



Memorandum

To: Charles Van Loan, Dean of the Faculty
From: Eduardo Peñalver, Allan R. Tessler Dean and Professor of Law
Date: April 21, 2020
Re: Second Elaboration on Proposal to Grant Law School Discretion over Maximum Periods of Service

Thank you again for the opportunity to present to the Faculty Senate last week. Shortly before the presentation, the Standing Committee on Academic Freedom and the Professional Status of the Faculty (AFPSF) issued its Review of the Cornell Law School Clinical Tenure Proposal requesting . After the presentation, the Committee reached out to us with additional questions and requests for information. This is our response to that request.

1. Unitary versus Clinical Tenure

With regard to the model of unitary versus clinical tenure, the Committee made a suggestion and posed several questions.

1.1 Consider Current Clinical Faculty for Unitary Tenure

In our previous submissions and in our presentation to the Faculty Senate we explained that moving to a system of clinical tenure will support clinical faculty recruitment. We received a suggestion that the law school start by offering unitary tenure to existing clinical professors, thus clearing the path for recruitment of new clinical professors who might feel uncertain about embarking on a tenure process at a school where clinician scholarship has never been a criterion for hiring or promotion. As we said at the Faculty Senate meeting, there is a lack of consensus behind unitary tenure at the Law School, and (with the exception of Georgetown) none of our peer law schools with top clinical programs employs a system. In addition, very few current clinical faculty would be willing to step into a unitary process. Most of the eligible faculty would have to recalibrate their priorities, particularly difficult over the next few years when the demand for clinician public service is high, to produce scholarship. Moreover, this strategy would throw interim recruitment efforts into confusion. There is consensus at the Law School that a clinical tenure pathway is a measured step forward that is both better tailored to our current clinical faculty and more inviting to new hires. That said, under our Clinical Tenure model, the *process* would look very much like unitary tenure, with ad hoc committees and FACTA review prior to Trustee approval of any tenure decision.

1.2 Example of another unit developing a system of unitary tenure across a “deep divide”

The Committee provided the example of the physics department, where a scholar with a unique research agenda (physics education) is in a unitary process. As is the case in other disciplines at Cornell, the Law School’s faculty tends to interact with (and compare itself to) peers in its own discipline at other universities rather than other departments at Cornell. As a result, our faculty culture has more in common with other law schools, such as the University of Pennsylvania Law School, than with the Cornell’s Physics Department. Adding to this, it is important to bear in mind that at the law school, clinician scholarship has not been a requirement for hiring or promotion and having a clinical tenure option/track is a way of beginning to both encourage and mainstream scholarly work by our clinicians. This is not simply a matter of changing hearts and minds about what is acceptable scholarship or what topics of study merit inclusion among the Law School’s tenured ranks, though this is an element of the process. It is about creating a new blended culture of scholarship production, consideration, and review. In short, the consensus view among our faculty is that the best path is to nurture our clinical program as a scholarly site through a parallel clinical tenure process. This is not to say that the Law School’s proposed solution is the only possible one – or that other models might not work perfectly well in other units. It is simply to say that, after a long period of deliberation that included consideration of a unitary system, the Law School’s faculty reached a conclusion about what system would work best for the Law School.

1.3 Clinical tenure as a pathway to establishing a system of unitary tenure at other law schools

We also received a request for information on clinical tenure as a pathway to establishing a system of unitary tenure at other law schools. The unitary tenure schools with the top clinical programs are American, CUNY, Denver, Georgetown, Maryland, and UDC (See Appendix I, which contains the updated chart of T-10 clinical programs that we showed in our presentation). Most of these histories date back to the 1970s and 1980s and they are not recorded, so we have reached out to faculty and Emeriti faculty at these schools. One of these schools moved first to clinical tenure then to unitary tenure (American), four moved to unitary tenure directly from a system of contracts (CUNY, Denver, Georgetown, and Maryland), and one (UDC) was founded in 1972 as a social justice law school that never distinguished between faculty who teach clinical courses and those who teach non-clinical courses, and so never went through a period of contracts. At least two of the schools that have unitary tenure (CUNY and Maryland) currently have a significant number of contract faculty because the unitary standard was discouraging. The reality is that schools with clinical tenure tend to have a higher percentage of clinicians who actually achieve the top available rank.

As we laid out in detail in our previous submission and Senate presentation, all but one of the T-14 peer schools with top clinical programs have opted for a system of clinical tenure (See Appendix II).

1.4 Question about U.S. News Methodology

In its April 18 memo, the AFPSF posed two questions regarding the law school's scholarly ranking concern, and asked that we include the following excerpt from one of our previous written statements:

The law faculty carefully discussed the possibility of converting the clinical faculty to the traditional tenure track. We rejected this option because we were persuaded that the Weill Cornell model provides the right one for what we are attempting to accomplish. Clinical faculty are promoted not just on the basis of the traditional metrics of scholarship, teaching and service, but also on the additional basis of their clinical acumen. We believe that a bifurcated tenure system, with clinical tenure demarcated by a difference in title and standards, is more transparent and safeguards the traditional tenure track from confusion. In addition, because – as a professional school – our pedagogical goals (and, increasingly, our methods) are closely aligned with Weill Cornell, adopting the structure they have already pioneered for professional instruction at Cornell University is less disruptive than a unitary system.

As we noted in our original proposal:

“One option we considered was to shift clinicians to the existing tenure track and allowing different kinds of “products” to be counted in the tenure dossier. We decided not to follow this path because of potential coming changes in the U.S. News law school ranking methodology that may begin quantifying and narrowly defining scholarship. A clinical tenure track is a more appropriate path for the law school at this juncture.”

The AFPSF posed the following two questions on this point:

“As you know, the methodology that US News uses to rank law schools does not take into account faculty publications and there is no plan to change that. But as mentioned in the CLS proposal, the magazine has plans to do a separate scholarly impact ranking and this is advanced as a reason not to proceed with a unitary system. Does this have something to do with the quotient #pubs/#TT that would no doubt figure in the ranking?

This is correct. Although this is not our primary reason for seeing the same exemption granted to the medical school, the coming addition of a scholarly impact ranking strongly supports our desire for an incremental approach. In case U.S. News decides to treat clinical faculty differently, maintaining a separate track is the most prudent course of action at the present time.

“And does it really matter given that law school deans across the country seem to be opposed to the whole idea of a scholarship-based ranking.”

The Committee's memo links to a letter from the Society for Empirical Legal Studies, which does not have much influence over U.S. News. The law school deans have not spoken with one voice on this issue, though many deans apparently did reach out to U.S. News' Bob Morse and he responded in an open letter last year. That letter made clear that the discussion is about how, not whether, the scholarly impact ranking will be instituted. Also, however fervent opposition

may be, U.S. News does not typically consider the views of law school deans in formulating its rankings methodology. And, however distasteful the topic of rankings may be, the reality is that law school rankings have great influence, particularly on student behavior.

2. Request for Environmental Impact Statement

In its April 15 statement, the AFPSF stated that “implementation of a clinical tenure path would have ramifications for the rest of the University and, as such, cannot be viewed in isolation but must be viewed in the broader context looking forward” to avoid “unintended side effects that impact the other colleges.” The AFPSF requested “a principled plan for handling analogous requests that are sure to come from the other colleges.”

2.1 Impact on Other Schools at Cornell

The law school’s request is rooted in long-standing trends in legal education that do not exist in other fields, and so it stands to reason that the consequences will be similarly confined. Moreover, the use of the “Clinical Professor” title at Cornell outside of the law and the veterinary schools is very limited. By focusing our proposal on that title, we are also limiting the impact of the proposal on other units.

The academic title counts by college as of November 1, 2019 are provided at Appendix III. The count reflects nearly 90% of the faculty using the Clinical Professor title at Cornell are located in two units – the Law School and the College of Veterinary Medicine. There are only five clinical professor title holders outside those schools: two are in Human Ecology and three are in the College of Business. And the College of Business is phasing out the title in favor of Professor of the Practice. By focusing on the Clinical Professor title and justifying its proposal in terms of longstanding trends within legal education, the Law School has – in effect – limited the potential cross-campus impact of its proposal.

Even within the Law School only some faculty with the Clinical Professor title will be eligible for tenure—faculty whose primary role is directing clinics (as contrasted with faculty whose primary focus is teaching in the simulation-based Lawyering Program). Even among the nine faculty members who have a primary focus on clinical teaching, only half are expected to “opt-in” to the new system. The others will choose to remain on the contract system. Thus, the impact of the change will be limited, even within our own unit.

Since one school already has the ability to tenure clinical professors (WCMC) and since only one other school besides the Law School is likely to ever consider granting tenure to Clinical Professors (CVM), producing “framework” legislation to govern the issue seems premature and likely excessive. The proposal we have made presents a question that is, by its nature, likely to have very little interest or impact outside Cornell’s professional schools.

2.2 Impact at Other Universities

We consulted with our counterparts at the top law schools with top clinical programs and clinical tenure listed in Appendix II (one of the updated charts we shared in our presentation). Of NYU,

Yale, Stanford, and UC Berkeley, none report that the move to clinical tenure in those settings led to any moves to tenure RTE faculty in other disciplines.

2.3 Plan for Analogous Requests

The AFPSF requested “a principled plan for handling analogous requests that are sure to come from the other colleges,” stating:

The Senate dealt with a similar situation in the early 2000s when the idea of “Clinical Professor” first came up. Enabling legislation was devised that established criteria that had to be met before a college was authorized to use the title. This establishes a measure of consistency; it is not advisable to have ten different versions of clinical professor across campus. Perhaps for the same reason we need enabling legislation that establishes criteria that must be satisfied before a college can be authorized to have a tenure option for one of their existing RTE titles.

As noted above, the Law School already uses the clinical title for two purposes: faculty whose primary appointment is clinical teaching, and faculty whose primary appointment is in the law school’s simulation-based “lawyering” program, which focuses on legal writing and oral advocacy. Thus, our program already has two “versions” of clinical professors.

Departments that propose to adopt systems of tenure for clinical professor title holders should be afforded a margin of appreciation to make this move. They must demonstrate careful strategic planning, substantial consensus in their department, and a spirit of progressive realization of inclusion and academic freedom.

2.4 Medical School

Any principled plan must also take into account the impact of a negative decision on the longstanding waiver held by the medical school.

3. Clarification of Proposed Clinical Tenure Process

We were asked to clarify the process of clinical tenure cases after law faculty vote. We anticipate that they would follow the same path as current cases: to the Faculty Advisory Committee on Tenure Appointments (FACTA), then to the Provost, and then to the Trustees.

4. Request for Additional Data

In its April 18 memorandum, the AFPSF requested additional data on the various tenure systems in use across the country. The committee drafted the data description and chart showed below at Appendix IV.

The University of Michigan Law School Center for the Study of Applied Legal Education (CSALE) conducts a biennial study of law schools that produces this data, but it is just beginning its current cycle and the existing data is out of date. CSALE also asks all law schools to post

their standards to its website, but few law schools choose to do this, and many of them do not update these submissions. We obtained most of the requested information through personal outreach, and we are currently waiting to hear back from one of the schools.

At Appendices I and II are the two updated charts we presented in our April 15 presentation with the data we feel is most relevant, namely our clinical program's aspirational peer T-10 clinical programs, and our peer T-14 law schools that have top clinical programs. As we stated in our presentation, those charts show that most of our peer schools with top clinical programs have instituted clinical tenure.

Appendix I. Law Schools Ranked by Clinical Program

School	Clinical Program Rank	Clinical Tenure	Unitary Tenure	US News Rank
Georgetown	1		Y	14
American	2		Y	76
CUNY	2		Y	107
NYU	2	Y		6
Yale	5	Y		1
Maryland	6		Y	47
Northwestern	6			9
Stanford	8	Y		2
UC Berkeley	8	Y		9
UC Irvine	8	Y		27
Denver	8		Y	74
Michigan	8			9
UDC	8		Y	unranked
Cornell	44			13

Appendix II. Top Law Schools with Top Clinical Programs

School	Clinical Program Rank	Clinical Tenure	Unitary Tenure	US News Rank
Georgetown	1		Y	14
NYU	2	Y		6
Yale	5	Y		1
Northwestern	6			9
Stanford	8	Y		2
UC Berkeley	8	Y		9
Michigan	8			9
Cornell	44			13

Appendix III: Academic Title Counts by College as of November 1, 2019
 available at <http://irp.dpb.cornell.edu/university-factbook/employees>

Academic titles group	Academic titles	Ag & Life Sciences	Arch, Art & Planning	Art & Sciences	Computer & Info Sciences	Cornell Tech	Engineering	SC Johnson College of Business ^a	Human Ecology	Ind & Labor Relations	Law	Veterinary Medicine	Library	Non-College	Grand Total
University Faculty	Prof Asst	61	12	85	22	3	42	34	26	13	2	26			326
	Prof Assoc	83	23	137	11	6	46	18	26	20		34			404
	Prof Leading									1					1
	Prof-At-Large													16	16
	Professor	205	15	287	24	14	111	47	40	23	37	58			861
Professional Titles	Clinical Prof titles							3	2		15	20			40
	Prof of Practice titl..	7	6	4		3	9	1	3		2				35
	Rsrch Professor titl..	3		1			2		1			8			15
Extension	Extension Assoc.	85							15	17		12			129
	Extension Assoc. Sr	69						1	7	23		12			112
Research	Rsrch Assoc. Sr	34		12	1		7		2	3		14		36	109
	Rsrch Associate	73	1	20	1		22		11	5		25	1	65	224
	Rsrch Scientist								1					1	2
	Scientist Sr			1											1
	Principal Rsrch Scie..													2	2
Teaching	Lecture	22	3	58	7	1	15	15	28	2	2	19		6	178
	Lecture Sr	23	1	96	8		20	26	7	5		17		8	211
	Instructor	2			1	1	1		3			7			15
	Teach Assoc		5	11											16
Library	Archivist titles												14		14
	Librarian titles				1								98	2	101
Postdocs & Fellow	Fellow Sr										1				1
	Post Dr Assoc & Fell..	226		106	13	21	127	2	32	3	7	53		92	682
Visiting	Critic		30	1										1	32
	Fellow	123		2				2	6	7	1	7		22	170
	Lecture Vis.	6	17	36	4	7	7	18	6	9	7	1		17	135
	Instructor Vis.					2	2	1				4			9
	Clin Prof & Prof of P..	1					1	3			4	5			14
	Prof titles -Vis	60	7	22	1	8	30	6	4	1	6	12		5	162
	Scholar/Scientist Vis	33	2	51	9	13	33	15	12	1	8	2	1	72	252
Courtesy/Adjunct	Lecture Courtesy	5		1					6			10		2	24
	Instructor Courtesy											1			1
	Prof titles Courtesy..	86		30	4	12	40	2	8	1	42	38		7	270
Grand Total		1,207	122	961	107	91	515	194	246	134	134	385	114	354	4,564

Appendix IV. Additional Data Requested on Various Tenure Systems in Use Across the Country

The AFPSF's April 18 request for additional data included the following description and chart:

More Data on the Various Tenure Systems in Use Across the Country

*The following tables list the top 50 **Best Law Schools** and the top 50 **Clinical Programs** according to US News.*

*“Cross listing” columns are provided to facilitate comparison. A blank in the **X** column means that the school is not a top 50 Best Law School list. A blank in the **X** column means that the school is not a top 50 Clinical Program list.*

For clinical faculty, a school offers Unitary Tenure (U), Clinical Tenure (C) or No Tenure (N). This is designated in the “TM” (Tenure Method) columns. We are hoping that you can supply TM data where you see a “?”

	Best Law	X	TM
1	Yale	5	C
2	Stanford	8	C
3	Harvard	22	N
4	Columbia	20	N
4	Chicago	22	N
6	NYU	2	C
7	Penn	27	N
8	Virginia		N
9	Northwestern	6	N
9	Berkeley	8	C
9	Michigan	8	N
12	Duke		N
13	Cornell	44	N
14	Georgetown	1	U
15	UCLA	27	N
16	Texas	32	N
17	Washington U	14	C
18	USC		N
18	Vanderbilt		N
20	Boston U	32	? - N

	Best Clinical	X	TM
1	Georgetown	14	U
2	American		U
2	CUNY		U
2	NYU	6	C
5	Yale	1	C
6	Northwestern	9	N
6	Maryland	47	U
8	Stanford	2	C
8	Berkeley	9	C
8	UC Irvine	27	C
8	Denver		U
8	Michigan	9	N
8	District of Columbia		
14	Suffolk		
14	Baltimore		
14	Washington	17	C
17	Fordham	27	? - N
17	New Mexico		
17	Tennessee		
20	Columbia	4	N

21	Minnesota	32	C
22	Notre Dame	44	? - N
23	George Washington U	22	? - C
24	Arizona State		
24	Emory		
24	Florida		
27	Fordham	17	? - N
27	UC Irvine	8	C
27	Iowa		
37	North Carolina	44	? - ½ N, ½ U
31	Boston College	27	? - N
31	Alabama		
31	Georgia		
31	Illinois		
31	Washington and Lee		
31	William and Mary		
37	Brigham and		
38	Indiana		
38	Ohio State		
38	UC Davis		
38	Wisconsin	44	?
42	George Mason		
42	Washington	44	? - U
42	Wake Forest		
45	Utah		
46	Colorado		
47	Pepperdine	39	? - N

20	Seattle		
22	George Washington	23	? - C
22	Harvard	3	N
22	Northeastern		
22	Rutgers		
22	Chicago	4	N
27	Boston College	31	? - N
27	Georgia State		
27	UC Hastings		
27	UCLA	15	N
27	Penn	7	N
32	Boston U	20	? - N
32	Brooklyn		
32	Mitchell Hamline		
32	Georgia	31	? - N
32	Miami		
32	Minnesota	21	C
32	Texas	16	N
39	Loyola New		
39	Pepperdine	47	? - N
39	Tulane		
39	Nevada		
39	South Carolina		
44	Albany		
44	Case Western		
44	Cornell	13	N
44	Howard		

47	Arizona				44	Catholic University		
49	Maryland Baltimore				44	North Carolina	27	?
50	Baylor				44	Notre Dame	22	? - N
50	Florida State				44	Washington	42	? - U
50	Connecticut				44	Wisconsin	38	?