information convenience store, hewing instead to the professional standards outlined in the AALL Code of Ethics.<sup>33</sup> The conscientious director may find it necessary to pursue a course not because it is profitable or popular, but because we are library professionals. A director unclenched by academic freedom would of course be understandably hesitant.

We can see that the need for academic freedom arises from several contexts. Without certain protection for the performance of professional duties, the director may withdraw to a position of personal security, acquiring only safe materials and seeking to avoid any controversy, rather than exercising an independent professional judgment. Such timidity not only diminishes the profession as a whole, but also, within the school, thwarts Polden's goal to provide adequate and appropriate materials to support the students' education.

*Directors Require Tenure to Ensure Academic Freedom*

Granting that library directors require academic freedom to perform even the most basic of their responsibilities, is tenure required to provide that security? Could some other arrangement achieve the same result?

The value of tenure is that it protects faculty from retribution arising from the performance of their professional activities. This is why five-year renewable contracts—one alternative contemplated by the ABA Standards Review Committee—is unsatisfactory.<sup>34</sup> Even if the librarian enjoys tenure-like

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Contract, University of St. Thomas School of Law Legal Studies Research Paper No. 09-17, 7 (2009) (citing Eliot Freidson), *available at* [papers.ssrn.com/abstract=1444587](http://papers.ssrn.com/abstract=1444587).

32. *E.g.*, James S. Heller, Finding a New Balance: Technical Services Meets Adidas, 7(3) AALL Spectrum 16 (Nov. 2002) ("Connecting library users to the information they need is pretty similar to how a shoe company makes, distributes, markets and sells shoes."); J. Paul Lomio, The Need to be the USAA/L.L. Bean/Fairmont Hotels/Lexus of Law Libraries, *in* How to Manage a Law School Library 47 (Aspatore Books 2008) ("Law libraries would be wise to learn some lessons from these and other top-rated companies as they strive to keep both their customers and their employees happy."). *But see* James M. Donovan, Skating on Thin Intermediation: Can Libraries Survive?, 27 Legal Ref. Serv. Q. 95 (2008).
33. AALL, Ethical Principles (1999), *available at* [http://www.aallnet.org/about/policy\\_ethics.asp](http://www.aallnet.org/about/policy_ethics.asp). For one view on the possible functions of libraries that cannot be reduced to simple information dispensing, *see* James M. Donovan, Libraries as Doppelgänger, 34(3) Southeastern L. Libr. 4 (2009).
34. *See supra* note 10. *See also* Albert Rees & Sharon Smith, Faculty Retirement in the Arts and Sciences, *in* The Case for Tenure 173, 176 (Matthew W. Finkin ed., ILR Press 1996):

A step beyond the concept of post-tenure review is the proposal to replace lifetime tenure with a series of fixed-term contracts. If the term of these contracts is short, the protection afforded to faculty members by tenure would be seriously eroded, and even long contracts would not fully protect the freedoms protected by tenure.

guarantees while under contract, they become vulnerable as their contract expires and a decision needs to be made whether to offer a new one.

Law school leaders need not justify their decision not to renew a contract and can use that opportunity to shed a director whose collection policies, while sound professionally, are challenging to entrenched faculty, or opposed by overweening alumni. Moreover, the notion that the director's academic freedom can be adequately protected without tenure may be more powerful than the poser intends, in that it raises the question as to the necessity of tenure for anyone. If tenure is superfluous to guarantee the exercise of the librarian's professional judgment against pressure, why is more required to accomplish the same end for other faculty members? In seeking to deprive librarians of tenure, critics may have overshot the mark and mortally wounded the justification of tenure for everyone.<sup>35</sup> Either the director's need for protection should trigger the tenure option, or it will probably cease to exist for anyone, including, eventually, doctrinal faculty. However, we do not anticipate the complete elimination of tenure, but rather the worst of all scenarios: The untenured library director amidst a tenured doctrinal faculty.

#### *Shared Governance Is an Accreditation Value*

Deans who question the need for even faculty tenure often insist that tenure impedes their flexibility and discretion to manage their law schools. Entrenched and obstructive faculty, so the argument goes, act to the detriment of students and the public, and absent tenure faculty would be more pliable, yielding to the innovations deans want to make.

The flaw in this argument is that it characterizes law schools as governed solely by deans, and that to remove faculty involvement is to return the school to its intended order. On the contrary, the unrestrained flexibility that deans claim to desire contravenes the traditional shared power distributions within American academic institutions. Attempts to weaken the faculty by removing their ability to disagree without risk of professional suicide represent a drastic reconceptualization of the university. In short, any weakening of tenure and employment security necessarily undermines the likelihood of viable faculty governance. One cannot have academic freedom without equally robust faculty governance, and tenure is the evolved status that imbues both abstract concepts with true substance.

35. The authors recognize that this result would be welcomed by many; *see e.g.*, Charles J. Sykes, *ProfScam: Professors and the Demise of Higher Education* 258 (1988) ("Tenure corrupts, enervates, and dulls higher education."); *see also* Naomi Schaefer Riley, *The Faculty Lounges and Other Reasons Why You Won't Get the College Education You Paid For* 69 (Ivan R. Dee 2011) ("The surest way to guarantee that higher education's priorities shift in the right direction is by eliminating tenure."). But herein we count as sincere the assurances by ALDA representatives that it is not their intent to eliminate tenure per se, but only to remove it as an accreditation requirement. *See* Scott Jaschik, *Law School Tenure in Danger?*, *Inside Higher Educ.*, July 26, 2010, *available at* <http://www.insidehighered.com/news/2010/07/26/law> ("Van Zandt said at the time that characterizing the changes as an assault on tenure was unfair.").

Not everyone believes that allowing faculty a serious role in the administration of their schools is worthwhile. Ryan Amacher and Roger Meiners—the first a former college president, the second a former department head—hold that allowing the formation of faculty committees means only that “many hours of valuable time are consumed producing decisions that any one person with good sense could have generated more quickly.... [T]he more power the faculty are given in administrative decision making in a college, the lower the quality of the college.”<sup>36</sup>

Although the American Association of University Professors (AAUP) has long supported the need for both academic freedom and shared governance, it was not until 1994 that it characterized the two standards as intertwined.<sup>37</sup> For the AAUP, the freedom to express without retribution one’s professional opinions about matters relating to the academic life of the institution—the central protection of academic freedom—is a prerequisite for meaningful shared governance (recall especially items 4-6 on Machlup’s list of conditions that should trigger academic freedom concerns). Matters central to the teaching and research mission of the school must be left to the faculty, who have the expertise to make the relevant judgments on both curriculum and tenure. Any other arrangement either removes critical matters from the hands of those best suited to make the relevant decisions, or allows retribution for unpopular but professionally reasonable actions.

Academic freedom, therefore, is a prerequisite for shared governance, and shared governance is necessary to maintain academic freedom. Combined with tenure, academic freedom and shared governance comprise what Cary Nelson termed the “three-legged stool” required to “support the higher education system we have had in place in the U.S. for over half a century.”<sup>38</sup>

[Sound] governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked.... [An] inadequate governance system—one in which the faculty is not accorded primacy in academic matters—compromises the conditions in which the academic freedom is likely to thrive. Similarly, although academic freedom is not a sufficient condition, it is an essential one for effective governance.<sup>39</sup>

36. Ryan C. Amacher & Roger E. Meiners, *Faulty Towers: Tenure and the Structure of Higher Education* 33-34, 39 (Indep. Inst., 2004). *See also* David Glenn, *Speakers See Threats to the Concept of Shared Governance*, *Chron. Higher Educ.* (July 13, 2010), *available at* <http://chronicle.com/article/Speakers-See%20Threats-to-the/65932/>.
37. *See generally* American Association of University Professors, *On the Relationship of Faculty Governance to Academic Freedom* (1994) [hereinafter *On the Relationship of Faculty Governance to Academic Freedom*].
38. Cary Nelson, *The Three-Legged Stool: Shared Governance, Academic Freedom, and Tenure*, in *Academic Repression: Reflections from the Academic Industrial Complex* 468 (AK Press 2010).
39. *On the Relationship of Faculty Governance to Academic Freedom*, *supra* note 37, at 3.

If shared governance is required for academic freedom, then it may also be considered an implied protected value within the law school accreditation process.

*The Director Requires Tenure to Participate in Shared Governance*

The argument for shared governance is based on expertise. Faculty should have the greater voice in the curricular and academic aspect of institutional life because they are equipped to make the most informed judgments. Administrators and trustees have their own skill sets that should inform “decisions about the institution’s long-range objectives, its physical and fiscal resources, the distribution of its funds among its various divisions, and the selection of its president.”<sup>40</sup> The library director’s expertise similarly warrants his or her inclusion in all meetings at which law school policies are decided—not only to learn of impending changes, but also to highlight the library’s strengths and weaknesses that might influence choices between equally attractive alternatives.

Could an untenured library director serve that need? Certainly not as well. Although the changes demanded by ALDA would also formally remove the requirement that doctrinal faculty be tenure-track, few expect that doctrinal faculty members would be pressured to surrender tenure. While “faculty in professional schools, where more nonacademic labor markets operate, might be more apt to relinquish tenure than colleagues with few or no options other than college teaching,”<sup>41</sup> so long as the majority of law schools remain attached to universities, it is from that perspective that law faculties will seek intellectual validation. In that venue “there is no substitute for tenure...[because] tenure, more than any other attribute, confers status, shapes a faculty member’s self-image as a proficient professional, and signals quality, rightly or wrongly, to colleagues everywhere.... Without tenure, one could be mistaken for an academic ne’er-do-well.”<sup>42</sup> In such environments a firm line divides those who are tenured and those who are not.

A common compromise between complete exclusion and full recognition is to grant library faculty “the opportunity to vote on all matters except personnel decisions,...allowing the non-tenure-track [faculty] an opportunity to participate without ceding power where professors generally think it matters most: hiring, promotion, and tenure decisions.”<sup>43</sup> Such selective exclusions are not uncommon, and show how even when nominally tenured, but on a distinct

40. *Id.* at 2.

41. Charles T. Clotfelter, Can Faculty Be Induced to Relinquish Tenure?, *in* *The Questions of Tenure* 221, 242 (Harvard Univ. Press 2002).

42. Richard P. Chait, Gleanings, *in* *The Questions of Tenure*, *supra* note 41, at 315.

43. Susan P. Liemer, The Hierarchy of Law School Faculty Meetings: Who Votes?, 73 *UMKC L. Rev.* 351, 371 (2004).

“librarian” track, the practical outcome is detrimental to the library. The rise of separate librarian tracks has been tied in at least one analysis specifically to the refusal of “regular law school faculty...to accept law librarians as equals.”<sup>44</sup>

Moreover, as the ALDA action suggests, deans can be resistant to the idea of full inclusion of law library directors in faculty governance matters, and a new dean may marginalize or even exclude them. In those instances, the director needs to be able to invoke the formal privileges of rank.

Aside from the explicit prerogatives of tenure status, Paul Callister calls our attention to the indirect benefits that may accrue simply by sharing the tenure review process all faculty endure. “The faculty tenure process is an important vehicle for directors to build relationships of trust and confidence with the faculty.”<sup>45</sup> Undergoing the same stressful experience can create common ground between the director and other faculty members who may otherwise feel that the librarian’s interests and work hold no relevance for them. This camaraderie benefits the library as “the general comity between faculty members [renders it] easier to resolve differences in a collegial fashion, something that may be less easy when the director is identified as ‘staff.’”<sup>46</sup> Moreover, reviewing the tenure dossier can be the first opportunity for many faculty members to understand the extensive work and activities required of a successful director.

In the end, to fulfill the key institutional role, the director needs to be not merely tolerated within the governance structure of the law school, but able to meaningfully participate in those duties. The director must be taken seriously as a true peer of the doctrinal faculty because an “individual professor’s input is not as highly valued and may not even be sought at all if there is no vote attached to it.”<sup>47</sup> Equal status can be achieved only by offering the director tenure conditions identical to those extended to regular faculty. Neither tenure earned under substantially less onerous criteria, nor renewable contracts, can provide the institutional stature to stand equally with doctrinal faculty in the heated confines of the faculty meeting. The second-class citizenship “status accorded to faculty on contracts versus colleagues with tenure...will be readily discerned” and result in their diminished participation.<sup>48</sup> So long as the doctrinal faculty enjoys tenured status, the practical realities of social interaction within the institution require that the director be eligible for the same.

44. Sharon Blackburn, Robert H. Hu, Masako Patrum & Sharon K. Scott, Status and Tenure for Academic Law Librarians: A Survey, 96 *Law Libr. J.* 127, 133 (2004).

45. Paul Callister, Standards for Library Directors, Reader comment posted to Doug Lederman, Calling in the Big Guns, Inside Higher Ed (March 2, 2009), available at <http://www.insidehighered.com/news/2009/03/02/lawprof>.

46. Simons, *supra* note 1, at 264.

47. Liemer, *supra* note 43, at 363.

48. Clotfelter, *supra* note 41, at 229.



### III. The Publication Hurdle to Tenure

Even the best argument for director tenure is a nonstarter if incumbents are either unwilling or unable to take those steps necessary to pass a tenure review. In the construction of our defense we made two assumptions about law library directors that, if not valid, may help to explain the circumstances that led ALDA to oppose Standard 603. The first assumption is that directors want tenure, and are willing to do the work required to generate a dossier of accomplishments that will pass review by a tenure committee; the second is that they are able to do this, that library directors possess not only the administrative skills to run a library but also the interests and expertise to produce the requisite scholarly output to be judged tenureable. We examine these assumptions in light of our earlier conclusion that librarian tenure must be offered on substantially the same terms as that extended to doctrinal faculty.

The primary tenure metric is the quantity and quality of scholarship an individual has produced. It “would be no exaggeration to say that unless librarians do engage in scholarship, they are not truly faculty members.”<sup>49</sup> Although the burden of their administrative responsibilities means that the scholarly criteria against which librarians are judged are inevitably different from those of doctrinal faculty, any deviation should relate to the quantity of their scholarship not its quality. Here we look at whether directors see this as a worthwhile goal for themselves, notwithstanding its desirability for the profession.

Without doubt, anyone associated with a university who has the option of being tenured will prefer to hold such status. The real question is whether they are also willing to do the extra work necessary to earn that prize, given that “the viewpoint that excellent librarianship alone should be enough to earn tenure has not won out and almost universally academic law librarians will be required to do more in order to earn tenure.”<sup>50</sup>

No tenure worth the name can be had without success in scholarly writing. This prerequisite is, at least in the case of the director, more contingent than necessary, given the earlier brief that the basis for librarian academic freedom rests primarily upon the choices made in the performance of professional duties rather than any controversial ideas that may be expressed in print or in the classroom. Yet if the tenure is to be perceived as equivalent to that given to doctrinal faculty, it must be awarded on substantially similar criteria. The short list of those criteria has at its top published scholarship. Given that fact, one might expect that academic law librarians everywhere are working to establish themselves as serious scholars so as to build the record expected of tenureable faculty.

49. Daniel F. Ring, *Professional Development Leave as a Stepping Stone to Faculty Status*, 4 *Acad. Libr.* 19 (1978).

50. Parker, *supra* note 24, at 9 n.17.

That hope would only be half correct. Many librarians may be writing, but less because they feel moved to contribute to the profession than from the need to compile a tenure dossier. Paul Callister, for example, regrets that without the prod of a tenure evaluation, library directors would have little interest or motivation to pursue publishable research. “If tenure track positions decrease or disappear altogether among law library directorships, my fear is that most of the serious scholarly efforts in the profession would likewise vanish. Engagement in law library scholarship would come to be seen as a luxury and a distraction, and therefore be resented.”<sup>51</sup> While this attitude is perhaps not unique to librarians, doctrinal faculty who fail to write and publish will quickly find their academic careers hobbled. Similarly unproductive librarians may suffer loss of formal or informal status, but only rarely denial of position. This reality creates an ambivalence within the profession toward scholarly writing.

Only when faced with an impending tenure review will librarians often attempt a serious writing project, perhaps their first—and, for many, their last.<sup>52</sup> But for most that moment comes too late to compile a publishing record of note, causing them to be understandably anxious about the prospects of an adverse judgment from their doctrinal colleagues.

Such “writing for tenure” is a grotesque reversal of the traditional causal links between tenure and scholarship. Whereas tenure should be awarded to those who pursue scholarship, and are thus in need of the academic protections it affords, surveys suggest scholarship will be pursued only by those who can exchange it for tenure status.<sup>53</sup> Martha Dragich has warned against just this attitude:

[Law] librarians who wish to be taken seriously as fully participating members of the legal academy must abandon any assumption that strictly equates the reason for writing with the achievement of tenure. This assumption manifests itself in two ways: that only an appointment on the tenure-track carries with it an obligation to publish, and that an appointment outside the tenure-track eliminates any reason to publish. Both assumptions are short-sighted. Neither serves academic law librarians well.<sup>54</sup>

51. Paul D. Callister, Comment Submitted to the Comprehensive Review Standards Committee 4 (Aug. 14, 2009), available at <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Callister%20August%202009.pdf>.
52. Others have also pointed out that librarians may not feel the same natural impulse to generate a scholarly literature as do the other faculty whose status librarians wish to share. *E.g.*, Mike Chiorazzi, *The Next Twenty-Five Years of LRSQ*, 25(4) *Legal Ref. Serv. Q.* 5, 9 (2006) (noting that “[t]here has been some healthy debate on the listservs as to whether librarians ‘need to publish.’”).
53. *See e.g.*, Blackburn et al., *supra* note 44, at 140 (“When the quest for tenure drops from the picture, the requirement to publish also drops.”).
54. Martha Dragich, *Law Library Director—Scholar: Writing for Tenure*, 27(2-3) *Legal Ref. Serv. Q.* 191,192 (2008).

On the contrary, “writing should begin early in a librarian’s career and become a sustained effort throughout.”<sup>55</sup> Though librarians tend not to undertake research and writing agendas, it would benefit them to do so, not least because they may realize that management of a research collection is easier if one has conducted scholarly research. Their personal understanding of how scholars actually use materials to write extended works can inform collection arrangement, identify needed services, and help choose appropriate formats.

We should not conclude that these librarians decline to write out of simple apathy. Many genuinely feel that they are not able to perform at the requisite level, as suggested by a 2004 survey among library directors:

I felt I couldn’t meet the faculty standards for promotion and tenure and do a decent job as library director, too. I did receive faculty rank and have a vote on all faculty matters except promotion and tenure. I felt this was sufficient.

This law school would want a librarian with faculty status to meet the same academic tenure track standards as faculty. I don’t believe that any law librarian could meet those standards.

Many who have tenure-track appointments are...doomed to failure.<sup>56</sup>

Simons, in fact, believes that insecurities rooted in publication demands for tenure are so widespread among law librarians that it is “likely that the law school seeking a new law library director will face a reduction in the number of candidates for the position if the tenure track is a requirement.”<sup>57</sup> Perhaps as a concession to this view, advertised openings today commonly specify that the position can be had on either tenure or nontenure track, according to the interests and abilities of the candidate.

Seeing the need to foster a strong scholarly tradition among all law librarians, AALL offers many opportunities to nurture young writers. Since the mid-1980s it has, in conjunction with LexisNexis, encouraged scholarly writing through its Call for Papers writing competition.<sup>58</sup> The committee overseeing the competition has expanded its mission by offering a workshop to mentor authors through the writing process. More recently, AALL has created the Publishing Initiatives Caucus<sup>59</sup> and produced a webinar to “learn

55. *Id.* at 193.

56. Linda Ryan, Academic Law Library Directors’ Survey (2004), on file with the authors. This unpublished survey is summarized at Simons, *supra* note 1, at 246 n.3.

57. Simons, *supra* note 1, at 260.

58. AALL, AALL/LexisNexis Call for Papers Awards, *available at* [http://www.aallnet.org/about/award\\_call\\_for\\_papers.asp](http://www.aallnet.org/about/award_call_for_papers.asp).

59. AALL, Publishing Initiatives Caucus, *available at* <http://www.aallnet.org/caucus/pic/index.htm>.

the nuts and bolts of getting published.”<sup>60</sup> There is hope, therefore, that rising librarians will become more confident in their ability to perform at the level demanded of tenureable faculty.

However, this expectation is still far from a uniform professional norm, a reality whose fruits might explain the present push to revise 603. “There are instances of directors who develop enviable records of legal scholarship and teaching; there is no reason that achievement should not be recognized, but it cannot reasonably be demanded of all directors.”<sup>61</sup> We disagree with that conclusion. It must be demanded of all directors, because to do otherwise puts them personally at a disadvantage vis-à-vis the law school, jeopardizes the library’s long term interests, and ultimately damages the profession of law librarianship itself. Yet, so long as Simons’s perception remains commonly accepted, Standard 603 does make little sense, and the deans’ opposition becomes more sensible. The solution, however, is not to lower the bar, but to expect more from the person chosen to be director.

#### **IV. Empirical Assessment of Law Library Directors’ Tenureability**

How do library directors actually perform on the tenure criterion of scholarship, relative to their faculty peers? If directors produce substantially less scholarship, we might then be able to deduce whether the difficulty is one of a too humble self-perception or an actual failure to perform.

The typical tenure review considers scholarship from the twin perspectives of quantity and quality, with the latter far outweighing the former. The candidate should strive for both, but better to have a few high quality publications than many lesser works. Our analysis looks at two independent measures: Leiter scholarly impact scores and SSRN downloads.

##### *Leiter Scholarly Impact Score Comparisons*

As an alternative to the misleading *U.S. News & World Report* rankings, Brian Leiter has generated several measures that analyze objective data rather than subjective reputational assessments. Of particular interest to the present project is his method of quantifying scholarly impact. To create these scores, one searches the Westlaw JLR database using the query “firstname w/2 lastname.” The first ten hits are reviewed to see how many are false positives, and the raw total is multiplied by this percentage to generate the corrected impact score.<sup>62</sup>

60. AALL, Webinar: Take the Write Road (April 14, 2010), available at <http://www.softconference.com/aall/sessionDetail.asp?SID=225164>.

61. Simons, *supra* note 1, at 267.

62. Leiter’s method is described in Brian Leiter, Top 35 Law Faculties Based on Scholarly Impact, 2007 (Sept. 1, 2007), available at [http://www.leiterrankings.com/faculty/2007faculty\\_impact.shtml](http://www.leiterrankings.com/faculty/2007faculty_impact.shtml).

While designed to permit comparison of schools, this published measure also allows direct comparison of the scholarly performance of law library directors at top law schools against that of their own faculties (see Table 1).<sup>63</sup>

**Table 1. Library Director Scholarly Impact Compared to Their Faculties (2005-2009)**

Law school	Faculty scholarly impact (mean)*	Law library director	Director's scholarly impact**	Law school dean	Dean's scholarly impact
Boston University	150	Marlene Alderman	0	Maureen A. O'Rourke	253
Cardozo	151	Lynn Wishart	3	Matthew Diller	154
Columbia	340	Kent McKeever	4	David M. Schizer	173
Cornell	238	Claire Germain	47	Stewart J. Schwab	394
Duke	250	Richard Danner	56	David F. Levi	135
Emory	156	Mark Engsborg	21	David F. Partlett	87
Florida State	153	Faye Jones	4	Donald J. Weidner	67
George Washington	202	Scott B. Pagel	7	Frederick M. Lawrence	90
Harvard	485	John Palfrey	104	Martha Minow	1046
New York University	364	Radu Popa	6	Richard L. Revesz	642
Northwestern	272	James Mc-Masters	3	David E. Van Zandt	71
Stanford	434	Paul Lomio	20	Larry D. Kramer	1106
University of Arizona	162	Michael Chiorazzi	26	Lawrence Ponoroff	90
University of California, Berkeley	324	Kathleen Heuvel	20	Christopher Edley, Jr.	141
University of California, Irvine	276	Beatrice Tice	3	Erwin Chemerinsky	2946

63. Omitted from Table 1 are scores for University of California, Davis; University of Texas, Austin; and Georgetown, which at the time of this writing had only interim directors.

Law school	Faculty scholarly impact (mean)*	Law library director	Director's scholarly impact**	Law school dean	Dean's scholarly impact
UCLA	235	Kevin Gerson	17	Stephen C. Yeazell	247
University of Chicago	493	Judith Wright	2	Michael H. Schill	194
University of Colorado, Boulder	132	Barbara Bintliff	34	David H. Getches	324
University of Illinois	180	Janis Johnston	11	Bruce P. Smith	84
University of Michigan, Ann Arbor	246	Margaret Leary	18	Evan H. Caminker	288
University of Minnesota	188	Joan Howland	42	David Wippman	190
University of Pennsylvania	228	"Paul M. George"	2	Michael A. Fitts	55
University of Southern California	129	Albert Brecht	8	Robert K. Rasmussen	264
University of Virginia	216	Taylor Fitchett	0	Paul G. Mahoney	423
Vanderbilt	257	Martin Cerjan	2	Chris Guthrie	458
Washington University, St. Louis	134	Phil Berwick	3	Kent D. Syverud	210
Yale	566	Blair Kauffman	21	Robert C. Post	1361
<b>Total</b>	<b>6961</b>		<b>463 (7 percent of faculty)</b>		<b>10,132 (146 percent of faculty)</b>

\* Source: Brian Leiter, Top 25 Law Faculties in Scholarly Impact, 2005-2009) (2010), available at [http://www.leiterrankings.com/new/2010\\_scholarlyimpact.shtml](http://www.leiterrankings.com/new/2010_scholarlyimpact.shtml).

\*\* Librarian impact scores were found by running the following search in the JLR database: (firstname w/2 lastname) and da(after 2004) and da(before 2010). Where indicated by quotations a search was made by exact form due to the common names involved.

When comparing this group of elite law faculties and their librarians, we see that in the aggregate Leiter scores for library directors are about 7 percent of those for doctrinal faculty. In other words, the average scholarly impact of a sitting director was slightly above one-fifteenth that of the average faculty member over this five-year span. We feel that this outcome is reasonably

robust, because the 2005–2009 study added many schools that had not been included in the 2005–2008 version, yet this percentage changed very little after the update.

The comparatively lower scholarly impact of librarians is not solely the result of a failure to publish, but rather failure to publish the kinds of things that others cite. Regrettably, author-librarians have earned their reputation for producing works that are “neither very memorable nor very quotable.”<sup>64</sup> Were librarians to write more literature that generated discussion at least among their colleagues, their impact scores would rise. As it is, they often concentrate on works that, while useful, occasion no reactions from even other law librarians. Such items as annotated bibliographies, book reviews, pathfinders, and other aids should be in the mix of a tenureable librarian’s published corpus, but leavened with more traditional scholarship that communicates the librarian’s own ideas, rather than only that which direct patrons to the ideas of others.

It is important to note that the scores in Table 1 by no means represent the whole of a librarian’s scholarly productivity and citations, but only that part which is reflected in the JLR database. Notably missing are journals from most commercial publishers, including the *Legal Reference Services Quarterly*, as well as regional publications—and thus these scores reflect a “discount” on that basis. Faculty scores are similarly deflated due to a lack of coverage of all outlets in which their work might appear or receive mention, such as interdisciplinary and foreign journals. Another limitation of this method is that authors receive at least one hit for each published article, plus any later citations, but receive no such credit for publishing in books, unless they are then cited by JLR periodicals. As a result, these tallies should not be read as an absolute indication of individual accomplishment, but only a consistent and relative measure for comparison within the sample.

Librarians could perhaps argue that their administrative responsibilities limit their ability to produce the significant scholarship valued by the Leiter score. Yet, appeals to administrative burdens can be taken too far. We suspect that data will not support the qualitative differences that librarians believe exist between the demands on their own time and those endured by other faculty, and which would support a vastly reduced expectation to publish. However burdened the librarian, it would be hubris to assert that the director has more pressing administrative demands than the law school dean. Yet, as the last column in Table 1 demonstrates, deans routinely exceed the mean scholarly impact scores for their respective institutions. At the very least, these data show that the reasonableness of an administrative discount will be a complicated argument that does not quickly justify a reduction in meaningful scholarship.<sup>65</sup>

64. John David Marshall, Foreword, in *Books are Basic: The Essential Lawrence Clark Powell* (Univ. of Arizona Press 1985).

65. For example, a more plausible basis for discounting could point not to the administrative duties of the director but to the longer contract term, which is typically a full twelve months rather than the doctrinal faculty’s nine months.

A logical question is whether these directors—many of whom have been in office for long years—were hired in a former era when the professional performance standards differed significantly from those expected today. Perhaps Table 1 reveals not the face of librarianship as it is, but as it was. What selections are law school deans making today, given the present environment which heavily scrutinizes the tenureability of library directors? One might assume that deans now search for candidates who more closely match the tenure criteria for their schools. To test this hypothesis, we generated a new dataset, one that looks not at established directors, but at new hires.

We identified sixteen directors who assumed their posts in 2009 (the last full year at the time of our inquiry), and calculated the Leiter score for each school’s faculty as well as its new director.<sup>66</sup>

**Table 2: Class of 2009 Library Directors  
Scholarly Impact Compared to Their Faculties**

Law school	Avg. faculty scholarly impact (lifetime)	Newly-named law library director	Director’s scholarly impact (lifetime)
Ave Maria	248	Mitch Counts	9
Charleston	34	Lisa Smith-Butler	26
Florida A&M	39	Phebe Poydras	3
Lincoln Memorial	13	Gordon R. Russell	24
LSU	121	Dragomir Cosanici	28
Northern Kentucky	46	Michael Whiteman	48
Pacific McGeorge	90	Matthew P. Downs	17
Regent	61	Margaret Christian- sen	5
San Joaquin	2	Pete Rooney	0
St. Thomas (FL)	68	Roy Balleste	24
SUNY Buffalo	178	James A. Wooten	114
Texas Wesleyan	52	Michelle Rigual	8

66. Our methodology differed from Leiter’s in that we accepted as “faculty” anyone the school listed as such on their public webpages. This means that we included names that Leiter in his most recent tally would exclude, such as untenured faculty, judges who do some teaching, as well as faculty “who have left for major government service.” Given the difference in our purposes however—to compare directors with their own faculties, and not to rank schools—we deemed this an acceptable deviation. Exceptions from this rule included visiting professors.



Law school	Avg. faculty scholarly impact (lifetime)	Newly-named law library director	Director's scholarly impact (lifetime)
University of Cincinnati	158	Kenneth J. Hirsh	26
University of the District of Columbia	50	Vicenç Feliú	11
University of San Diego	224	Karl T. Gruben	60
Wayne State	145	Virginia Thomas	4
<b>Total</b>	<b>1529</b>		<b>407 (27 percent of faculty)</b>

While small, this sample displays marked improvements, suggesting that the remedial efforts of AALL and other entities have begun to yield fruit among rising directors. Not only do new directors have an impact score much higher relative to their faculty colleagues than did the previous sample (27 percent instead of 7 percent), but they seem to be a better match for their respective schools, with more productive librarians tending to receive appointments at more productive schools ( $r=0.40$  instead of  $0.27$ , which drops to  $0.21$  when Table 1 scores are recalculated to reflect the lifetime scholarly impact scores used in Table 2).

Future data generated as new directors are appointed will reveal whether these results are the leading edge of an emerging trend or a statistical fluke. If the former, we would then have evidence to argue that new directors are beginning their directorships with better scholarship records than many of their predecessors have achieved at the end of theirs. Equally important, deans appear to be selecting directors who fit well with the scholarly priorities of their schools.<sup>67</sup> This is an environment in which directors should be competitive tenure candidates and peers with the doctrinal faculty.

#### *SSRN Comparisons*

To offset the possibility that the conclusions above are based upon a small and potentially unrepresentative sample of new directors, we also examined these questions from the perspective of a different, independent measure of scholarly impact. The Social Science Research Network (SSRN) is a free repository of working papers that are individually uploaded. These papers are both “pushed” by electronic series generated by SSRN, and easily found

67. An interesting follow-up question would be whether new directors are more likely to receive institutional support for scholarship in the form of startup funds, release time, and sabbaticals, than was formerly the case.

by browsers such as Google. The number of total downloads for each paper is publicly displayed, and SSRN now posts aggregate statistics including each school's affiliated authors.<sup>68</sup>

The SSRN data correct what we identified as a limitation of the methodology underlying Leiter scores, i.e., the restricted range of scholarship included within the JLR database. Here each individual is free to upload whatever content, from any source that he or she wishes, provided only that SSRN editors deem it relevant to the selected distribution series. In other words, the full written output of a librarian can be counted and weighed on parity with faculty submissions. This method has its own shortcomings. Instead of gathering material from established publishers, SSRN relies entirely upon author submission, and thus its database, while sizeable, is much more idiosyncratic. For example, many faculty members have resisted posting drafts of their work in this public forum. Moreover, "SSRN download counts are likely to be more manipulable by authors than citation counts."<sup>69</sup>

Table 3 compares the same top law schools and their library directors on two SSRN measures. The institution's "Total downloads per author" is most readily analogous to the Leiter score, representing "total all-time downloads of all papers by all authors...divided by the number of such authors." The second score, "Total downloads per paper," is the "average number of all-time downloads per paper for all papers by authors currently affiliated with an institution."<sup>70</sup>

**Table 3: Directors and Faculties Compared on Two SSRN Statistics**

Law school	Total down-loads/author	Total down-loads/paper	Law library director	All-time downloads	Downloads/paper
Boston Uni- versity	1699	232	Marlene Alderman	o	o
Cardozo	1627	221	Lynn Wishart	o	o

68. SSRN Top U.S. Law Schools, *available at* [http://hq.ssrn.com/rankings/Ranking\\_Display.cfm?TMY\\_gID=2&TRN\\_gID=13](http://hq.ssrn.com/rankings/Ranking_Display.cfm?TMY_gID=2&TRN_gID=13). SSRN statistics are updated monthly; results in Table 2 reflect data from Dec. 18, 2010.

69. Bernard S. Black & Paul L. Caron, Ranking Law Schools: Using SSRN to Measure Scholarly Performance, 81 Ind. L.J. 83, 115 (2006); *see also* Benjamin Edelman & Ian Larkin, Demographics, Career Concerns or Social Comparisons: Who Games SSRN Download Counts, Harvard Business School Working Paper 09-096, *available at* <http://www.ssrn.com/abstract=1346397>.

70. About SSRN Top Law Schools, *available at* [http://www.ssrn.com/institutes/about\\_top\\_law\\_schools.html](http://www.ssrn.com/institutes/about_top_law_schools.html).

Law school	Total down-loads/author	Total down-loads/paper	Law library director	All-time downloads	Downloads/paper
Columbia	2614	401	Kent McKeever	218	218
Cornell	1018	193	Claire Germain	1030	515
Duke	1720	265	Richard Danner	950	118
Emory	1069	196	Mark Engsborg	0	0
Florida State	1819	142	Faye Jones	0	0
George Washington	3016	485	Scott B. Pagel	0	0
Harvard	2779	435	John Palfrey	7733	351
New York University	1141	246	Radu Popa	0	0
Northwestern	2316	334	James McMasters	0	0
Stanford	2147	455	Paul Lomio	0	0
University of Arizona	1598	269	Michael Chiorazzi	0	0
University of California, Berkeley	1471	276	Kathleen Heuvel	0	0
University of California, Irvine	2372	272	Beatrice Tice	37	37
UCLA	2904	394	Kevin Gerson	0	0
University of Chicago	5016	476	Judith Wright	0	0
University of Colorado	1267	252	Barbara Bintliff	109	109
University of Illinois	3084	349	Janis Johnston	29	29
University of Michigan	1772	268	Margaret Leary	66	66
University of Minnesota	2104	276	Joan Howland	0	0
University of Pennsylvania	2635	313	Paul M. George	0	0
University of Southern California	3376	391	Albert Brecht	0	0

Law school	Total down-loads/author	Total down-loads/paper	Law library director	All-time downloads	Downloads/paper
University of Virginia	1479	231	Taylor Fitchett	0	0
Vanderbilt	3660	292	Martin Cerjan	0	0
Washington University, St. Louis	1152	259	Phil Berwick	0	0
Yale	1544	344	Blair Kauffman	124	124
Total	58399	8267		10296 (17 percent of faculty)	1567 (19 percent of faculty)
Class of 2009					
Ave Maria	98	40	Mitch Counts	0	0
Charleston	134	89	Lisa Smith-Butler	602	301
Florida A&M	100	100	Phebe Poydras	0	0
Lincoln Memorial	281	94	Gordon R. Russell	0	0
LSU	177	65	Dragomir Cosanici	37	37
Northern Kentucky	514	162	Michael Whiteman	242	121
Pacific Mc-George	401	146	Matthew P. Downs	0	0
Regent	177	67	Margaret Christian-sen	0	0
San Joaquin	0	0	Pete Rooney	0	0
St. Thomas (FL)	416	75	Roy Balleste	0	0
SUNY Buf-falo	531	112	James A. Wooten	1342	268
Texas Wes-leyan	318	114	Michelle Rigual	0	0
University of Cincin-nati	927	172	Kenneth J. Hirsh	0	0
Univer-sity of the District of Columbia	91	172	Vicenç Feliú	75	37

Law school	Total down-loads/author	Total down-loads/paper	Law library director	All-time downloads	Downloads/paper
Univer-sity of San Diego	3060	283	Karl T. Gruben	0	0
Wayne State	891	156	Virginia Thomas	0	0
<b>Total</b>	<b>7225</b>	<b>1691</b>		<b>2298 (31 percent of faculty)</b>	<b>764 (45 percent of faculty)</b>

While the significance of SSRN statistics is open to debate, it is reassuring that we find the same trend seen for Leiter scores. On both SSRN measures, new directors outperform established directors, their aggregate total downloads represent 31 percent of their respective faculties (as compared to 17 percent for Table 1 schools), and their per-paper downloads reach an impressive 45 percent (versus 19 percent).

To summarize, while each of the analyses offered are small and suffer from recognized shortcomings,<sup>71</sup> their convergence on the same broad results bolsters this paper's arguments. First, past law library directors may not have been easily tenureable on the same basis as doctrinal faculty, especially when one looks at the primary evaluative criterion of scholarly production. That finding makes reasonable the objections of law deans to a requirement that directors receive a tenure track appointment.

However, we find evidence that these circumstances are changing with the new generation of library directors. The data consistently find that new directors begin their terms performing at least as well, if not better, on scholarly measures than have established directors well into their careers. Moreover, they are better matched for their environments on these terms, promising successful tenure cases. Whether measured by Leiter scholarly impact scores or by SSRN downloads per paper, these younger directors as a group appear to take the tenure requirement to write more seriously than their older colleagues. As

71. Not discussed is the likelihood of a tiered effect. By definition, Table 1 schools are all in the first tier, and thus have a solid stable of stellar academic faculty against whom any librarian is likely to pale in comparison. By contrast, Table 2 schools represent a broader mix. On that basis alone, Table 2 librarians are likely to look better compared to their faculties. We are at this time not certain how to control for this effect.

more data become available, we can better plot these changes. Such trends provide a more appropriate response to the concerns of the deans expressed by ALDA than simply the elimination of tenure. Time will tell, however, whether this improvement comes too late to preserve the current form of Standard 603.

### **V. Conclusions**

As librarians, directors need and fully deserve the protections and privileges attached to tenured status. Tenure, however, is awarded on the merits of scholarship, not librarianship, and on this measure we appear to have historically fallen short. That lapse arguably fosters a perception of librarians as not true faculty. That perceived inability to earn tenure has led to the conclusion that we do not deserve it, thereby generating resistance to any mandate that the school must offer directors a tenure track position.

Tenure represents a concession to the tension within the university between administrative self-interest and educational idealism. It protects the central values of legal education, including academic freedom and shared governance. Library directors qualify for this status on exactly the same terms as doctrinal faculty; we could identify no principled reason to exclude these librarians while justifying tenure for anyone else. Directors need tenure protections in order to fulfill the core responsibility of managing the library, and as such, merit appointment as full peers with their doctrinal colleagues. The only exception to this standard should be those rare circumstances where no one at the law school holds tenure. Separate librarian tenure tracks or renewable contracts offer neither the necessary formal guarantees nor the informal status of an equal that facilitate effective representation of the library to the faculty and administration when curricular and related matters are being debated.

Librarians, however, have traditionally been of two minds about the work required to earn tenure by the established criteria, specifically scholarly production. Some judge it beyond their abilities (but fine for those who enjoy the process), while others think tenure itself is not a worthwhile goal for librarians. Many view scholarship as a desirable but optional activity. Consequently, director scholarly productivity consistently stands far below that of their doctrinal faculty, making it difficult to defend librarians as tenure-worthy peers.

Fortunately, we see signs that what was the exceptional productivity of a few within the previous generation of directors may become the norm among those rising to replace them. Every effort should be taken to encourage this trend, especially by regarding writing as a routine professional activity for librarians of all ranks. We cannot predict whether these changes will thwart the push to eliminate Standard 603, but even without that directive we should, simply from our own professional motives, be engaged in the activities that would sit comfortably within any tenure dossier.

In sum, for the sake of their libraries, directors should strive for tenure status. This goal requires fostering within librarians the expectation that they

should produce scholarship that rises to the quality demanded of doctrinal faculty. If we would be tenured, we must first, as a profession, make ourselves tenureable.