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# College and University Governance: Vermont Law School<sup>1</sup>

(MAY 2019)

This report concerns issues of academic governance stemming from the actions taken in spring 2018 by the administration of the Vermont Law School to “restructure” the law school’s faculty by lowering salaries, reducing the number of full-time positions, and eliminating the tenured status of fourteen of the nineteen tenured faculty members without meaningfully involving the faculty in the decision-making process.

## **I. Context: The Status of Legal Education**

Historically, law schools have tended to manage and govern themselves somewhat independently from the universities of which they are a part and thus have been shielded from many of the massive changes in the administration and culture of higher education during the past two decades. When the 2008 economic crisis brought about a decrease in legal opportunities, a subsequent precipitous drop in enrollments forced law school administrations to adopt the tuition- and revenue-driven models that are now so ubiquitous in higher education. These models typically require individual colleges to generate increased revenues each year in order to secure their budgets for the following year, as failure to increase revenue in any given year

results in a decreased budget for the following year or the placement of the unit in deficit status.

For colleges and universities, increasing revenue generally depends on increasing enrollments, obtaining more grant funding, and identifying other “revenue streams.” In law schools, these revenue streams take many forms, including development and implementation of non-juris doctor programs aimed at international students, online courses and programs, and various topical certificate programs designed for nonlegal professionals. Most law schools do not wish to increase their traditional juris doctor enrollments (and cannot practically do so) beyond pre-2012 levels, making it particularly difficult to balance their books in accord with the requirements of their university administrations.

This challenge became even more difficult when, with applications at record lows, law schools began to compete for higher-quality students through tuition discounting—a phenomenon already widespread in the undergraduate context. Law schools began to offer not only larger scholarships to admitted students, but more scholarships to more students. This created a buyer’s market for students, who could then use a scholarship offer at one school to bargain for larger scholarships at other, usually higher-ranked, schools to which they had been admitted. This trend in discounting required many law schools, especially public institutions or those lacking hefty endowments, to lean heavily on their universities to subsidize their efforts to attract the best students, lest they lose the strongest admittees, often to lower-ranked schools offering more generous scholarships. The national trend in law school tuition discounting turned the world of law school admissions upside down; it remains one of the

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1. The text of this report was written in the first instance by the members of the investigating committee. In accordance with Association practice, the text was then edited by the AAUP’s staff and, as revised with the concurrence of the investigating committee, was submitted to the Committee on College and University Governance. With that committee’s approval, it was distributed to the principal parties for comment and corrections of fact. In the light of the responses received and with the editorial assistance of the Association’s staff, this final report has been prepared for publication.

biggest factors in the declining financial health of law schools that once were considered cash cows for their affiliated universities. In legal education, as in higher education more generally, the trend has not abated, and there is little reason to think that it will do so in the near future.

Law schools that are not part of a larger university face different and in some instances even greater challenges, in that they are more directly accountable to their governing boards, alumni, faculty, staff, students, and, of course, the public at large. Independent law schools across the country thus continue to struggle not only with how to grow but also with how to sustain their JD and other programs in ways that will best serve their students and the legal profession. In their commitments to the public good and with the challenges they face in fulfilling those commitments, free-standing law schools are similar to other higher education institutions. As is often the case with law schools, however, they are simply a little late to the game.

## **II. The Institution and Its Governance**

Vermont Law School, located in rural South Royalton, is a private, not-for-profit law school, not affiliated with a university. During the 2017–18 academic year in which the events of concern occurred, VLS enrolled approximately 630 full-time students, most of them in the JD program, who were taught by approximately 120 part- and full-time faculty members, including nineteen upon whom tenured status had been conferred years ago. As of this writing, the faculty is made up of thirty-seven full-time faculty members, nine regular part-time faculty members, and seventy-one adjunct faculty members, who serve on both part- and full-time appointments.<sup>2</sup> Only five faculty members retain tenure.

VLS was established in 1972 and fully accredited by 1978. It is Vermont's only legal education institution and is nationally recognized for its environmental law program. Accredited by the council of the Section of Legal Education and Admissions to the Bar of the American Bar Association (ABA) and, since 1978, by the New England Association of Schools and Colleges,

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2. Regular part-time time faculty members are "appointed to the faculty by the Dean after a national search, review by the faculty, and recommendation to the Dean by the faculty" and are eligible to vote under section II.A, article 1.3, of the faculty bylaws. Adjunct faculty members, mainly career attorneys who teach part time, are sometimes appointed locally and are not eligible to vote.

VLS describes its mission as enabling students to "attain outstanding professional skills and high ethical values with which to serve as lawyers and environmental and other professionals in an increasingly technological and interdependent global society."

Mr. Thomas J. P. McHenry, the ninth president and dean of VLS, has served in that capacity since summer 2017.<sup>3</sup> Prior to accepting his appointment at VLS, Dean McHenry was a partner in the law firm of Gibson Dunn in Los Angeles, California, and also served as a visiting professor of government at Claremont McKenna College, where he taught environmental law. Dean McHenry received his BA from Yale College, his MFS from the Yale School of Forestry and Environmental Studies, and his JD from New York University School of Law. He succeeded Dean Marc Mihaly, who resigned after a five-year term. VLS is governed by a twenty-four-member board of trustees chaired since October 2018 by attorney and VLS alumna Colleen Connor.

The board can comprise up to thirty-two members serving in staggered four-year terms. Two student trustees are elected annually in the spring, and two alumni trustees are elected biennially. Several nonvoting representatives also sit on the board, including an annually elected faculty representative, a staff representative, and "trustees emeritae/i." Because VLS is an independent law school, the board also includes "corporate officers" of VLS—the chair, vice chair, dean, secretary, and treasurer. All officers, except the dean, serve one-year terms. Of the corporate officers, only the chair, vice chair, and dean have voting privileges.

The VLS administration comprises the dean, vice president for finance, director of human resources, vice dean for students, associate dean for student affairs and diversity, vice dean for faculty, associate dean for the Environmental Law Center, associate dean for academic affairs, vice president for enrollment and marketing, and vice president for alumni relations and development. Historically, tenured, tenure-track, and non-tenure-track faculty members have served in many of these full-time administrative positions, without having to relinquish their faculty status.

VLS does not have a faculty senate. Pursuant to the faculty bylaws set forth in the faculty handbook, the institution-wide governance body is the faculty

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3. "President and dean" is a joint title stemming from the fact that the law school is unaffiliated with a university. Chief administrative officers holding this title are usually referred to only by the title "dean," as is the case at VLS and throughout this report.

meeting, for which a quorum is constituted by a majority of the full- and part-time voting faculty.<sup>4</sup> The dean presides over the meeting. Under article 1 of the bylaws, the voting faculty consists of

1. The President and Dean (hereinafter the Dean);
2. Full- or part-time employees who have been appointed to the faculty by the Dean after a national search, review by the faculty, and recommendation to the Dean by the faculty, including individuals participating in the phased retirement program, . . . and
3. Full- or part-time employees who have been appointed to the faculty and who have been granted the right to vote by an affirmative vote of two-thirds of the voting faculty present and voting at a properly noticed meeting of the faculty at which a quorum of the voting faculty is present.

These voting provisions are unusual in that voting privileges are not restricted to tenured or tenure-track faculty members alone, as they are at most law schools. As of this writing, twenty-five of the thirty-seven full-time faculty members and two of the part-time faculty members have voting privileges. The twenty-seven voting members of the faculty thus represent 117 total faculty members, which amounts to a 23 percent enfranchisement. Curiously, nonvoting members of the faculty are eligible to serve on both appointed and elected committees. A nonvoting member of the faculty may, for instance, be elected by the faculty to serve as the faculty representative to the board but may not vote at faculty meetings; as a consequence, nonvoting faculty members nominated for elected committees may not vote for their own appointments.

The faculty handbook further states, “The faculty conducts policy and planning work of the law school through standing and ad hoc committees.” The standing committees relevant to the events discussed in this report are described below.

- The Dean’s Advisory Committee (DAC) is made up of four elected faculty members and the vice dean for academic affairs (ex officio).

At all relevant times, one of the three elected faculty members of the DAC was a nonvoting faculty member, and only one was a tenured faculty member.

- The Tenure and Retention (T&R) Committee is made up of the entire tenured faculty and the dean (ex officio). According to the faculty handbook, the purpose of the T&R Committee is to “make recommendations to the faculty and Dean regarding policies for faculty retention, promotion, and tenure; to evaluate progress of faculty under tenure criteria; to make recommendations to the Dean regarding re-appointments and to the Dean and Trustees regarding reappointments without term.” Thus, the T&R Committee historically has been charged broadly with periodic review of tenured and tenure-track as well as non-tenure-track faculty members and with formulating recommendations to the administration based on its assessments; the committee does not, however, review adjunct faculty members. At all relevant times, Professor Peter Teachout, a member of the faculty since 1975 and a tenured faculty member since 1979, served as chair of the T&R Committee. In at least one instance in the recent past, the T&R Committee recommended terminating the appointment of a nontenured faculty member. In so doing, it applied the handbook’s dismissal policy, which expressly follows the procedures set forth in the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*.
- The Curriculum Committee is made up of appointed faculty members and students as well as the vice dean for academic affairs (ex officio). Its purpose is to “manage the development of, and modifications to, the school’s academic programs and courses, including . . . studying and making recommendations to the faculty on specific curricular matters, and other tasks assigned to it by the faculty or Vice Dean for Academic Affairs.”
- The Joint Advisory Committee on Budget (JACOB) is an eight-member committee with only two faculty members, both appointed, one of whom is the faculty representative to the board.

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4. The version of the faculty handbook cited throughout this report is the edition “amended through October 2013” and “corrected through September 3, 2014.” The administration circulated a revised edition to the faculty in November 2018, after most of the events detailed in this report had occurred.

### **III. The Events of Concern**

What follows is a chronological account of the events leading up to the actions that are the subject of this investigation and report.

#### **A. The Institution's Financial Condition**

Since at least 2012, VLS has experienced significant financial difficulties, resulting in part from the national crisis in legal education previously described. However, some of the difficulties, though exacerbated by the national crisis, are attributable to the institution's unique mission. VLS prides itself on its environmental law program, which for more than forty years has produced some of the nation's finest environmental lawyers and policy makers. Because VLS attracts a distinct type of service-oriented student, most of its graduates dedicate their professional lives to public service, rather than pursue lucrative careers in large law firms or in corporate practice. As a result, alumni support has not translated into a large endowment that would enable the law school to weather the crisis in legal education.

With financial difficulties mounting in 2012 and 2013 and the law school drawing on its reserves in order to pursue a board-authorized strategic plan, then dean Mihaly offered buyout packages to both tenured and full-time nontenured faculty members. A small handful volunteered to accept the buyouts, agreeing to forego their existing terms of appointment, which in some cases meant relinquishing tenure. Each faculty member was rehired on an individually negotiated basis to teach courses of mutual interest and need, but at a greatly reduced salary. The 2012–13 buyout program, by all accounts, did little to alleviate VLS's financial difficulties. The school continued to reduce expenditures through the elimination of faculty and staff positions, salary freezes, and major reductions in health and retirement benefits. Efforts to increase revenue involved strategic initiatives, themselves requiring significant expenditure of reserves, to increase enrollments through expanded recruitment, marketing and outreach efforts, new program development, increased fundraising, and restructuring a \$15 million loan from the US Department of Agriculture. The expanded recruitment effort appears to have increased the size of entering first-year classes, from approximately 140 students in fall 2016 to approximately 160 in 2017 and approximately 190 in 2018. However, during this time, law school applications began to rebound nationally, so it is difficult to determine whether the growth in enrollment can be linked

to these expanded recruitment efforts. The increase in tuition discounting, however, must be taken into account in calculating the actual impact of these improved enrollment numbers on the school's financial condition.

#### **B. Financial Crisis: July 2017 through mid-May 2018**

When Dean Mihaly stepped down from his administrative position to return to the faculty on July 1, 2017, he wrote a farewell message to the law school's donors, presumably based on the above-discussed efforts, in which he characterized the institution's financial condition as follows: "I am most pleased that VLS has reached a stable fiscal situation after weathering the decline in JD enrollment of the past years. At the same time as we reduced expenses, we invested in new revenue-generating activities and increased our admissions and communications capabilities. The result is a second year of balanced budgets without increases in tuition and what appears as of this writing to be an increase in enrollment for the 2017–18 academic year for the JD, the master's, and the LLM programs."

Only a few months later, at the October 2017 faculty meeting, Dean Mihaly's successor, Dean McHenry, presented to the faculty a markedly different assessment of the school's financial condition. At that meeting, according to faculty accounts, he stated that the law school would need to take immediate measures to address a budget deficit so severe that it threatened the institution's very existence.

Three facts relating to what was communicated at the October 2017 faculty meeting warrant further discussion. First, according to the many interviews the investigating committee conducted, most faculty members present at the October meeting were stunned by the report of the institution's dire financial condition. Though many of them were well aware of earlier financial difficulties, they believed, based on the former dean's account, that the situation had improved and that the institution was now in relatively good financial shape. However, other faculty members experienced in dealing with the school's budget and finances, either because they had served as administrators or because they had been members of key committees, were less surprised by the new dean's report. They attributed the discrepancy between the two deans' accounts both to the likely effect of an increase in tuition discounting that had brought in the larger entering class in fall 2017 and to differing interpretations of the financial data and different

approaches to addressing and communicating what those data meant.<sup>5</sup> By all accounts, however, most faculty members understood after the October 2017 meeting that changes were coming and that sacrifices would have to be made to improve the law school's precarious financial condition.

Second, almost every faculty member interviewed who was not serving in an administrative capacity reported that the possibility of *involuntary* terminations of faculty appointments was not raised until late spring 2018. During his interview, Dean McHenry, however, maintained that the administration had made it clear to the faculty from the outset, presumably beginning with the October 2017 faculty meeting, that involuntary terminations were a possibility. Yet, in his August 22, 2018, letter to the AAUP's staff, the dean stated, "Before a course leading to involuntary cuts was pursued, faculty members were provided the opportunity to make individual alterations to their status, such as reducing their course loads or transitioning to part-time status at reduced salaries," a statement that appears to contradict his assertion that the faculty was indeed made aware of this drastic possibility early in the 2017–18 academic year.

Third, while the VLS administration did not publicly declare that VLS was in a state of financial exigency, it made clear at the October 2017 faculty meeting and thereafter that for all intents and purposes such was in fact the case, even if the administration and board chose not to issue a formal declaration.<sup>6</sup>

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5. In a written response to a prepublication draft of this report, VLS professor John Echeverria disputed the former dean's assessment of the institution's financial condition, as well as the suggestion that Dean McHenry might have misrepresented it in fall 2017:

The school's PF 990's [Internal Revenue Service Form 990-PF] confirm that in both the years 2015 and 2016 the school suffered significant operating losses. In addition, contrary to the projections alluded to by the outgoing administration, as Dean McHenry announced to the faculty in October 2017, the school faced further losses in 2017 due to a combination of a higher than expected tuition discount rate and modest (but nonetheless financially significant) shortfall in the number of matriculating students. There is no question the school faced a financial exigency in 2017, and there is no factual basis for suggesting that an exigency might not have existed or that it was somehow manufactured for ulterior purposes.

6. While VLS did not publicly declare that a state of financial exigency existed, the administration was certainly successful in communicating the narrative of the school's dire financial straits. And it proceeded to assume the existence of such a condition as the basis for "programmatic and faculty restructuring." To a person, the faculty members

Following the October 2017 faculty meeting and throughout the spring 2018 semester, Dean McHenry convened several special faculty meetings, in addition to regularly scheduled ones, to present budgetary information. At these meetings, that information was often projected on slides filled with spreadsheets—as was also done at the October meeting—but faculty members present were not provided with paper or digital copies for the stated reason of keeping such information confidential. As it became increasingly clear to many faculty members that the financial situation was so severe that it threatened the institution's very existence, Dean McHenry announced at a special February 15, 2018, faculty meeting that the board had passed a resolution at its February 10 meeting requiring the administration to present it with a balanced budget by May 11.

In addition to the special faculty meetings, the Dean's Advisory Committee (DAC)—which then included three voting faculty members (one tenured and two untenured), one nonvoting faculty member, and the head librarian—was dispatched to conduct smaller "focus group" meetings with faculty members, as well as "office hours" for those preferring one-on-one meetings.

At these faculty and DAC meetings, faculty members reported that they were asked to suggest possible measures that could be taken to reduce the deficit and to indicate their willingness to accept large salary cuts or take early retirement. At any given time during this period, many faculty members proposed and circulated ideas about balancing the 2019 budget, both formally in the larger faculty meetings and in the smaller DAC meetings and informally among themselves. Several faculty members also individually submitted formal written suggestions or proposals directly to the dean or to Mr. Sean Nolon, the vice dean of faculty, and some met with administrators to discuss their proposals. Throughout this period, the administration continued its efforts to persuade

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interviewed by the committee registered the seriousness of the situation and expressed their deep concern for the school's future. The committee was troubled to learn that, despite the claims of dire financial straits, during the 2018 fiscal year VLS continued to invest a significant sum in its strategic plan, increased spending in the areas of "technology" and "marketing and administration," and authorized salary increases for faculty members at the lower end of the salary scale. Such expenditures during supposed financially exigent circumstances raise the question as to whether terminating tenured faculty appointments was more a matter of preference than necessity.

faculty members to take early retirement or to accept salary and teaching-load reductions. Some faculty members expressed willingness to do so.

By spring 2018, one measure appeared to emerge as the most viable, according to many faculty members the committee interviewed: deep across-the-board salary reductions for all members of the faculty. Nevertheless, in April 2018, with many proposals still on the table, the administration began discussions with the faculty about criteria to apply to a “restructuring” process, the details of which were not specified. At a special April 19 faculty meeting, Dean McHenry presented a budget report that included details on “Programmatic Restructuring Criteria” and “Faculty Restructuring Criteria.” The programmatic criteria included relationship to VLS mission, JD, and master’s programs; integration with overall curriculum and student involvement; fostering critical-thinking skills; bar passage rates; grant or tuition funding; student enrollment and interest; student employment; and alumni relations and recruitment. The faculty criteria reflected the three already-established criteria for awarding of tenure—teaching, scholarship, and service—and also incorporated the programmatic criteria. By most faculty members’ accounts, however, no one mentioned the possibility of involuntary restructuring.

Significantly, during the period between October 2017 and mid-February 2018, a number of governance processes did not occur. Faculty members were not provided—and by some accounts, did not ask to see—VLS’s financial statements for the preceding five years, which would have enabled them to determine whether the institution was in fact in a state of financial exigency. The T&R Committee was not consulted about possible faculty restructuring. The Curriculum Committee was not consulted about possible programmatic restructuring. No special or ad hoc committee was formed or elected to express the faculty’s collective position on these important matters. Instead, the DAC was employed to gather information from individual faculty members about what they were willing to do and to transmit that information to the dean and other members of the administration. With regard to the numerous suggestions and proposals that members of the faculty had already conveyed to the administration, no committee—not even the DAC—was asked to compile, analyze, or present these ideas to the full faculty for review, discussion, vetting, or vote. As a result, the faculty itself never took a collective position on addressing the financial crisis. Many faculty members who had submitted ideas to the dean reported that

the administration either dismissed their ideas or did not respond to them at all. Nor did the administration itself ever make a public presentation of the many ideas offered and indicate its reasons for rejecting them. Similarly, although faculty members were asked to provide the administration at faculty and DAC meetings with recommendations about the criteria to be considered in the voluntary restructuring process, the administration did not inform them whether it was considering their recommendations, and the faculty played no collective or even individual role in analyzing, assessing, or, most important, approving these criteria. By all accounts, faculty members and the DAC were still discussing options and proposals into the late spring, leaving very little time for a faculty governance process to take place before the budget was due to the board.

### **C. Involuntary Restructuring Plan and Implementation: May 2018**

At the May 11 board meeting, the dean informed the trustees of the administration’s plan to reduce the number of faculty positions and received approval to proceed.<sup>7</sup> Neither the faculty meeting nor the T&R Committee, the committee formally responsible for reviewing faculty appointments and reappointments, were involved in the review process that identified the faculty members whose positions would be restructured.

Faculty members we interviewed reported that the administration did not disclose its plan to address the financial crisis until the May faculty meeting, which took place shortly after the board meeting. According to faculty accounts, the dean stated at this meeting that faculty members would be informed individually of their status under the plan at upcoming individual performance review meetings. Since most faculty members still assumed that the major component of the plan would be substantial reductions

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7. In a written response to a prepublication draft of this report, Professor Teachout noted that, according to board members with whom he spoke, the board approved a “general plan put forth by the administration to make significant economic cuts” but left it to the administration “to determine the particular form of implementation.” Board members also told him that the board was “not informed of, or asked to approve, the decision to implement the cuts by stripping fourteen out of nineteen faculty members of the tenured faculty of tenure.” Professor Teachout concluded that regardless of the board’s prior knowledge of the administration’s intentions, “it acquiesced in the administration’s actions after the fact, and apparently approved of the way the dean handled the matter at a retreat in late August 2018.”

in pay, many continued to believe that they would be informed of salary reductions at these meetings. Faculty members were also told that the forms they had traditionally used for their end-of-year reports would now also include questions relating to the criteria that had been presented to them at the April 19 special faculty meeting. Several faculty members reported that when the dean was asked at this meeting whether tenure would be considered as part of the decision-making process, he replied, without providing details, that it would.<sup>8</sup>

The investigating committee was told that many faculty members who attended the May meeting were shocked by the administration's plan to terminate faculty appointments through restructuring. Other faculty members the committee interviewed stated that they had expected cuts to occur and expressed surprise that their colleagues had not. While the investigating committee was initially perplexed by these very different responses, it eventually became evident that they were the result of the administration's failure to communicate formally the details of its plan at any time. As a result, outside of faculty and DAC meetings, individual faculty members were left to speculate among themselves—and in some instances, with various administrators in private or informal meetings—about what options the administration was seriously considering to keep the school open.

In May and early June performance review meetings, the dean and other administrators informed fourteen tenured faculty members of the termination of their appointments, effective July 1, 2018. These faculty members were given a memorandum dated June 5, which reported a projected \$1.1 to \$2.3 million budget deficit in the 2019 fiscal year and described the administration's decision-making process to "restructure" the law school faculty as a "series of difficult decisions taken only to avoid closing the school during FY19 and only after significant consultation with trustees, faculty and other stakeholders." According to this memorandum, the administration had concluded as a result of this process that faculty salary reductions were not enough to reduce the budget deficit and that "the remaining savings would need to come from the involuntary restructuring of

faculty positions." The memorandum described how the administration had developed "programmatic goals" and "instructional models," had "measured the number of faculty needed under the models," had "consulted with other academic institutions," and had then proceeded to evaluate each faculty member's relative merit according to criteria it had developed. With the necessary board approvals in place and the announcement at the faculty meeting having been made, members of the administration then "met to select the faculty members who would remain to teach the envisioned curriculum."

At the performance review meetings, the administration presented the fourteen affected faculty members with a range of choices, in different combinations. Some were given a list of three "restructured faculty options" that they might select in lieu of having their appointments terminated outright on July 1. These options consisted of a variety of short-term appointments with reduced teaching and service responsibilities. All required faculty members to relinquish their tenured status and faculty voting rights, sign a general and age-discrimination release, and agree to nondisclosure and nondisparagement provisions. A few faculty members who rejected the first three options were offered a fourth "option"—termination of appointment effective July 1 with "no further teaching, service or scholarship obligations" and "no title, office, library or other faculty privileges." A few other faculty members were given a variation of option four—termination of appointment on July 1 but with health-care benefits through the end of 2018 if they signed the releases and the nondisclosure and nondisparagement agreements. Thirteen faculty members signed an agreement. Only one of the affected faculty members, Professor Craig Pease, refused, and his appointment therefore terminated on July 1.

The affected faculty members had the opportunity to appeal the adverse decisions under a process established by the administration specifically for this purpose. The Faculty Restructuring Appeals Panel consisted of the three nontenured faculty members originally elected by the faculty to serve as members of the DAC, now repurposed as an ad hoc appeals body. The scope of review, also determined by the administration and described in its document titled "Appeals Process for Programmatic Restructuring Decisions," was as follows: "The Review Panel's charge is not to make an independent determination of the merits of any case, but to determine whether the administration fairly considered, in accordance with the stated

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8. Professor Teachout noted in his written response to the draft that the dean later explained to him that the administration, in making the decisions to eliminate tenured faculty appointments, had been, in the dean's words, "agnostic toward tenure." Professor Teachout inferred from the dean's remark that "tenured status had been irrelevant."

criteria, the relevant information regarding appellant's circumstances as they relate to the decision to restructure based on the future programmatic needs of Vermont Law School."

The criteria set forth in this memorandum mirrored the substance of the questions that had appeared on the new end-of-the-year performance review forms that faculty members had completed in preparation for their individual meetings with Dean McHenry. In filling out these forms, faculty members focused only on their 2017–18 academic year performance, rather than on their entire careers, since they were unaware that the administration would use their responses to terminate their tenured appointments based on relative merit. In short, the faculty members identified for involuntary restructuring were not afforded a career review by their faculty peers, the type of review stipulated in VLS policy documents for major faculty personnel decisions.

Among the criteria used to evaluate the relative merit of the faculty members, as described in Dean McHenry's June 5 memorandum, were "professionalism," quality and quantity of scholarship, and "impact on VLS's National reputation." Notably, the teaching, scholarship, and service criteria set forth in the memorandum (and at the April 19 presentation) reflected the very same criteria that the T&R Committee had traditionally employed in making its decisions to recommend tenure. Yet the T&R Committee, with its long-standing institutional jurisdiction over such matters, was never consulted during the decision-making process by which tenured faculty were selected for appointment termination based on the stated criteria.

#### **D. Faculty Response to the Restructuring Plan**

On June 12, Dean McHenry met with the T&R Committee at the committee's request. Chair Teachout, writing to the dean on behalf of the committee in a memorandum of the same date, acknowledged the law school's precarious economic situation and described the main purpose of the meeting as "to provide an opportunity to explore jointly alternative or modified approaches that may help achieve the same basic economic ends without resorting to measures which needlessly disrespect the contributions made by long-serving members of the tenured faculty to the Vermont Law School and threaten the institution of tenure itself." While praising the dean for "being open and transparent in outlining the general situation in meetings with the faculty prior to announcement of the

implementation plan," the memorandum was far less sanguine about the "implementation phase," which it characterized as follows:

The decisions made, the process utilized in making the decisions, the impact of those decisions on particular faculty, the availability of forums in which concerns about the implementation could be openly and freely discussed by faculty, all of that which has transpired in implementation has been obscured in darkness and secrecy. The process of implementation has been the antithesis of transparency. Long-tenured faculty are scared and frightened to discuss with each other and with other colleagues on the faculty what has happened lest they be threatened with immediate eviction on July 1st, summarily stripped of tenure, office, salary, and medical benefits.

The T&R Committee's memorandum questioned whether the administration's "draconian approach" to the tenured faculty was necessary to achieve financial stability and whether "the rationale of 'financial exigency' [was] being used to clean house of expensive tenured faculty members in order to be able to replace those removed with lower cost new hires." The memorandum proposed the voluntary buyout model as an alternative approach that "would not cost the school a penny more to implement." The memorandum also objected to the composition of the hearing committee on grounds that it lacked tenured members. Appended was a list of questions for the administration concerning the law school's financial situation, its unwillingness to share financial documents, and the composition of the appeals panel. The committee proposed to conduct a faculty election to select a tenured faculty member to serve on the panel. In the end, no such vote took place, and the administration provided no financial documents, beyond the slides projected at faculty meetings, to support its claims.

#### **IV. Issues of Concern**

The investigating committee has identified the following issues as the most salient posed by this case.

##### **A. The Absence of Joint Effort and Meaningful Consultation**

The VLS administration asserts that the course of action it undertook during the 2017–18 academic year—which ultimately resulted in the detouring and disenfranchisement of fourteen of nineteen tenured faculty members—constituted a "consultative"

restructuring process that comported with AAUP-recommended standards of academic governance.

These standards are articulated in the Association's foundational 1966 *Statement on Government of Colleges and Universities*, formulated in cooperation with the American Council on Education and the Association of Governing Boards of Universities and Colleges. As an underlying premise, the *Statement on Government* posits an "inescapable interdependence" among governing board, administration, and faculty that calls for "adequate communication among these components, and full opportunity for appropriate joint effort." With regard to the internal operations of the institution, the statement asserts that "effective planning demands that the broadest possible exchange of information and opinion should be the rule for communicating among the components of a college and that the faculty should be fully informed on all budgetary matters." The statement also recommends that "[a]gencies for faculty participation in the government of the college or university . . . be established at each level where faculty responsibility is present. An agency should exist for the presentation of the views of the whole faculty." The AAUP's statement *The Role of the Faculty in Budgetary and Salary Matters*, which derives its recommendations from principles articulated in the *Statement on Government*, further provides that, when institutions experience major threats to their continued financial support, "the faculty, employing accepted standards of due process, should assume primary responsibility for determining the status of individual faculty members." When the overall budget for teaching and research is reduced, "the faculty should be given the opportunity to minimize the hardship to its individual members by careful examination of whatever alternatives to termination of services are feasible."<sup>9</sup> The

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9. The council of the ABA's Section of Legal Education and Admissions to the Bar has promulgated governance standards with which law schools must comply in order to receive and maintain accreditation. While the ABA standards are not directly at issue here, they are certainly relevant. Standard 201 of the *2018–2019 ABA Standards and Rules of Procedure for Approval of Law Schools* speaks directly to "Law School Governance":

- (a) The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.

VLS administration has argued that it communicated often with faculty members, keeping them regularly informed about what it considered to be "arguably financially exigent circumstances." It has also asserted that it repeatedly solicited suggestions from faculty about addressing the deficit. These efforts, it believes, amounted to a sufficient level of faculty consultation, thereby rendering governance-based critiques of its actions inaccurate.

The investigating committee received ample evidence regarding the administration's concerted efforts to communicate with faculty members in order to solicit their ideas about and reactions to various expenditure-reducing scenarios. Those facts were corroborated by almost every individual interviewed and by documents provided by the administration. But absent from the administration's approach was the fundamental understanding that shared governance requires far more than merely providing information to faculty members and inviting their perspectives before making a decision. At no time during spring 2018, when the administration presented various expenditure-reducing proposals for discussion, did the administration afford the faculty—as a body—the opportunity to make a recommendation or take a vote to record its position. This absence of meaningful faculty consultation excluded the faculty as a collective body from the decision-making process regarding the nature and scope of the budget cuts, the termination of tenured faculty appointments, and the assessment of the effects of reductions on academic programs and curriculum.

As the *Statement on Government* makes clear, "important areas of action involve . . . the initiating

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- (b) The dean and the faculty shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of members of the faculty.
- (c) The dean and the faculty shall each have a significant role in determining educational policy. . . .
- (e) A law school that is not part of a university shall be governed by a board with responsibility and authority for ensuring operation of the law school in compliance with the Standards.

Further, Standard 202, "Resources for the Program," makes it clear that a law school whose "current and anticipated . . . financial condition" is expected to have a "negative and material effect on the school's ability to operate in compliance with the Standards or to carry out its program of legal education" is *not* in compliance with the standards. Notably, the relevant ABA standards on law school governance refer to the "dean" and the "faculty" coequally, giving each "primary responsibility and authority" for all aspects of the law school program, including the selection, hiring, retention, and promotion of faculty.

capacity and decision-making participation of all the institutional components,” the differences among them “determined by reference to the responsibility of each component for the particular matter at hand.” The faculty has “primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.” Given that the “particular matter at hand” was how budgetary conditions at VLS might affect faculty status, academic programs, teaching, and curriculum, the faculty should have been afforded primary responsibility in initiating proposals and making decisions. Furthermore, Regulation 4c (Financial Exigency) of the AAUP’s *Recommended Institutional Regulations on Academic Freedom and Tenure* unequivocally states that “the responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty.”

By acting unilaterally in the decisions involving the elimination of fourteen tenured appointments, the administration—with the approval of the board of trustees—effectively undermined the authority of the faculty in important areas of its primary responsibility, most egregiously in the determination of faculty status and in the oversight of teaching and curriculum, thereby violating generally accepted principles of academic governance.

There is very little disagreement among those the committee interviewed that throughout the first half of the 2017–18 academic year, Dean McHenry forthrightly communicated to the faculty that VLS was in financial distress because of the depletion of the school’s reserves. As discussed above, he made this clear not only at regular faculty meetings but also at several special faculty meetings scheduled solely for purposes of discussing the budget and soliciting ideas from faculty members for dealing with the crisis. The DAC also met with faculty members in small groups and individually for the same purposes. During these months of meetings and conversations, the administration consistently asked faculty members to consider voluntary retirement, but, by most accounts, few expressed interest in doing so. Most of the faculty members we interviewed, however, indicated that they were willing to take significant salary and course load reductions once they understood just how dire the situation was. Several faculty members also reported having sent email messages to the dean offering proposals and having made such proposals

at faculty meetings. It is unclear to the committee, however, whether or to what extent the administration seriously considered any of these proposals prior to its May 2018 announcement concerning the elimination of tenured faculty appointments.

Herein lie the committee’s concerns. Dean McHenry was, to a degree, transparent about the budget crisis. He projected sobering numbers to the faculty and communicated the severity of the school’s deficits at meeting after meeting throughout the academic year. Furthermore, he charged an elected faculty committee, the DAC, with acting as his intermediary with the faculty at large in soliciting ideas from faculty members about reducing expenditures. DAC members attempted to do so by scheduling special meetings and office hours, in part to give those who might not feel comfortable speaking up in larger faculty meetings an opportunity to share their thoughts in private. Nevertheless, DAC members reported to the investigating committee that while they were responsible for gathering information, they were not charged by the administration to perform any analysis or assessment of the viability of the ideas they received. Rather, they gathered information and passed that information on to Dean McHenry and members of the administration. Thus, the DAC, which was strictly an advisory body to the dean, did not serve as a faculty-authorized decision-making body in any real sense, as it made no analyses, assessments, or reports regarding the implementation of voluntary or involuntary faculty restructuring.

Significantly, aside from the DAC, no standing faculty committees were consulted about the restructuring process, even though such matters fell squarely within their purviews, as defined in the faculty handbook. The T&R Committee was never involved in meaningful consultation with the administration, notwithstanding its well-established practices and institutional knowledge relating to the status and retention of faculty personnel. Similarly, the Curriculum Committee, the stated responsibility of which is to “manage the development of, and modifications to, the school’s academic programs and courses, including . . . studying and making recommendations to the faculty on specific curricular matters, and other tasks assigned to it by the faculty or Vice Dean for Academic Affairs,” was not formally consulted in the decision-making process. In view of the asserted “programmatically” nature of the restructuring plan, the administration’s failure to consult formally with the Curriculum Committee appears to have been a curious oversight, to put it generously.

While the absence of meaningful faculty consultation is concerning enough, the investigating committee is also troubled by the appeals process that the administration implemented in late spring 2018. The administration points out that the panel tasked with reviewing such appeals was an “elected” faculty body in that its members were drawn from the elected faculty members of the DAC. However, the purpose of an election requirement for such an appeals body is to enable potentially affected faculty members to elect colleagues who they believe are most capable of fairly adjudicating difficult cases. This purpose was not served here, even though the appeals panel was appointed from an existing committee whose members had been elected, because neither the elected DAC faculty members nor the colleagues who elected them had ever contemplated at the time of their election that they would serve on a panel charged with reviewing appeals. Additionally, given the role of the DAC in gathering and soliciting information throughout the year and the fact that none of the DAC members tapped to serve on the appeals panel was a tenured or tenure-track faculty member, many of the affected faculty members were skeptical of whether the panel would or could fairly adjudicate any appeals.

It must be noted that several faculty members we interviewed, including some who appealed the elimination of their tenured appointments, reported that the appeals panel seemed to have taken its limited charge seriously and to have operated in good faith, and they commended its members for taking on a difficult task. To be sure, Professor Pease, whose termination was affirmed by the panel, was not among them. But it appears that the administration took no action either to comply with or even respond formally to the panel’s recommendations. Indeed, members of the appeals panel were never notified of the dean’s final decisions on cases they had reviewed, a lack of transparency that is antithetical to shared governance norms. Thus, it appears to the investigating committee that the appeals process was implemented more to give the appearance of due process than to actually provide any substantive remedy based on such a process.<sup>10</sup>

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10. In his response to the prepublication draft, Professor Teachout stated, “This view is supported by comments made by the dean in my own personal interview. At that interview, the dean explained the so-called ‘appeals process’ that had been established, then went on to stress—I was surprised by his comment in this respect—that he was not concerned about any decisions or recommendations that the appeals panel might make, since he was completely free to disregard them.”

## **B. The Culture of Shared Governance at VLS**

After conducting lengthy interviews with more than twenty faculty members and administrators, the committee became aware that while a form of shared governance has existed at VLS since its founding, it has not always been robustly practiced or fully understood. This is so even though most full-time faculty members—regardless of tenure status—serve on committees and are eligible to vote. The right to participate means little, however, when such participation contemplates, as it did in the case of the restructuring process, only the solicitation, compilation, and communication of data and not the analysis, assessment, and application of it to the crisis at hand by appropriate faculty bodies. Similarly, the right to vote means little if the voting faculty, as a body, does not actively participate in deciding essential matters—such as the future of the school, the retention of various faculty members, and program offerings—on which its input should presumably be desired and sought.

Shared governance, as envisioned in the relevant AAUP policy documents, not only actualizes the type of institutional joint effort so important to the academic enterprise but, ideally, also provides an institutional structure by which the faculty can act when facing difficult and unanticipated circumstances, such as those faced by the VLS faculty for many years. Established faculty committees and deliberative bodies are essential to creating that structure. If, however, those committees are unable to act decisively when it counts—either because of administrative fiat, the lack of institutional mechanisms by which to act, or their own sense of powerlessness, paralysis, or apathy—they may not be able to surmount the problems they face. We are not suggesting that the VLS faculty was apathetic about what was happening throughout the 2017–18 academic year. On the contrary, every single person we interviewed was genuinely committed to the mission and survival of the institution and proud to be a part of the VLS community. Our point is that the limited ways in which faculty committees and other governance structures have apparently operated historically at VLS—particularly in relation to the administration—prevented faculty members from acting more quickly and more meaningfully in response to the crisis at hand.

For example, that the T&R Committee did not take action until it was too late (in June 2018, after termination decisions had been made and communicated to specific faculty members, both tenured and nontenured) and that the Curriculum Committee

never asserted its authority at all speak to the less than optimal exercise of shared governance responsibilities that likely preceded Dean McHenry's arrival. Further, while almost everyone we interviewed testified to the strong sense of community, some noted that this sense of community is not equivalent to an effective structure for collaborative decision making.

The significance of this distinction—between the existence of a sense of community and the reality of meaningful collaboration—cannot be overstated. For a stand-alone law school that is the only law school in the state (and is, moreover, geographically isolated), the distinction takes on even more significance because there are no larger university norms to follow or nearby colleges with which to compare notes. In times of stability and growth, such independent institutions may be able to get by with simply doing things in an ad hoc fashion that works for them. But in times of uncertainty and crisis, a robust governance structure enables the faculty to act cooperatively and more effectively with the administration and governing board in guiding the institution through a crisis. Unfortunately, in the context of higher education, nothing demonstrates the need for a strong institutional structure of collaborative decision making—and not just long-standing accepted community practices—than the type of financial crisis faced by VLS and, unfortunately, by an increasing number of law schools nationwide.

It appears that this form of shared governance has not been part of the law school's culture, although certain aspects of shared governance have certainly been practiced there. That is, while faculty members seemed to have the strong impression that the VLS governance structure was democratic, that impression was primarily based on the fact that faculty members of different statuses had voting rights and participated actively in committee work and faculty meetings. This sort of democratic inclusiveness, however, is only a small part of shared governance. At the same time, it is problematic that the disenfranchisement of the large number of faculty members serving on contingent appointments does not allow for full participation of all faculty members in governance.

Notably, the administration ignored the compelling reasons for supporting a governance structure that would have allowed for meaningful faculty consultation. This apparent disregard for the importance of shared governance structures and for the faculty's legitimate role in joint decision making during a time of financial exigency (albeit undeclared) contributed

significantly to the downfall of tenure at VLS. Likewise, the faculty must shoulder some responsibility for neglecting to establish a governance structure of shared obligations that might have allowed for a more robust voice and greater protections in times of crisis. These factors, combined with the fact that Dean McHenry came to VLS from a corporate law practice—instead of from an academic institution with a strong culture of shared governance—helped create a perfect storm, precipitated by the financial crisis, that eventually led to the administration's unilateral action to revoke the tenure of three-quarters of its tenured faculty members through a process that, in the end, bore a striking resemblance to a corporate layoff.

### C. Programmatic Restructuring

We would be remiss if we did not address the administration's assertion that the late spring termination and detenuing decisions were based on programmatic needs and priorities. First, if we accept that this was in fact the case, it troubles us deeply that three-quarters of the *tenured* faculty at VLS—or at any institution, for that matter—would be considered so nonessential to the school's core mission as to be expendable. Second, the information provided to us indicates that VLS's premier environmental law program has been and will continue to be severely diminished, as various faculty members have left or will soon leave as a result of the spring 2018 involuntary restructuring.

Additionally, the international law program at VLS, which in recent years has reportedly earned a reputation for excellence and drawn first-rate applicants, has been effectively dismantled, having lost many of its affiliated faculty members. Thus, it was difficult for this committee to understand how the faculty reductions actually served the school's programmatic needs, given the negative impact of the cuts on the very programs that are at the core of its mission.

Finally, we wish to reiterate how troubled we are by the administration's failure to involve faculty members meaningfully in a broad assessment of programs—assuming decisions to cut faculty positions actually took into account programmatic considerations—either through the Curriculum Committee or through some other, perhaps ad hoc, committee. Widely accepted standards of governance emphasize the primary role that the faculty plays in the planning and implementation of academic programs. Yet the committee found that the faculty was not asked to perform the most rudimentary programmatic analysis, even to save the law school.

These concerns have left us with many basic operational questions, questions that faculty members and administrators could have addressed had there been a truly collaborative decision-making process in place. For example, what will happen to students who enrolled at VLS specifically because of its environmental and international law programs? Once the short-term teaching appointments of various formerly tenured and long-term faculty members end, who will then be responsible for teaching core classes and leading and expanding those programs in a sustainable way? To our knowledge, many professors teaching on contingent appointments are filling in gaps left by last spring's reductions. This in itself is a troubling development, and it begs the question: How will the institution move forward, especially given legal accreditation standards that limit the number of adjunct faculty members teaching in any given program? Now that only five tenured faculty members remain at VLS, some of whom both teach and serve in an administrative capacity, how will they maintain and manage their historical governance roles in the face of the school's continuing financial struggles? And, in that connection, what roles will the nontenured faculty play in governance going forward? Perhaps most important, how will VLS ensure the academic freedom of its faculty, including the freedom to criticize the administration, when the protections of tenure apply to only a few? All of these questions, frequently brought to our attention by the many faculty members we interviewed, remain unanswered. But they are exactly the types of questions that meaningful consultation with the faculty, as contemplated by AAUP governance standards, was designed to raise and address.

#### **D. The Board of Trustees**

One final issue in relation to governance at VLS concerns the role of the board of trustees during the period in question. Beyond the resolutions it passed in 2018 charging Dean McHenry with balancing the budget and approving his proposed involuntary restructuring plan, the board appears to have played almost no role in the events leading up to the reduction in the number of full-time positions and the elimination of the tenured status of fourteen of the nineteen tenured faculty members. According to the *Statement on Government*, the governing board of an institution “plays a central role in relating the likely needs of the future to predictable resources; it has the responsibility for husbanding the endowment; it is responsible for obtaining needed capital and operating

funds; and in the broadest sense of the term it should pay attention to personnel policy. In order to fulfill these duties, the board should be aided by, and may insist upon, the development of long-range planning by the administration and faculty.”

In talking with some twenty faculty members and administrators, the investigating committee was struck by the marginal role the board appears to have played in stewarding the law school's financial resources in a time of crisis. In such situations, governing boards at the very least are usually called upon to ensure that the administration provides the faculty with complete data relating to the institution's financial position. The available information suggests that the board's only significant actions were to issue the resolutions dictating a balanced budget and approving the dean's restructuring plan.

#### **E. Impact on Academic Freedom and Tenure**

No faculty member we interviewed indicated that his or her academic freedom in teaching and research had been affected by the administration's actions.<sup>11</sup> Indeed, VLS has historically and consistently fostered a strong culture of academic freedom with regard to classroom teaching and research. The clinical faculty members in the environmental law program expressed particular appreciation for the administration's past support for the sometimes controversial positions clinics have taken in the course of litigation, noting that the administration has never pressured clinics to take different positions based, for example, on the interests of individual alumni or donors.

While many faculty members tend to think about academic freedom primarily in terms of classroom teaching and research, academic freedom also protects

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11. In a written response to a prepublication draft of this report, Professor Pease noted that his “academic freedom of teaching and research has most certainly been harmed” by the actions of the VLS administration and board. He explained that he was unwilling to sign the nondisparagement agreement, in part, because “it would have restricted what [he] could say about VLS, both in public discourse and in private conversations.” He further stated: “Any restriction on my ability to speak in public is in fact a restriction on my ability to teach and research. Public discussion of science [is] an integral part of my scientific research. More broadly, teaching is not something restricted to a formal classroom. Teaching also occurs when law school faculty participate in public debate and discussion. The attempt by VLS to restrict my public speech through the non-disparagement agreement was thus a direct assault on my ability to teach. The faculty members who signed a non-disparagement agreement are restricted in their ability to teach in the public arena.”

faculty participation in institutional governance. As the AAUP's *Statement On the Relationship of Faculty Governance to Academic Freedom* asserts, academic freedom of faculty members includes "the freedom to express their views (1) on academic matters in the classroom and in the conduct of research, (2) on matters having to do with their institution and its policies, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom." A great majority of the faculty members we interviewed told us that the restructuring process—in both the voluntary and involuntary stages—severely hampered their willingness and ability to express themselves freely "on matters having to do with their institution and its policies." For example, because affected faculty members were required to sign nondisclosure and nondisparagement agreements as a condition of their restructured (short-term or part-time) appointments at VLS, they were prohibited from talking with one another (or anyone else) about the specific terms of their restructured status. This situation seeded an atmosphere of silence and fear, to the point where some faculty members, when asked by others in late spring 2018 about what courses they would be teaching the following year, declined to respond lest they be charged with violating their nondisclosure agreements or targeted for involuntary restructuring.

Most important, the administration terminated the appointment of a tenured faculty member and deprived an additional thirteen faculty members of their tenured status. Additionally, the administration employed assessments of each tenured faculty member's relative merit in selecting which faculty appointments to detenure—a process the AAUP has long considered tantamount to dismissal for cause—without affording the due-process protections that normally accompany tenured status: an adjudicative hearing of record before an elected faculty body in which the administration demonstrates adequate cause for dismissal. As the 1940 *Statement of Principles on Academic Freedom and Tenure* famously argues, tenure is instrumental for preserving academic freedom. In the name of involuntary restructuring, the administration and governing board at Vermont Law School, has nearly eliminated tenure and with it, the most effective means of protecting academic freedom. It remains to be seen whether faculty members will continue to experience a lack of constraint on their academic freedom in teaching and research when most of the faculty lack the protections of tenure. But clearly, the faculty's ability to assert its

governance rights in the face of further assaults has already been severely constrained.

## **V. Conclusion**

Based on our investigation of the events that led to the detenuring of fourteen of the nineteen tenured faculty members in spring 2018, this investigating committee finds that the administration of Vermont Law School violated the standards set forth in the AAUP's *Statement on Government* and derivative Association documents and that unacceptable conditions of academic governance prevail at the institution. Contrary to the assertions of some administrators and faculty members, we did not consider this a "foregone conclusion" when we began our investigation. Indeed, we acknowledge that the administration did take many steps to comply minimally with certain Association-supported standards. It consistently asked faculty members for suggestions and made a compelling case for why some faculty members, for the good of the school, should volunteer for early retirement. We appreciate that Dean McHenry communicated the gravity of VLS's financial position early in the restructuring process. And we recognize that some remaining VLS faculty members still feel that they have the freedom to teach and research as they wish and that non-tenure-track faculty members have historically participated in shared governance at VLS.

But, as discussed earlier in this report, minimal compliance with a few AAUP standards does not by itself bring VLS into alignment with those standards. Asking faculty members for suggestions does not constitute meaningful consultation when the faculty is not given any opportunity to review, analyze, and assess the options, whether suggested by faculty members or not, and, ultimately, to affect decisions being made. Having access to data is not equivalent to being consulted about what those data mean and how they should be understood and addressed. A strong culture of academic freedom relating to classroom teaching and research is only one part of what constitutes academic freedom. And providing non-tenure-track faculty members some participatory rights does not necessarily translate to a strong culture of governance if faculty members with those rights are not afforded the opportunity to exercise them in ways that matter.

Finally, we must relate the two concerns that we have found most troubling about the VLS administration's failure to comport with AAUP-recommended standards of academic governance during the 2017–18 academic year: the significant erosion of trust within

the law school community during that time and the net effect on the institution of the events of that year. With regard to the former, and as we hope this report makes evident, the story of VLS during the period under investigation is one of eroding trust not only between a wide swath of faculty members and the administration but also among faculty members themselves. This erosion of trust stands in stark contrast to what we heard about the strong sense of community that had existed at VLS in the past. This breakdown of trust resulted not from the administration’s failure to keep faculty members informed or solicit suggestions from them but from its failure to comprehend why providing data and asking for input do not, by themselves, constitute meaningful collaborative decision-making. A statement Dean McHenry made to a local newspaper reporter comparing faculty members to children “handled” by the administration reflects precisely the administration’s approach: faculty members could be manipulated into thinking they were making decisions for themselves, when all along the grown-ups had made the decisions for them. This is the antithesis of shared governance.<sup>12</sup>

A view of the situation that accounts for the net effect on VLS of the events of 2017–18 is even more devastating. The administration eliminated the tenure of three-quarters of the school’s tenured faculty members, making them essentially at-will employees; transferred the bulk of the teaching load to contingent faculty members; and radically reduced the size of the full-time core faculty. Put inelegantly, VLS laid off a majority of its most expensive faculty members and then outsourced the work they did to a much cheaper contingent labor force, with no intention, it seems, of looking back. Left in the dust pile of this type of corporate restructuring are the primary goals of higher education: to serve the common good and advance the progress of society through teaching and research, which goals are the very reason for academic freedom, tenure, and shared governance.

We wish to reiterate that every single person with whom we spoke in the course of our investigation expressed a commitment to Vermont Law School. Everyone was devastated by the events of last spring and the school’s continuing difficulties. All of those we spoke with, and the members of this committee,

want to see VLS survive so that it can carry forward its mission to educate and train leading environmental lawyers, particularly in a time when they are so needed. Vermont Law School will be able to do so, however, only if it conforms not only to the letter of AAUP-supported standards, but to the animating spirit of the AAUP’s commitment to shared governance, academic freedom, and the common good.<sup>13</sup> ■



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University of New Hampshire

*Investigating Committee*

The Committee on College and University Governance has by vote authorized publication of this report on the AAUP website and in the *Bulletin of the American Association of University Professors*.

Chair: **MICHAEL DECESARE** (Sociology), Merrimack College

Members: **RACHEL IDA BUFF** (History), University of Wisconsin–Milwaukee; **ALLISON BUSKIRK-COHEN** (Psychology), Delaware Valley University; **PHILIP COLE** (Physics), Lamar University; **RUBEN GARCIA** (Law), University of Nevada, Las Vegas; **PIPPA HOLLOWAY** (History), Middle Tennessee State University; **SUSAN JAROSI** (Art History and Women’s and Gender Studies), Hamilton College; **JULIA SCHLECK** (English), University of Nebraska–Lincoln; **NOELEEN MCILVENNA** (History), Wright State University, *liaison from the AAUP-CBC*; **BRIAN TURNER** (Political Science), Randolph-Macon College, *liaison from the ASC*; **RUDY H. FICHTENBAUM** (Economics) Wright State University, *ex officio*

13. In response to a prepublication draft of this report, Dean McHenry submitted a sixteen-page response and numerous attachments marked *confidential*. Following further communication with the AAUP’s staff, he submitted for publication the following statement.

Any suggestion that Vermont Law School engaged in reduction of its instructional budget, including restructuring faculty positions in the spring of 2018, without ongoing, extensive, and continuous involvement of the faculty is inaccurate. When a condition of financial

12. The local newspaper quoted the dean as follows: “The faculty . . . can’t be, as a whole, in the position of deciding how people are restructured. It’s like asking kids at a playground who is going to get the ball—it just doesn’t work.”

exigency was identified, and it became clear that the survival of the school was at stake, the administration explored, together with the faculty, all realistic alternatives to involuntary reductions in faculty positions, while at the same time preserving its premier environmental program. The AAUP report does not identify a single viable alternative that was presented to the administration by the faculty, or suggest one on its own. To the extent that the report notes lack of involvement by some portion of the tenured faculty, the report fails to highlight the administration's continued solicitation of input from the faculty, and the extent to which some faculty were not willing or did not choose to participate.

History: What really happened at Vermont Law School, as explained to the AAUP Committee in person on December 19, 2018, documented in a timeline, response to questions and documentation provided to the AAUP Committee on February 4, 2019, and further documented in a sixteen-page response and accompanying attachments provided to the AAUP by letter dated March 31, 2019, is the following:

The financial challenges of a private independent law school with a small endowment caught up with VLS in the fall of 2017. Enrollment and discount rates did not meet projections, strategic initiatives did not generate adequate anticipated revenue and the school could no longer sustain the deficit spending it had incurred annually for the past six years. Despite significant success in increasing enrollment, starting new programs, including nationally recognized online courses, and renegotiating debt service, the school's reserves were significantly depleted and another year of deficit spending at that level could have forced the school's closure. Most challenging was the projected deficit of more than \$2 million for FY19, and the years following. Audited financial information fully documenting the finances has been provided to the AAUP, and has not been contravened.

Immediate action was necessary to place the school on a sustainable path and preserve and grow its renowned environmental program. Over seven months, from the October 2018 Board of Trustees meeting through the May 2019 board meeting and commencement, the board, its Budget & Finance Committee, the school's senior leadership team consisting of five faculty members and four administrators, the staff and, most importantly, its faculty and especially its elected Dean's Advisory Committee, met, conferred, discussed and reviewed numerous options to address the financial challenges and ensure the survival of the school. All suggestions were solicited, and no option was left unexamined. Lacking the support of a larger university to rely on for funding, the school explored partnerships with other schools, including the University of Vermont, solicited donors for contributions, and explored funding from the State of Vermont—all without success.

In February 2018, the board passed a resolution requiring a balanced budget while also requiring the maintenance of educational quality and the school's premier environmental program. As the school had already reduced expenses in all other areas, the instructional budget would have to be reduced. At this time, the school was carrying a faculty more than twice as large as the faculty at many similarly-sized law schools. The administration approached the faculty, both collectively and individually, about voluntary restructuring. Very few faculty were willing to participate voluntarily in salary reductions

or position changes to allow the school to close the budget gap, despite the obvious conclusion that the failure of a voluntary approach ensured that involuntary action would have to be taken. It was abundantly clear that if viable alternatives were not identified, involuntary reductions to the instructional budget would have to be made.

Having exhausted all other options, the school took action in the form of a programmatic restructuring that has resulted in a close-to-balanced budget in FY19 and a projected balanced budget for FY20. We acknowledge that this process was, although necessary, a deeply painful experience the school hopes never to repeat.

The Faculty Were Informed and Meaningfully Engaged Through-

out: VLS provided the AAUP investigating committee with detailed information on the extensive measures taken to solicit the views and suggestions of the faculty, as well as the engagement of the Dean's Advisory Committee. The financial issues and proposed solutions were discussed in regular faculty meetings, special faculty meetings, and in the Dean's Advisory Committee open meetings with the faculty (the administration was present on an invitation-only basis to provide information). The administration presented various options to the faculty as a whole in these meetings, including projections detailing salary reductions and reductions in the number of faculty. Documents provided to the investigating committee demonstrate that a variety of options were presented and that responses and suggestions were solicited. The administration cannot be faulted because some faculty failed to engage in governance—that was their choice—as best evidenced by the fact that only one tenured faculty chose to serve on the Dean's Advisory Committee.

Once the magnitude of the needed budget cuts was clear and the board of trustees adopted the resolution for a balanced budget in early February 2018, the faculty was presented with several options for achieving the necessary budget cuts, which included an across-the-board salary decrease, voluntary changes in status leading to major reductions in the number of FTEs, or some combination thereof. It was obvious that insufficient acceptance of voluntary reductions, would have to lead to involuntary reductions to the instructional budget, including involuntary separations. The report acknowledges the "writing was on the wall," particularly after the board's mandate, announced in mid-February, that the budget be balanced for FY19.

VLS's Financial Situation Was Dire. Required Action and a

Measure of Flexibility: VLS's extreme financial circumstances did not afford it the luxury of drawn-out decision-making or more generous severance offers than those provided to restructured faculty. It was essential to take prompt action and to tailor flexible solutions suited to VLS's particular circumstances. All reasonable alternatives were explored, as evidenced by the report's failure to identify—after extensive investigation, interviews, and review of audited financial information—any other viable solutions.

The report suggests that individual faculty proposed solutions to the administration that were never acknowledged or acted upon. However, the report provides no indication of what those overlooked ideas were or might have been, as the administration afforded numerous opportunities to faculty to offer suggestions and proposals. Nor does the report discuss whether any of these suggestions was even marginally realistic. The administration and the faculty elected

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Dean's Advisory Committee eagerly solicited and considered every possible option short of involuntary restructuring, as the documentation provided to the investigating committee demonstrates.

The report[s] narrow focus on tenured faculty fails to acknowledge that the restructuring applied to all faculty at VLS; short and long-term contract faculty, grant-funded faculty, and clinical faculty as well as tenured. More than three quarters of the faculty of 60 were affected and administrator salaries were reduced, some by as much as 20%, and the dean's salary was reduced by 25%. Half-year severance payments were offered and as much flexibility as possible was provided to restructured faculty, many of whom are still teaching at the school.

At the time of the restructuring, there were approximately 60 faculty, less than one-third of whom were tenured. The other two-thirds of the faculty, as the report correctly points out, were granted committee and other significant leadership and administrative roles in running the school. More than 50 of the 60 faculty—80%—were impacted by the restructuring in position or salary or both.

VLS Has Maintained Its Environmental Program: VLS prioritized and maintained its flagship environmental program, which has been reinforced and certainly not diminished. Post-restructuring, VLS is offering essentially the same set of environmental law courses and will increase the number of environmental courses in the coming academic year. Its environmental offerings are the most comprehensive in the country, and will continue as such under the very capable leadership of its Environmental Law Center Director, Jennifer Rushlow.

VLS Has a Lean Administrative Team and Structure: The Report incorrectly states that VLS is top heavy with administrators. VLS in fact has a very lean administrative management team. Five of the administrators are full-time faculty (two vice-deans, two associate deans and the ELC director) who carry a half or greater than half teaching load. One administrator (the dean) is also teaching two classes this year. Two of these deans run academic centers in addition to their teaching and administrative responsibilities. The remaining four administrators are the vice presidents for fundraising and alumni affairs, marketing and admissions, the director of human resources, and chief financial officer. These are essential positions and functions often assumed by or run out of a central university, a resource unavailable to VLS or other independent law schools.

Two additional facts are important to stress. First, without a university to provide student services, the law school administration must provide all of the disability accommodation, counseling, and other student services usually provided by a central administration. Second, VLS is more than a JD granting law school. It offers numerous LLM degrees (environmental law, food and agriculture law and policy, energy regulation and law, and American legal studies), and four master's degrees (environmental law, food and agriculture law and policy, energy regulation, and restorative justice), and an accelerated JD program and numerous online course offerings.

The Board of Trustees was Actively Engaged: The board Budget & Finance Committee met monthly, reviewed detailed financial information and explored a variety of financial and budgeting options, which led to the board's February 2018 mandate for preparation of a balanced budget and sustainable financial model, its approval of the

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restructuring plan in May 2018, and adoption of the revised budget in late June 2018.

It is unfortunate that the committee, and/or the AAUP, has chosen to further the personal agendas of a small minority of previously tenured faculty as part of a collective effort to protect tenure nationally, instead of focusing on the unique and compelling circumstances facing VLS in the FY18 academic year. In doing so, the AAUP is doing a disservice to higher education, by suggesting that even a thoughtful, deliberate and consultative programmatic restructuring process in an institution in financial exigency is improper. If the AAUP "want[s] to see VLS survive" as its report states, it will tell the whole story, accurately and fully.