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JUDICIAL ENFORCEMENT OF ACADEMIC TENURE: AN EXAMINATION

Alan A. Matheson*

In recent years, critical attacks on higher education have focused upon tenure of faculty members and have mounted in both volume and intensity. As a result, there has been an agonizing reappraisal of the whole subject of academic tenure. The concept of tenure in the teaching profession, though subject to varied definition, eligibility and legal basis, includes a basic element: a measure of employment security. Tenured faculty members enjoy the assurance of continued employment which can be terminated only by means of procedural due process and for reasons of extreme misconduct or program curtailment. In addition, tenure is an important guarantee of academic freedom, protecting as well as attracting qualified teachers. To the faculty member, tenure also entails a "kind of communal acceptance into the professorial guild."

Although there is no uniform system in higher education, tenure

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3. But the essential characteristic of tenure is continuity of service, in that the institution in which the teacher serves has in some manner relinquished the freedom or power it otherwise would possess to terminate the teacher's services. Byse, Academic Freedom, Tenure and the Law: A Comment on Worzella v. Board of Regents, 73 HARV. L. REV. 304, 305 (1959).


5. McHugh, Faculty Unionism and Tenure, in FACULTY TENURE, supra note 1, at 195.
programs at public institutions are generally created by regulation or bylaw rather than by statute. Tenure at private institutions is generally established by contract, and a substantial number of community and junior colleges utilize a term-contract system in lieu of tenure. Apart from these observations, few generalizations can be made about tenure plans. As Professors Clark Byse and Louis Joughin summarize:

Tenure is embodied in a bewildering variety of policies, plans and practices; the range reveals extraordinary differences in generosity, explicitness and intelligibility. Large or small, public or private, non-sectarian or religiously affiliated, there is no consensus concerning either the criteria or the procedures for acquiring and terminating tenure.

Although, as of 1972, 94% of all faculty members in American universities and colleges served at institutions recognizing tenure in one form or another, the legal status of academic tenure remains unclear. Relatively few cases have come before the courts, and no pattern in treatment is evident. Indeed, the judiciary has often compounded the confusion. As one writer observed, "[r]eluctance, amorphousness, a substantial degree of diversity, and even a modicum of whimsy have marked judicial conceptions and appraisals of tenure over the years." Since tenure continues to play a prominent role in higher education, legal solutions will be sought to the problems associated with its acquisition, termination and attendant procedural safeguards. This article will examine the existing judicial authority on the legal status of academic tenure at the college level. The article begins with a discussion of acquisition of tenure and proceeds to analyze ob-

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6. There are some exceptions. See, e.g., CAL. EDUC. CODE §§ 24306, 24308, 24309 (West Supp. 1974). Wisconsin provides a tenure system for all teachers in any state university . . . Employment shall be permanent, during efficiency and good behavior after appointment and acceptance . . . for a sixth consecutive year . . . . The employment of a teacher who has become permanently employed . . . may not be terminated involuntarily except for cause upon written charges . . . . WIS. STAT. ANN. § 37.31(1) (Supp. 1974).
7. See FACULTY TENURE, supra note 1, at 219–21.
8. BYSE & JOUGHIN, supra note 2, at 133.
10. Rosenblum, Legal Dimensions of Tenure, in FACULTY TENURE, supra note 1, at 160.
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stacles to its enforcement and grounds for dismissal from a tenured position, together with the procedural protections which must accompany dismissal.

I. ACQUISITION OF TENURE

Full and "legitimate" tenure is gained through fulfillment of the prescribed standards of the respective institution. Ordinarily, the receipt of tenure after a probationary period is not automatic, but requires the adoption by the governing board of a favorable recommendation of faculty and administrative officers.

A faculty member may obtain tenure contrary to the wishes of the employing institution, however. Tenure can be acquired "by default" if the institution fails to follow its own rules of tenure, e.g., by not notifying ineligible candidates or not issuing conditional contracts within the requisite time span. So too, if the qualification for tenure is ambiguous, interpretation of the standard will generally lie against the college or university. Two recent examples of the acquisition of tenure "by default" were presented in Bruno v. Detroit Institute of Technology and Chung v. Park.

In Bruno, the institution's policy provided that a faculty member "shall be considered to hold tenure" if he or she: (1) adequately performs his or her duties for three consecutive years; (2) is assigned the rank of associate or full professor; and (3) accepts a fourth annual contract. The Michigan Court of Appeals held that any professor meeting these qualifications has tenure even though the institution does not affirmatively confer that status, and indeed chooses to terminate the professor's employment. A lack of any criticism of performance during the period of employment, coupled with yearly renewal of contracts and promotion of the faculty member were considered to be inconsistent with any assertion of dissatisfaction by the institution.

Chung v. Park concerned a Pennsylvania state college's tenure policy.

15. 215 N.W.2d at 747.
16. *Id.* at 748.

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which provided for a three-year probationary period after which the professor was to be dismissed, tenured or granted an additional two-year probationary period with specific requirements for obtaining tenure at the end of that period. A federal district court in Pennsylvania held that a professor who was neither released after three years of probation nor given specific requirements to meet during his fourth and fifth probationary years obtained tenure, notwithstanding contrary wishes of the institution. General expressions of concern by the president to the faculty member regarding classroom teaching were not sufficient to qualify as "requirements"; there must be a set of goals which the faculty member must meet. Tenure was recognized in this instance even though the teacher was aware that the intention of the college was not to grant tenure but to place him on extended probation.

"De facto tenure," not formal tenure but the right to procedural due process before the termination of employment, may be obtained if a school's written and unwritten policies or practices grant qualifying employees a concrete expectancy that their future employment is secure. In *Perry v. Sindermann*, a college teacher claimed reliance upon a provision in the college's faculty guide which stated that the administration "wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." In addition, he pointed to guidelines promulgated by the governing board which provided that one who had been employed as a teacher in the system for seven years or more had some kind of job security, notwithstanding the presence of a formal disclaimer of a tenure system. The United States Supreme Court held that a teacher alleging reliance upon policies and practices of this nature must have the opportunity to prove his claim. A mere subjective "expectancy" of employment is not sufficient by itself to require the application of procedural due process protection, but de facto tenure may be implied in an "understanding" fostered by the educational institution.

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17. 369 F. Supp. at 966. The tenure regulation in issue was described as a "paradigm of turbidity." *Id.* at 965.
18. 408 U.S. 593, 603 (1972).
19. *Id.* at 602-03.
II. OBSTACLES TO ENFORCEMENT

Once a professor has acquired tenure, obstacles may arise to the enforcement of rights as a tenured faculty member. The school officials may have lacked the authority to enter into a tenure agreement, and, if the institution is governed by a statute providing for “removal at will,” the professor may find that the tenure agreement provides little security against dismissal. A professor in a private institution faces additional problems with respect to enforcement of tenure rights.

A. Constitutional Power to Control

In Worzella v. Board of Regents, the Supreme Court of South Dakota invalidated a tenure plan on the basis that it improperly limited the governing board’s power to deal with employees. Worzella had qualified for tenure under a policy adopted by the Board of Regents of South Dakota State College. He was dismissed from his faculty position, contrary to the tenure policy, without complaint, notice or hearing allegedly for involvement in personal disputes and insubordination. The court interpreted the tenure policy to provide that the board could not discharge or remove a faculty member with tenure if the president of the college refused to file a complaint or if the president and the tenure committee failed or refused to recommend dismissal. The tenure policy was held invalid as an unlawful delegation of authority since it was in conflict with a provision in the state constitution declaring the college to be “under the control of the board.”

20. Legal protection of tenure is insubstantial. Judicial reluctance to decree specific performance of 'personal service' contracts, charter provisions authorizing discharge at will, disclaimer and finality clauses, confusing uncertainty in the written plans of some institutions, the complete absence of formal plans in others, the vagueness and inclusiveness of termination criteria, and retention of ultimate decisional authority by most governing boards—all underscore the hazards of reliance on judicial protection of tenure.


22. Id. at 412.

23. Id. at 413.

24. Id.
of regents. Thus, the board's power of removal was absolute; it could not be restricted by the tenure program.

The power-to-control rationale was also utilized by the Supreme Court of North Dakota to limit a board regulation under which a teacher could be removed only for cause after a hearing. The board of higher education, under the state constitution, was given "full authority over the institutions under its control." Therefore, according to the court, the regulation could not prevent the board's "right to discharge . . . without assigning cause for . . . removal and without a hearing, if it saw fit to do so."

B. Removal-at-Will Statutes

The governing boards of some institutions of higher education are empowered to remove faculty members when the interest of the school "requires" it. Despite such broad discretion, some governing boards have adopted tenure and related employment policies which restrict their blanket authority. These self-imposed limitations have been declared ineffective by some courts on grounds that the governing board's authority may not be compromised in this manner and that such limitations unlawfully bind future board members and future decision making by the present board.

Other decisions, however, have limited the effect of statutory "at will" provisions by finding that the presence of the restrictions does not disable a governing board from effectively contracting not to remove a teacher unreasonably or arbitrarily. Thus, a board can make reasonable agreements for the contractual terms of faculty members. What is "reasonable" remains in question, but this treat-

26. Id. at 34.
27. Id. at 36. A hearing was, in fact, held. The suit was by writ of certiorari to review the discharge.
28. E.g., the relevant statute, later amended, interpreted in State ex rel. Hunsicker v. Board of Regents, 209 Wis. 83, 244 N.W. 618 (1932), allowed the board to "remove at pleasure."
ment of the statutory restriction makes an action for damages for breach of contract available to a teacher for premature dismissal even though the ultimate power to discharge remains basically inviolate.

C. Private Institutions and Contract

While action by a governing board which is contrary to a tenure plan may result in an order of reinstatement for the faculty member at a public institution, the tenured employee at a private institution may face difficulty in attempting to acquire reinstatement as a result of the judiciary's reluctance to specifically enforce personal service contracts. The basis for any legal claim to tenure at a private institution is limited to contract since there is no statutory protection.\(^3\) Often rights similar to those found in tenure systems are contained in the bylaws or regulations of private institutions. The teacher's contract may provide that dismissal will be only for reasons set forth in a tenure program; thus, dismissal contrary to the plan will be a breach of the contract.

Proving that the policy was indeed a part of the contract may constitute an initial obstacle to claiming the benefit of tenure provisions.\(^3\) But, even assuming that a binding obligation between a faculty member and a college or university is established, there has been little judicial support for a remedy for breach of contract beyond an action for damages. Specific performance of a personal service contract is generally denied because of the traditional equitable rule that the continuance of a close and undesirable personal relationship will not be compelled.\(^3\) This is so even though money damages may not be a legally adequate remedy where the college faculty member has had a career damaged by loss of employment.\(^3\)

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32. See Byse & Joughin, supra note 2, at 78, 82–94.
34. An action for damages leaves the teacher out of work even if he or she ultimately prevails. If other employment is taken, the mitigation principle is applicable. See, e.g., Bruno v. Detroit Institute of Technology, 51 Mich. App. 593, 215 N.W.2d 745, 749 (1974). For the teacher at a public institution, the doctrine of sovereign immunity may prevent recovery. Cf. Kondos v. West Virginia Bd. of Regents, 318 F. Supp. 394 (S.D.W. Va. 1970). However, actions for damages against public educa-
An exception to the general rule was applied by the Chancery Court of New Jersey in *American Association of University Professors v. Bloomfield College*, in which tenured personnel at a private college had been dismissed on the basis of a "financial exigency" found unsupported by the evidence. The court ordered reinstatement of the faculty members. Termination had not been based upon any dissatisfaction with the services rendered, but ostensibly only on reasons of financial stress; therefore, the dangers of requiring an educational institution to hire or maintain one deemed undesirable or incompatible were absent. The court concluded that the fact that a private institution was involved did not preclude specific performance, particularly when reinstatement to public institutions through the use of mandamus amounted to nothing more than compelling adherence to academic tenure commitments.

Other contractual pitfalls which, in particular instances, could affect the tenure protection of a teacher at a private institution include: (1) provisions disclaiming a legal obligation on the part of the college; (2) allegations of a lack of "mutuality" in the contract based upon the teacher's freedom to refuse a proffered position; (3) lack of authority of administrative officials to adopt a tenure plan; and (4) for informal plans, failure to comply with the Statute of Frauds.

III. DISMISSAL OF TENURED TEACHERS

A. Cause

Under the 1940 *Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors (AAUP), the service of teachers with tenure "should only be termi-
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tated for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.” “Adequate cause” is not defined in particular terms, but there are references to “incompetence” and “moral turpitude.”\(^\text{42}\) In the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings,\(^\text{43}\) the AAUP made no attempt to define cause and left such a determination to the individual institutions.\(^\text{44}\) A 1971 study of the status of tenure policies in public colleges and universities, however, revealed that only about half of the 80 institutions surveyed provided specific criteria for the discharge of tenured faculty.\(^\text{45}\) Of these, the most common were immorality, misconduct, professional incompetence, neglect of duty, criminal involvement and incapacity. A majority of the remaining institutions in the survey did not enlarge upon the provision of dismissal for “cause.”

Aside from cases involving constitutional questions, there has been relatively little litigation dealing with the reasons for faculty dismissal. The paucity of litigation and consequent lack of definition for cause is explained by the fact that formal dismissal proceedings for faculty members have been a rarity. The Commission on Academic Tenure in Higher Education\(^\text{46}\) advocated “work toward a broadly acceptable definition” to avoid a judicial determination of institutional policy or elaborate code adoption by the academic community. In its recommendation, the Commission stated that “adequate cause” should be restricted to (1) demonstrated incompetence or dishonesty in teaching or research, (2) substantial and manifest neglect of duty and (3) personal conduct which substantially impairs the individual’s fulfillment of his or her institutional responsibilities.\(^\text{47}\)

Although generally courts have not been helpful in defining what conduct justifies the termination of a faculty member, they have made it clear that dismissal for engaging in constitutionally protected activity is not permitted.\(^\text{48}\) In other situations, courts have not been as

\(^{42}\) Id. at 38.
\(^{43}\) Id. at 40-45.
\(^{44}\) Id. at 41.
\(^{45}\) SHAW, supra note 2, at 62-65.
\(^{46}\) The Commission was sponsored by the Association of American Colleges and the AAUP in 1971 to conduct a general inquiry into academic tenure. Its report and recommendations are contained in FACULTY TENURE, supra note 1.
\(^{47}\) Id. at 75.
\(^{48}\) See Part III-B infra.
concerned with the substantive charge as with the process accorded or have made a decision on a basis other than an examination of the alleged reasons for termination.  

Some courts, however, have considered the issue of adequate cause. A complaint charging "insubordination" filed against a University of Nevada professor led to an order for his dismissal by the governing board in State ex rel. Richardson v. Board of Regents. The professor opposed a change in admission standards, which the president apparently supported, and distributed to his colleagues copies of a magazine article critical of "professional educators." He also stated at a meeting of the local AAUP chapter that he was surprised to see the number there "in view of the unfair and unwarranted criticism of the [organization] made by the president this afternoon." Defining "insubordination" as conduct which "imparts a willful disregard of express or implied direction, or such a defiant attitude as to be equivalent there-to," the Nevada Supreme Court found inadequate support in the record to provide cause for removal. The court classified the question of cause for removal as one of "law." Although granting "full recognition of the right of the regents to weigh the evidence, to pass upon the credibility of the witnesses, to commit procedural errors not going to the jurisdiction, and to be the finders of facts relevant to the issues," the court subjected the charges and the evidence to a substantially independent review.

Whether there is "cause" for removal may be determined partially by statutory provisions for tenure. In Wisconsin ex rel. Ball v. McPhee, the Supreme Court of Wisconsin held that a state statute guaranteeing tenure "during efficiency and good behavior" made illegal any discharge for a reason unrelated to efficiency and good behavior. The court stated that comments by a faculty member criticizing the graduate program of the institution and attempts to dissuade graduates of the institution from accepting teaching employment within the

50. 70 Nev. 347, 269 P.2d 265 (1954); see also the earlier opinion of the Nevada Supreme Court reversing the trial court's dismissal of the same case, 70 Nev. 144, 261 P.2d 515 (1953).
51. 269 P.2d at 270.
52. Id. at 276.
53. Id. at 268.
54. Id. at 276.
55. 6 Wis. 2d 190, 94 N.W.2d 711 (1959).
state did not qualify as grounds for dismissal under the statute. The court also rejected the claim of the state college that it possessed unreviewable discretion to determine what conduct constituted "good cause" for dismissal.

Other decisions have supported the discharge of college faculty on the basis of charges of "evident unfitness for service," "doubt as to future usefulness," "refusal to follow a prescribed teaching schedule," "incompetency and intransigence," and refusal to answer questions posed by an institution regarding communist party membership.

B. Constitutional and Statutory Rights

Although a tenured professor may be dismissed for cause, termination of employment or denial of tenure may not proceed on the basis of "race, color, religion, sex or national origin," nor upon the assertion of rights guaranteed by the Constitution:

[The Government] may not deny a benefit to a person on a basis that infringes his [or her] interest in freedom of speech. For if the government could deny a benefit to a person because of his [or her] constitutionally protected speech or associations, his [or her] exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.

Protection of the constitutional rights of faculty members at public

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56. Id. at 718–19.
institutions is independent of their tenure status. Indeed, the nontenured instructor and even the teacher hired with no formal contract but with clearly implied promises of continued employment are equally secure against discharge for the exercise of a protected right as is the person who has earned continuing employment under a tenure system. Thus, the following discussion applies alike to tenured and nontenured professors.

In many instances, the exercise of a protected interest is alleged by the teacher as being the real reason for attempted termination, whereas the institution may point to other, independent factors. The difficulty is compounded by the fact that often the reasons for dissatisfaction with a teacher involve matters of speech, association, political or social activity. There may at times be honest dispute regarding the classification of activity as "protected," and the chances for protected speech being intermingled with unprotected activity can be significant, with a judicial sorting-out process required:

[1]f, judged by constitutional standards, there are valid as well as invalid reasons for the discipline or discharge of a teacher, such discipline or discharge will not be set aside by the federal court so long as the invalid reasons are not the primary reasons or motivation for the discharge.

In theory at least, a teacher may speak freely on matters of public concern without fear of retaliatory sanction by his or her employing institution. In Pickering v. Board of Education, plaintiff wrote a letter containing alleged falsehoods to the editor of a local newspaper. In the letter, plaintiff challenged the manner in which the school board had handled revenue raising proposals. The board dismissed

64. Id. at 598.
65. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967) (state statutes banning state employment of any person advocating or distributing material which advocates the forceful overthrow of the government unconstitutionally vague); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967) (school board not free to exercise its discretion whether to rehire teacher in an arbitrary or racially discriminatory manner).
66. E.g., Watts v. Board of Curators, 495 F.2d 384 (8th Cir. 1974); Lewis v. Spencer, 369 F. Supp. 1219 (S.D. Tex.), aff'd, 490 F.2d 93 (5th Cir. 1974) (discharge not in retaliation for appearance at legislature or participation in local teacher organization but for failure to accept new position).
plaintiff on grounds that the letter was "detrimental to the efficient operation and administration of the schools of the district." In holding that plaintiff's removal infringed upon his freedom of speech, the United States Supreme Court stated in regard to the Illinois supreme court opinion which had sustained the dismissal:

[T]o the extent that the . . . opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

The Court, however, did not establish an unlimited right on the part of a teacher to be critical of superiors or to speak on any subject or under all circumstances. Recognizing that the "State has interests as an employer in regulating the speech of the citizenry in general," the Court announced a "balancing test" by which the teacher's interest as a private citizen in commenting on matters of public concern was to be weighed against the interests of the state "as an employer, in promoting the efficiency of the public services it performs through its employees."

Several cases since Pickering have dealt with the dismissal of teachers as a result of incidents associated with speech. These cases underscore the difficulty in attempting to determine when dismissal of a faculty member will lie for reasons which arguably include exercise of protected rights. In Duke v. North Texas State University, a teaching assistant's dismissal was upheld on the charge of making speeches using profanity before a group of students and criticizing university administrators and policies. According to the institution's findings, the statements in the setting of a meeting held in violation of university regulations "impaired her efficiency as a teacher and her judgment as a scholar." The Court of Appeals for the Fifth Circuit supported the university's "interests" to "maintain a competent faculty

69. 391 U.S. at 564.
70. Id. at 568.
71. Id.
72. Id.
73. 469 F.2d 829 (5th Cir. 1972).
74. Id. at 832.
and to perpetuate public confidence in the educational institution," both of which had been infringed upon by the assistant's activities.

An assistant professor with "stability of employment" at Arizona State University was dismissed by the board of regents in *Starsky v. Williams* for "general unfitness" after a series of alleged "unprofessional acts," including an unexcused class cancellation and several extramural or public activities in which speech played an important role. The federal court, in a civil rights action, found that the termination violated the teacher's right of free speech. The facts showed some unprotected speech activity among the university's charges, but the court determined it must decide whether the substantial or primary cause of the discharge was impermissible. The court utilized a process of tabulation: eight specific charges had insufficient evidence and some constitutional protection, while two incidents were established by the facts. With reference to public speech by the teacher as a citizen, the court suggested that "an extremely strong or unusual case of efficiency would have to be made to outweigh a citizen's interest" and, further, that a narrower professional standard could not be applied. Even the strongest criticism of a remote employer (in this case a governing board) may not be sufficient to rule out a first amendment right of a teacher. "Constitutionally protected criticism" should not be confused with "disrespect," according to the court.80

The dismissal of several faculty members and administrative officials from the Oklahoma College of Liberal Arts was overturned by the Court of Appeals for the Tenth Circuit in *Rampey v. Allen*. "Divisiveness" was the reason given for the termination by the institution, where a tenure system had been recently abolished. The majority, after reviewing the testimony in the record, concluded, however, that the explanation was "frivolous." The true and unacceptable reasons for the dismissal were held to be "disapproved association, or

75. Id. at 839.
77. See text accompanying note 67 supra.
78. 353 F. Supp. at 923.
79. Id. at 920.
80. Id. at 924.
82. "As we view it, the tenure issue enters into this case to the extent that it provides some insight regarding the alleged arbitrariness of the [college administrators]." Id. at 1094.
disapproval of statements made, or on account of [the college president's] disagreement with [the teachers'] philosophies . . . ."83

C. Financial Exigency

The recent economic downturn and declining enrollment in some collegiate institutions have raised a serious challenge to the employment security of faculty members. Under these circumstances, tenure provides "no guarantee against becoming a casualty to institutional change."84 Termination of tenured employment because of financial exigency, "under extraordinary circumstances,"85 has long been considered legitimate, but until recently it has not been a serious prospect at most institutions. Courts uphold the dismissal of tenured faculty if the financial distress of an institution is sufficiently serious to necessitate personnel cutbacks and if reasonable procedural safeguards accompany the process of selecting which faculty members are to be released.86

The question whether a private college's financial status necessitated the abolition of tenure was presented recently to a chancery court in New Jersey in AAUP v. Bloomfield College.87 For reasons of alleged financial exigency, the employment of some tenured faculty members was terminated, and tenure was abolished for professors who were retained. On review, the court recognized the "poor" economic health of the college, but held that faculty cutbacks could not be justified on the basis of a bare allegation of "financial exigency." The college board of trustees must show that an immediate financial benefit could be expected from the abrogation of tenure for all faculty; it is not a sufficient justification that action be taken "in the [bona fide] belief that the measure would in some degree advance the

83. Id. at 1099.
85. The reference is to the 1940 Statement of Principles on Academic Freedom and Tenure, in ACADEMIC FREEDOM AND TENURE 33 (L. Joughin, ed. 1967).
86. See text accompanying notes 91–94 infra.
87. 129 N.J. Super. 249, 322 A.2d 846 (1974). The abrogation of tenure for continuing faculty members was to be carried out under a policy providing that "Termination of continuous appointment because of financial exigency of the institution must be demonstrably bona fide." 322 A.2d at 848.
financial fortunes of the institution." The court concluded that the institution failed to meet its burden of proving the existence of financial exigency. The financial problem was identified as merely one of liquidity which had plagued the college for many years. Moreover, the hiring of new faculty members after firing tenured personnel weakened the school's claim of financial exigency and was not justified by the alleged need for a "modified curriculum." The court seemed convinced that the dismissal was a subterfuge, designed to abolish the tenure system rather than to alleviate an immediate financial crisis.

Even though they had tenure, plaintiffs in *Levitt v. Board of Trustees of Nebraska State Colleges* found their continued employment unprotected. The 1973 Nebraska state budget necessitated a reduction in the number of faculty members at Peru State College. At the direction of the governing board, the acting president of the college, in association with his academic deans, prepared a list of criteria on which faculty members could be evaluated and retained or released. Consideration was given to retaining those faculty members necessary to staff the "most necessary programs at the college." Hearings were provided before a faculty grievance committee and the governing board. A federal district court upheld the dismissal of tenured faculty members, finding that the process utilized was "fair and reasonable."

The Supreme Court of Wisconsin took substantially the same position in *Johnson v. Board of Regents of the University of Wisconsin System*, a case concerning faculty layoffs. There, the court stated that the release of tenured personnel would be upheld so long as a fair opportunity was provided to demonstrate that the true reasons were not constitutionally impermissible or wholly arbitrary and unreason-

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88. 322 A.2d at 854. The court selected a test "to effectuate the intent of the parties" and declared to be "materially comparable to that used for judicial review of cases involving the discharge of tenured teachers for cause": whether the action taken followed from the board's demonstrably bona fide belief, under honestly formulated standards, in the existence of a financial exigency and extraordinary attendant circumstances, and in the necessity for terminating tenured faculty members as a means of relieving the exigent condition. *Id.* at 855.

89. *Id.* at 856–57.


91. 376 F. Supp. at 949.

able. The court concluded, however, that there is no constitutional requirement that tenured faculty participate in all stages of the general decisionmaking process of reduction for fiscal reasons. The court upheld the dismissal of tenured faculty although under state law faculty employment was “permanent, during efficiency and good behavior” and could not be terminated involuntarily “except for cause.”

D. Vagueness of Dismissal Charges

Dismissal charges should be sufficiently specific to fulfill the dual requirements of enabling the professor to respond and providing a definite standard by which the professor’s conduct can be evaluated. Although statutory precision for standards governing faculty dismissal has not often been deemed necessary, a federal district court in Nevada did require greater specificity in charges for the dismissal of a tenured professor in Adamian v. University of Nevada. The plaintiff, a professor at the university, was discharged for violating a provision of the University Code which obligated faculty members “to be accurate, to exercise appropriate restraint, to show respect for the opinions of others and to make every effort to indicate that he [or she] is not a spokesman for this University.” The court held that this regulation was unconstitutionally vague and overbroad and therefore it infringed upon the rights of free speech and assembly. The range of constitutionally protected activities which could be infringed by the regulation was “unlimited”; utterances which were “inaccurate” could be the basis for termination.

Courts display varying degrees of tolerance for vague charges affecting academic personnel. To one court, a public school teacher’s dismissal for “immorality” was invalid because the term was not defined and “may be applied so broadly that every teacher in the state

93. Id. at 238.
94. Wis. Stat. Ann. §§ 37.31(1)(a), (b) (Supp. 1974). No provision is made for the reduction or layoff of faculty members for financial exigency.
97. The provision was taken from the 1940 Statement of Principles on Academic Freedom and Tenure of the AAUP. See note 41 supra.
98. 359 F. Supp. at 830.
could be subject to discipline . . . .”\textsuperscript{100} On the other hand, a federal district court held in \textit{Dougherty v. Walker}\textsuperscript{101} that the phrase “doubt as to future usefulness” was not vague and overbroad as applied to the facts. The court found, in a summary judgment action in connection with the midterm dismissal of a visiting professor, that there was ample evidence from which university officials could question “usefulness.” The teacher had addressed a letter of concern to the university chancellor, disseminated the letter to the press, conducted a hunger strike and publicly shaved his head, caused students to transfer from his classes and attempted to stop the institution’s marching band while it was participating in a parade sponsored by an organization which he considered racist. The relevant portion of the regulations provided that “the cause for removal shall be only such as to seriously interfere with a teacher’s usefulness to the University.”\textsuperscript{102}

A recent United States Supreme Court decision may weaken the applicability of the vagueness doctrine to dismissal charges. In \textit{Arnett v. Kennedy},\textsuperscript{103} a statute dealing with civil service employees provided for discharge “only for such cause as will promote the efficiency of the service.”\textsuperscript{104} A majority of the Court held that the standard was not unconstitutionally vague or overbroad. “Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but . . . to give . . . different federal employees performing widely disparate tasks a common standard of job protection . . . .”\textsuperscript{105} The standard was interpreted as excluding constitutionally protected speech.\textsuperscript{106}

\textbf{IV. PROCEDURAL PROTECTION FOR THE TENURED}

Assuming there are adequate grounds for removal of a tenured faculty member, what procedural safeguards must accompany the dismissal process? Basic to any tenure plan for academic personnel is the requirement that before dismissal or contract nonrenewal, procedural

\textsuperscript{100} \textit{Id.} at 255.
\textsuperscript{101} 349 F. Supp. 629, 646 (W.D. Mo. 1972).
\textsuperscript{102} \textit{Id.} at 646.
\textsuperscript{104} 5 U.S.C. \textsection 7501(a) (1970).
\textsuperscript{105} 416 U.S. at 159.
\textsuperscript{106} \textit{Id.} at 162.
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protection must be accorded. Varied protections are provided by statute or regulation, including in some instances the use of professional peers in the evaluation of charges,¹⁰⁷ but the fundamental core is for the teacher to receive notice of the reasons given for termination and an opportunity to respond to those reasons. Where an institutional tenure policy outlines particular procedural standards, they must be followed explicitly,¹⁰⁸ unless waived by the parties concerned.¹⁰⁹ Similarly, statutory prescriptions of due process requirements are mandatory.¹¹⁰

There are a number of collateral procedural benefits for tenured professors, one of which is that the burden of proving "cause" for dismissal is upon the institution.¹¹¹ As a consequence, the college or university must marshall its charges carefully and avoid unsupported allegations. The advantage to the faculty member is obvious. In contrast, where a nontenured person is contesting a refusal to renew a contract, he or she carries the burden of proof.¹¹² The distinction between tenured and nontenured faculty persons is also significant in that proceedings to dismiss a tenured faculty member must be initiated by the employing institution, whereas proceedings to avoid termination of a contract for one lacking tenure who has received notice that nonrenewal is contemplated must generally be initiated by the nontenured individual.¹¹³ In addition, in a tenure dismissal case, "[t]he degree of formality in the total procedure is somewhat heavier."¹¹⁴

¹⁰⁷. 1940 Statement on Academic Freedom and Tenure, in ACADEMIC FREEDOM AND TENURE 38 (L. Joughin ed. 1967). See also A. Van Alstyne, supra note 4, at 80–82.
¹⁰⁸. [I]f the governmental agency has established discharge regulations the agency must comply with those regulations as a matter of constitutional due process even if the agency could have discharged the employee summarily without a due process review. Mabey v. Reagan, 376 F. Supp. 216, 223 (N.D. Cal. 1974). See also Bowing v. Board of Trustees of Green River Community College Dist., 11 Wn. App. 33, 521 P.2d 220 (1974).
¹¹⁰. State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959).
¹¹². See, e.g., Fluker v. Alabama St. Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971). See also Frazier v. Curators of Univ. of Mo., 495 F.2d 1149, 1153 (8th Cir. 1974).
¹¹³. W. Van Alstyne, supra note 84, at 330.
¹¹⁴. Id.
A. The Roth and Sindermann Decisions

Apart from any institutional provision, a professor's entitlement to procedural due process is dependent upon whether his or her employment status involves a liberty or property interest under the fourteenth amendment to the United States Constitution. If the employment status can fairly be characterized as tenure, minimum procedural protections must be afforded to comply with due process.115 This issue was addressed by the United States Supreme Court in Board of Regents v. Roth116 and Perry v. Sindermann.117

In Roth, the Court held that failure to renew a nontenured professor's contract by itself did not deprive the professor of protected "liberty" or "property." With respect to a claimed invasion of "liberty," the Court stated that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he [or she] simply is not rehired in one job but remains as free as before to seek another."118 However, the Court stated in dictum that procedural protections would be required if a significant collateral injury of larger legal consequence resulted from the action of the educational employer, e.g., charges seriously damaging a professor's standing and associations in the education community119 or imposing a "stigma"120 which foreclosed other employment opportunities. In regard to the property-right issue, the Court concluded that, absent a state statute or university rule or policy establishing an interest or claim to reemployment, there arises no

115. "Thus, it is irrelevant whether the University's tenure regulations provided for a hearing . . . ; the fourteenth amendment gives him certain hearing rights simply because he had tenure per se." University of Alaska v. Chauvin, 521 P.2d 1234, 1238 (Alas. 1974).
117. 408 U.S. 593 (1972). These decisions have received widespread comment. See, e.g., Rosenblum, supra note 10, at 163-80; W. Van Alstyne, The Supreme Court Speaks to the Untenured, 58 A.A.U.P. Bull. 267 (1972); Note, 73 Colum. L. Rev. 882 (1973).
119. 408 U.S. at 573. In Wellner v. Minnesota State Junior College Bd., 487 F.2d 153 (8th Cir. 1973), the presence of racist charges against a teacher in his file was considered the principal cause of nonreappointment and a deprivation of liberty.
120. 408 U.S. at 573. Since Roth, some courts have suggested that a finding of professional incompetence would mandate a due process hearing. See, e.g., Whitney v. Board of Regents, 355 F. Supp. 321 (E.D. Wis. 1973). But see Blair v. Board of Regents of State University & College System of Tenn., 496 F.2d 322 (6th Cir. 1974); Jablon v. Trustees of the Cal. State Colleges, 482 F.2d 997 (9th Cir. 1973); Perkins v. Regents of Univ. of Cal., 353 F. Supp. 618 (C.D. Cal. 1973).
property interest sufficient to require the university authorities to provide a hearing prior to nonrenewal of a teacher's contract.121 Thus to have a property interest in a benefit, an individual "must have a legitimate claim of entitlement to it."122 A tenured professor, with an interest in continued employment, has such a property right, as does a nontenured faculty member dismissed before the end of an agreed period of employment.

In a companion case, Perry v. Sindermann, the Court recognized the possibility of de facto tenure as a status sufficient to support a claim for due process protection. Proof of a "property" interest in continued employment—notwithstanding the absence of a formal contractual tenure provision, and indeed, in the presence of a formal disclaimer of a tenure system—was alleged by Professor Sindermann on the basis of an "understanding" fostered by the college administration. The Court suggested that there may be an unwritten "common law" in a particular institution, based on conduct, usage and communication that is tantamount to tenure even in the absence of an explicit contractual reference. Proof of implied-in-fact tenure, but not a mere subjective expectancy, could be sufficient to establish a property interest, which in turn would trigger due process.123

Although Roth and Sindermann involved professors who did not have formal tenure, it is clear from these opinions that formal tenure is a property interest which entitles the tenured professor to procedural due process in removal proceedings.

B. Minimum Procedural Requirements

Once it is established that procedural due process is constitutionally mandated in a removal proceeding, the applicability of specific procedural protections must be examined. In Sindermann, the court stated:124

[P]roof of . . . a property interest . . . would obligate college officials to grant a hearing at [the teacher's] request, where he [or she] could be informed of the grounds for his [or her] nonretention and challenge their sufficiency.

121. 408 U.S. at 578.
122. id. at 577.
123. 408 U.S. at 603.
124. id.
Beyond these general rules, "the form of hearing required... by procedural due process may be determined by assessing and balancing the... particular interests" of the professor and the institution.\footnote{125}{Roth, 408 U.S. at 570. This balancing process has been described as a "judicial 'cost-benefit' analysis." W. Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 864.}

In some respects, the procedural protections of tenure are "analogous to fair hearing requirements... for the protection of various kinds of status in the public sector... to the statutory procedural protection of civil servants, and to the grievance procedure conventional in collective bargaining agreements."\footnote{126}{W. Van Alstyne, supra note 84, at 329.} Thus, one might look to cases in these areas to determine the content of a hearing pursuant to possible removal of a tenured professor.\footnote{127}{See, e.g., (in addition to Roth and Sindermann) Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (sequestration of property to prevent waste); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole); Fuentes v. Shevin, 407 U.S. 67 (1972) (repossession of consumer goods); Bell v. Burson, 402 U.S. 535 (1971) (revocation of a driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages).} In \textit{Goldberg v. Kelly},\footnote{128}{397 U.S. 254 (1970).} the Court concluded that due process in proceedings to deprive welfare benefits demands timely and adequate notice, detailed reasons for termination of benefits, an effective opportunity to defend by presenting oral arguments, the right of confrontation, the right of counsel, a statement of the decisionmaker's reasoning and of evidence relied upon, as well as an impartial panel or judge. The critical nature of the recipient's interests in continuation of benefits prompted the requirement of a more elaborate hearing process.

A recent case involving the dismissal of a federal civil service employee is also instructive with reference to procedural standards. In \textit{Arnett v. Kennedy},\footnote{129}{416 U.S. 134 (1974).} the Court held that the employee was protected against arbitrary discharge under existing statutes and that the additional safeguard of a requested pretermination trial-type hearing was therefore unnecessary. Relevant legislation permitted removal "only for such cause as will promote the efficiency of the service."\footnote{130}{5 U.S.C. § 7501(a) (1970), quoted, 416 U.S. at 140.} In the plurality opinion, Justice Rehnquist concluded that by conferring a right not to be discharged except for "cause" and concurrently conditioning the grant of that right by specific procedural limitations,
"[Congress] did not create an expectancy of job retention in those employees requiring procedural protection . . . beyond that afforded . . . by the statute and related agency regulations."\textsuperscript{131} A majority of the justices, however, concluded that the facts demonstrated a property interest requiring protection that could not be infringed upon except by way of a proceeding which met independent due process standards, and that the federal government does not have unlimited freedom to determine procedural safeguards to be accorded substantive property rights bestowed.

As to the adequacy of the procedures available to Mr. Arnett, the concurring and dissenting justices disagreed. Three would have required a pretermination evidentiary hearing;\textsuperscript{132} the others would not recognize such a requirement in the face of a system which provided for written notice, an opportunity to file a written answer, the right to appear personally before the deciding official and a written statement of reasons for the decision.\textsuperscript{133} At that stage of the proceedings, a full hearing with cross-examination of witnesses could be provided or be available later on appeal.

Although the cases discussed above are relevant, their factual settings are distinguishable from faculty-tenure cases. Fortunately, there is case authority which provides some insights into the minimum procedural requirements for proceedings affecting tenure. In \textit{Ferguson v. Thomas},\textsuperscript{134} the Court of Appeals for the Fifth Circuit listed the minimum procedural protections to be granted a teacher with an "expectancy of reemployment" who opposed his termination for cause:\textsuperscript{135}

\begin{enumerate}
\item he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist;
\item he be advised of the names and the nature of the testimony of witnesses against him;
\item at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense;
\item that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
\end{enumerate}

\textsuperscript{131} \textit{Id.} at 163. Justice Rehnquist was joined by the Chief Justice and Justice Stewart.

\textsuperscript{132} \textit{Id.} at 206 (Marshall, Douglas and Brennan, J.J., dissenting).

\textsuperscript{133} \textit{Id.} at 164, 171 (Powell, Blackmun, J.J., concurring in part & concurring in the result in part; White, J., concurring in part, dissenting in part).

\textsuperscript{134} 430 F.2d 852 (5th Cir. 1970).

\textsuperscript{135} \textit{Id.} at 856.
The court observed that the institutional hearing committee's failure to hear witnesses requested by the professor, to provide a transcript or written record and to make findings of fact "could deprive these proceedings of that necessary inherent fairness which due process demands." In *Chung v. Park*, dismissal proceedings for a tenured professor were characterized by a federal district judge in Pennsylvania as comporting with the "bare minima of 'due process'" when the faculty member received a lengthy hearing during which he was "fully able to cross-examine his accusers, subpoena witnesses, present evidence, and, in effect, demand a full accounting from the college as to whether the decision . . . to fire him was supported." In a case involving a nontenured faculty member, *Ortwein v. Mackey*, a federal district court concluded that "under the guidelines set forth by Goldberg, Sindermann and Roth, the active participation of counsel at some pretermination hearing is necessary to accord . . . due process of law." Thus, although the law does not appear to require that a hearing with every judicial trapping be offered the college professor threatened with employment termination, notice of charges, a hearing with representation by counsel and the opportunity to present and challenge evidence are basic to any dismissal procedure. Since the degree of due process protection afforded varies legitimately with the nature of the interest involved, strong arguments can be made that the procedural protection for tenured teaching personnel should be maximized in a setting where "reputation, professional stature and livelihood are at stake . . ."

V. CONCLUSION

For a faculty member at an institution of higher education, tenure remains a valuable asset, offering some assurance of stability and employment protection. Certainly, a tenure system which provides for peer evaluation in a disciplinary setting, for specific charges and for an opportunity to respond to those charges stands as a bulwark

136. *Id.* at 857–58.
138. *Id.* at 529.
140. *Id.* at 714–15.
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against unsupported termination of service. Under a formal program, carefully administered, the occasion for resort to the courts for resolution of employment decisions can be minimized.

The genuine disadvantages of an attempted legal solution to an academic controversy involving tenure simply cannot be ignored. Factors as varied as the public or private nature of the institution, interpretation of the statutory authority of the governing body, the ambiguity of tenure provisions, the adequacy of the procedural process employed and the nature of the faculty activity which spawned the disagreement have influenced judicial reception to tenure over the years. Because of the resulting uncertainties, it would be a "serious mistake to think of the legal dimensions of tenure as a series of specific codified rules or principles subject uniformly to enforcement in the courts." In addition, the practical difficulties associated with pursuing legal action present a formidable challenge to faculty members entertaining the thought of legal remedy. Unless "possessed of extraordinary fortitude," many choose not to pursue a legal claim after weighing the considerable problems of expense, delay and the possible effect upon future teaching opportunities.

A recent countertendency is present, however. For tenured faculty at public institutions, the law now recognizes a property interest demanding procedural protection against termination and new security for the exercise of protected activities. To this extent, at least, the legal value of tenure has been strengthened, and cases dealing with institutional decisions in faculty personnel matters are being taken to a judicial arena with increasing frequency.

How important is legally enforceable tenure? In their useful study of tenure in higher education, Byse and Joughin stated that "assurance of continuity of employment extended by an institution with a long and honorable tradition of academic freedom and tenure often will be much more meaningful than an express legal obligation grudgingly assumed by a lesser institution." They concluded, however, that the availability of judicial review of a dismissal might operate as a curb on the occasional "arbitrary" administrator or governing board or strengthen the hand of their "conscientious" counterparts "when

143. W. Van Alystyne, supra note 125, at 859.
144. BYSE & JOUGHIN, supra note 2, at 74-75.
inflamed public pressures unjustifiably seek the discharge of a teacher."\textsuperscript{145} Professor Victor Rosenblum agrees: "On the whole, courts may be more effective as a looming presence to prevent cases from arising than as an avenger to redress particular inequities."\textsuperscript{146} In view of the mixed record of judicial treatment of academic tenure, this assessment is an accurate one.

\textsuperscript{145} \textit{id.} at 75.
\textsuperscript{146} Rosenblum, \textit{supra} note 10, at 192.