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IN A RECENT EDITORIAL entitled "Threat to Campus Freedom," the *New York Times* stated: [1]

> The national mood of economic frustration and anti-intellectual reaction has begun to feed a growing movement against academic tenure. The arguments marshalled for abolishing professional job security are cloaked in high-minded rhetoric of academic reform. This is a transparent disguise of the economic and political anger which provides the true motivation.
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> It would be naive to pretend that the two-front threat to academic freedom today constitutes less of a clear and present danger [than the 'know-nothing onslaught in the 1950's']. That danger places a special burden on the academic leadership to tighten its own safeguards against abuses of tenure. But such reforms must be carried forward with a firm resolve not to surrender the essential protection of those freedoms without which the universities would soon become the pawn of powerful and unscrupulous forces.

Thus, we are now in a period during which present tenure systems are undergoing close scrutiny by the public and the legislatures. Some of those now criticizing universities would like to see these institutions of higher learning placed under greater accountability to the public. It is especially during this period that university boards and administrators must exercise extreme care to eliminate abuses of tenure and prevent any new abuses from occurring, in order to avoid unnecessary criticism from those who wish to embarrass the supporters of that academic freedom under which our universities have flourished.

To further complicate this controversy on the retention of academic tenure, a new movement has arisen in universities supported by public funds, for tenure rights to be granted to *non-tenured* faculty, thus nullifying the distinction between tenured and non-tenured personnel. By *tenure* we mean the right not to be dismissed except for cause. This trend for the obliteration of the distinction has recently received some support from the courts in this country. The proponents of this trend argue that upon his being given notification of non-reappointment, the non-tenured professor ought to be given reasons therefor and also a subsequent hearing upon request for a hearing on the reasons. The non-tenured professors are thus asking that they be treated differently from other professionals, skilled laborers, secretaries, custodial workers and others who also may have one year contracts with governmental agencies and whose contracts may be not renewed at the discretion of their employers. In this article, we will examine whether the due

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[1] New York Times, April 27, 1971, at 42, col. 2.

process provisions of the fourteenth amendment to the Constitution of the United States entitle a non-tenured professor, who has been appointed for a single academic year, to a statement of reasons justifying his non-reappointment *and a hearing thereon* where no substantive constitutional issue is involved.

Due Process and the Non-Tenured Professor

The source of the constitutional rights, substantive and procedural, of a professor to renewal of his contract, even where the principal contract contains no provisions for renewal, lies in the fourteenth amendment of the Constitution, which states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law. . . ." [2] It is now widely recognized in the courts that a teacher may not be dismissed or denied reappointment or rehiring for constitutionally impermissible reasons such as those based on prejudice against a race, religion, national origin or the assertion of rights guaranteed by law.[3] This applies to a teacher without tenure or an expectancy of reemployment.[4] In *Pickering v. Board of Education,*[5] the Supreme Court stated that:

> To the extent that the Illinois Supreme Court's 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.

In *Keyishian v. Board of Regents,*[6] the Supreme Court reviewed its decision in *Adler v. Board of Education*[7] which had stated that teachers "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." [8] In *Keyishian,* Justice Brennan writing for the court, stated that the constitutional doctrine which had emerged since *Adler,* had rejected its major premise that "public employment, including academic employment, may be conditioned upon the sur-

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[2] U. S. CONST. amend. XIV, § 1.

[3] *See* Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Ferguson v. Thomas, 403 F.2d 852 (5th Cir. 1970); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967); Bomar v. Keyes, 162 F.2d 136 (2nd Cir. 1947), *cert. denied,* 332 U.S. 825 (1947); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

[4] Ferguson v. Thomas, 403 F.2d 852, 857 (5th Cir. 1970).

[5] 391 U.S. 563, 568 (1968).

[6] 385 U.S. 589 (1967).

[7] 342 U.S. 485 (1952).

[8] *Id.* at 492.

render of constitutional rights which could not be abridged by direct government action." [9]

Despite these repeated assertions by the Supreme Court on the issue of a teacher's constitutional rights, apparently at least two federal courts of appeal and the Supreme Court of Illinois have dismissed cases where teachers claimed that their contracts had not been renewed because of their exercise of rights protected by the first amendment.[10] The Illinois *Fooden* case places the burden of proof on the complaining professor.

With few exceptions, it is now apparent that professors who believe they have been denied reappointment or contract renewal in violation of their substantive constitutional rights have a readily available remedy to demand, in the form of mandamus, the renewal of the contract, or to maintain an action for damages or other such actions as may be appropriate in the various states.[11] Despite these judicial remedies which guard against violation of a non-tenured professor's substantive constitutional rights, some professors are nevertheless intensifying their demand that a statement of reasons whether bottomed on substantive constitutional grounds or not, and a hearing thereon, be provided to *any* teacher denied reappointment. In the spring of 1971 The American Association of University Professors adopted the view (in general terms) that reasons for non-renewal ought to be given to a probationary teacher, and that he be entitled to demand and get a formal hearing thereafter if he allege some cause. The thrust for "reasons" is probably attributable to the general trend towards unionization of faculties. This movement for "reasons" recently received encouragement from a United States District Court decision in Wisconsin, now stayed pending appeal. *Roth v. Board*

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[9] 385 U.S. 589, 605 (1967).

[10] Parker v. Board of Education, 348 F.2d 464 (4th Cir. 1965). This case, which notably was decided prior to the recent decisions in Pickering v. Board of Education, 391 U.S. 563 (1968) and Keyishian v. Board of Regents, 385 U.S. 589 (1967), refused to consider allegations of "termination" based upon violation of constitutional rights on the ground that according to the contract involved, the Board had a right not to renew upon proper notification. In Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970), a teacher at Southern Colorado State College was not reappointed following the completion of his second year of service. It is unclear whether the court based its decision on a finding that the appellant failed to state sufficient facts alleging a denial of his first amendment right to free speech or whether the court decided that the board of trustees had non-reviewable discretion in not reappointing the appellant under COLORADO REV. STATS., §§ 124-17-1 and 124-5-1 (1963) and therefore Jones had no right which could be infringed. Two judges dissented, citing Supreme Court decisions and stating that upon an allegation of infringement of constitutional rights, a trial of the issues was in order. Fooden v. Board of Governors, 268 N.E.2d 15 (Ill. Sup. Ct., Jan. 25, 1971) cited *Jones, supra,* as authority in denying a similar action.

[11] *See* Freedman, *The Legal Rights of Untenured Teachers,* 1 NOLPE SCHOOL L. J. 93 (1970) for a summary of the cases and types of actions brought by non-tenured teachers under 28 U.S.C. § 1983. In Fallon v. Board of Higher Education, 14 Misc. 2d 9 (Sup. Ct. Queens County 1958), *aff'd* 192 N.Y.S.2d 239 (1959) the supreme court was confronted with a political science instructor who was not reappointed. In denying the instructor's application for reappointment, the court stated:

> The law is not merely a composition of cold type; it is a living organism which moulds itself to meet the needs of an ever changing civilization and if there were any claim in this case by Dr. Fallon that he was the victim of racial or religious discrimination, this court, if such a claim were substantiated, would not hesitate to find a remedy to meet the situation. Fallon, *supra* at 13.

of Regents,[12] involved an instructor who was not reappointed for a second year. Although the teacher alleged he was not reappointed for reasons involving his expression of criticisms of the university, the issue of whether he was not rehired in violation of his constitutional right to free speech was not involved in the court's decision. Judge Doyle issued a decision stating that irrespective of whether a teacher's employment is terminated during a contractual period, or he is not renewed for a subsequent period:

> I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, a notice of hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such hearing, the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.[13]

Thus, the *Roth* case mandated that a university provide a statement of reasons and a hearing thereon upon the non-reappointment of a non-tenured teacher, irrespective of whether those reasons are constitutionally impermissible. Under *Roth,* a non-tenured teacher is equally entitled to reasons and a hearing whether he was not rehired on account of race, exercise of free speech, incompetent teaching, insubordination or excessive absence.

The *Roth* decision failed to realize the impact of the Supreme Court decision in *Cafeteria and Restaurant Workers Union v. McElroy*[14] which specifically states that:

> The Court has consistently recognized that an interest closely analogous to . . . the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment in the absence of legislation can be revoked at the will of the appointing officer.

Judge Doyle, in the *Roth* decision, stated that:

> In the present case, I consider myself bound by *Cafeteria Workers v. McElroy* to undertake the balancing test described there: that is, to determine the precise nature of the government function involved as well as of the private interest that has been affected by government action.[15]

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[12] 310 F. Supp. 972 (W.D. Wisc. 1970); and see below, n. 31, as to the appeal in the 7th Circuit.

[13] *Id.* at 980.

[14] 367 U.S. 886, 896 (1961). In this case, a short order cook, working on a military installation was required to turn in her identification badge because she had failed to meet the security requirements of the installation. Without this badge, she could not continue in the employment of the concessionaire on the base. Thus, she was denied her right to be employed on the military base by government action.

[15] 310 F. Supp. 972, 977 (W.D. Wisc. 1970).

Judge Doyle believed that this balancing test was to be applied to each type of government employment to decide which positions were entitled to hearings and which were not. The Wisconsin Federal District Court then decided that the interests of a non-tenured member of the instructional staff of a university were greater than those of a short order cook on a military base (the interest involved in the *Cafeteria Workers* decision).

A careful reading, however, of *Cafeteria and Restaurant Workers Union v. McElroy*, reveals that the balancing test was applied in that case to the situation of *all* government employees and that the Supreme Court found that a hearing was not required. Thus, the Supreme Court stated:

> . . . the government function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, . . . [t]his case . . . involves the Federal Government's dispatch of its own internal affairs.[16]. . .

Admittedly, if a person is denied a license to teach, his personal interest in being entitled to a statement of reasons and a hearing would be greater than the government interest. The interest which we are discussing in this article, however, is solely that of teaching at *one* college and is certainly no greater than that of the average government employee. While a teacher may be questioned by a subsequent prospective employer as to the reasons for his leaving a previous position, an engineer, law enforcement officer, secretary, and even a custodial worker is likely to encounter the same inquiries. In *any* type of employment such inquiries may lead to the obtaining of a poor reference from a previous employer which may be a factor in denying an application for employment. A person denied reappointment from one college cannot, in good faith, assert that he is thereby banned from the profession. If a teacher does not continue in the employment of one college for an indefinite number of years, he is not necessarily undesirable.

Effect of Litigation on the Roth Standards

Although the issue involved here has been litigated numerous times in the past, with the result that courts invariably have decided that non-tenured teachers are *not* entitled to a statement of reasons and a hearing,[17] the past few years have seen a great increase of activity in

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[16] 367 U.S. 886, 896 (1961).

[17] There are numerous New York State decisions which have held that the public employer need not give reasons nor a hearing for not appointing or reappointing a teacher. *See* Block v. Tead, 179 Misc. 554 (Sup. Ct., N.Y. Co. 1943); Pinto v. Wynstra, 255 N.Y.S.2d 536 (1964); Butler v. Allen, 29 App. Div. 2d 799 (3rd Dept. 1968); Fallon v. Board of Higher Education, 14 Misc. 2d 9 (Sup. Ct., Queens Co. 1958), *aff'd* 192 N.Y.S.2d 239 (1959); Schaflander v. Brooklyn College, in 158 N.Y.L.J., July 12, 1967 (Sup. Ct., N.Y. County 1967). In the latter case, involving a sociology instructor, the court stated:

> When petitioner speaks of "notice and hearings," obviously he is confused with the rights of an appointee with tenure. Petitioner has no tenure, nor does he make any claims to tenure; hence the board is not required to give any reasons for its failure to reappoint him.

(Continued on next page)

the courts on this issue. While the *Roth* decision has received much publicity and serves to inspire faculty groups to continue their litigation on the issue, it has received little support in the courts.[18] Most decisions continue to completely deny any inherent right to demand reasons and a hearing thereon,[19] but two decisions have produced novel results.

The Fifth Circuit Court of Appeals, in *Sinderman v. Perry*,[20] ruled that under all circumstances, except one, a non-tenured teacher would not be entitled to a hearing upon non-reappointment. The exception contemplated by the court is that when a teacher believes non-renewal of his contract is based either on his exercise of constitutionally guaranteed rights or constitutes some other actionable wrong. In this situation he should so inform the institution with reasonable promptness and in sufficient detail to better enable the college to expose any errors which may exist in the claim. In such a case, the institution would then constitute a tribunal which possessed the qualities of academic expertise and impartiality to the charges to conduct a hearing. In justifying this policy, the court stated that: "[s]chool-constituted review bodies are the most appropriate forums for initially determining issues of this type,

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There are also numerous decisions by the New York State Commissioner of Education on this issue. In Lorch v. Board of Higher Education, 71 N.Y. State Dept. Rep. 152, 153 (1950), the Commissioner stated:

> No reasons were given for the failure of respondent Board of Higher Education to reappoint him, nor does the law require that such reasons be given. No provision requiring such action appears in the Education Law. There is no requirement of such law, furthermore; which imposes a duty to reappoint, nor is it necessary that a failure to reappoint must be based on charges, hearings, or any other specified procedure.

See also Swadesh v. Board of Higher Education, 71 N.Y. State Dept. Rep. 154 (1950); Matter of James, 10 Ed. Dept. Rep. ---, N.Y. Comm. Decision No. 8195 (1970). A recent Massachusetts decision, DeCanio v. School Committee of Boston, 260 N.E.2d 676, 680 (Mass. Sup. Jud. Ct. 1971) stated: "Most of the cases in which the question has been considered have concluded, that in the absence of a statute to the contrary, a probationary teacher may be dismissed without a hearing." A long list of cases is thereafter cited.

[18] Gouge v. Joint School District No. 1, 310 F. Supp. 984 (W.D. Wisc. 1970) was also decided by Judge Doyle. Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio, 1970) involving a high school teacher not reappointed for a second year, adopted the conclusion of the *Roth* case. In Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), a public school teacher was dismissed during his contract term on account of wearing a beard. The case, decided on a constitutional, rather than a contractual basis, stated that the teacher's right to wear a beard in combination with his professional reputation entitled him to a statement of reasons and a due process hearing prior to being dismissed. The scope of the decision was not made clear and the teacher's right to a hearing may have been primarily based on a constitutional right to wear a beard as a means of expression.

[19] *See* Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, March 23, 1970; Fooden v. Board of Governors, 268 N.E.2d 15 (Ill. Sup. Ct. Jan. 25, 1971); see note 10, *supra*, for a discussion of these two cases. Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969), a decision concurred in by Justice Blackmun involved the non-reappointment of six black public school teachers in Arkansas. Sinderman v. Perry, 430 F.2d 939 (5th Cir. 1969) will be discussed later in the text. Thaw v. Board of Public Instruction, 432 F.2d 98 (1970) involved a public school teacher who alleged no violation of his constitutional rights as to the cause of his termination. DeCanio v. School Comm. of Boston, 260 N.E.2d 676 (Mass. Sup. Jud. Ct., 1970) involved the dismissal of six public school teachers in Boston. The decision stated: "We are unsure of the precise constitutional basis for the holding of the District Court in the *Lucia* case. Nor are we persuaded by the reasoning of the court in the *Roth* and *Gouge* cases." 260 N.E.2d 676, 681.

[20] 430 F.2d 939 (5th Cir. 1970).

both for the convenience of the parties and in order to bring academic expertise to bear. . .".[21]

In the *Sinderman* case, the court was well intentioned in attempting to resolve a troublesome problem, but the issue should have been left to the legislature. The legislature had determined that the courts should be the first mandatory review panel for the hearing of claims of denial of substantive constitutional rights. If the legislature wishes an academic board to be the initial tribunal, it has the statutory power to enact appropriate laws to that effect. The legislature might consider the court's justifications for such a tribunal to be nullified by other policy considerations. The court noted that an academic panel would be convenient for the parties, but such a panel may also encourage frivolous and numerous claims. Every teacher who feels he has been slighted may decide to allege that his constitutional rights have been violated when all he has to do to start the process is to submit a letter making a bare allegation. Whether an academic panel or a court is better equipped to hear a teacher's claim of persecution is a question of judgment, and a legislature may well decide that a court is more expert in determining if constitutional freedoms have been violated. It is questionable whether it is beneficial for a court to decide constitutional questions on review from an academic panel. The substantial evidence doctrine may well prevent the court in a review situation from dispensing justice in an area which merits the full participation of men fully trained in law. Whether such an academic panel will decrease the number of cases which end up in the courts is doubtful since usually only one fully convinced of his rights will bring an action. Such a person is unlikely to be deterred by the decision of an academic panel especially since unions, the presence of which are being increasingly felt amongst faculties, encourage litigation to the final step. The aggrieved person is unlikely to be convinced of the impartiality of an academic panel which in some manner owes its jurisdiction to the college administrators who appoint them.

In addition to the *Sinderman* case, we must discuss the decision of the First Circuit Court of Appeals in *Drown v. Portsmouth School District.*[22] In the *Drown* case, the court recognized the cases we have already discussed here and decided that in determining what procedures are required where a non-tenured teacher is not reappointed, one must balance the competing interests of the individual teacher and of the school board. Although this is the same line of reasoning the *Roth* case used, a line which we have previously indicated may not be correct if *Cafeteria and Restaurant Workers Union v. McElroy*[23] is followed, the *Drown* court reached a result different from *Roth.* The First Circuit Court of Appeals decided that while due process requires a statement of reasons, a hearing thereafter is not required.

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[21] *Id.* at 944.

[22] 435 F.2d 1182 (1st Cir. 1970).

[23] 367 U.S. 886 (1961).

Policy Considerations

In the remainder of this article, we will discuss the policy arguments on both sides of the issue of whether "reasons" need be given for the non-renewal of a contract of a non-tenured professor. If the balancing test is eventually adopted as the rule to be applied with respect to this issue, it is our belief that the integrity of the academic institution and the faculty in maintaining a policy of not giving "reasons" and a hearing are much greater than those of the non-tenured individual teacher in obtaining the "reasons."

A statement adopted by the Board of Higher Education of the City of New York in December of 1967 explains its policy for not giving reasons or a hearing to the non-reappointed non-tenured teacher or even the non-appointed applicant.[24] The reasons given by the Board for not

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[24] "No Presumptions. At every step in the appointment and reappointment procedure, it should be made clear to the candidate and to all concerned that, until the candidate gains tenure under the provisions of the statute and the bylaws of the Board, each appointment is for one year, there is no presumption of reappointment, and no reasons for non-reappointment need be given. This fact should be communicated, in academic rather than in legalistic language, in the original and subsequent letters of appointment or reappointment, and in all conversations held with the candidate, both by department members and chairmen, and by officers of the college outside the department. The temptation to attract promising candidates to the college by implications of the virtual certainty of a permanent position must be sternly resisted, unless and until the tenure law is revised to provide, as many universities do, for permissive initial tenure appointments at certain ranks. . . .

The recommendation that no reasons should ever be given for the action of a committee in voting not to recommend appointment or promotion of a candidate is a recommendation which was arrived at after a rather careful consideration of the pros and cons.

On the side of giving reasons, the most potent argument arises from a sense of fair play: if a person has tried his best to make good in a position, it seems in accord with our American traditions that he should be told wherein he failed and be given an opportunity to rebut, explain or otherwise appeal. Furthermore, the need to support a non-reappointment by the citation of definite reasons might be conceived of as a barrier to the forces of malice and prejudice, whether personal or ethnic.

On the other side, the necessity to give reasons for non-reappointment, with the consequent receipt of rebuttals, explanations and submission of contrary expert opinion, places the college and its P & B [personnel & budget] committees in the position of defendant rather than of judge. College officials would soon find their time, energies and talents dissipated in disputes. Academic excellence could not thrive in that atmosphere and a premium would be placed on peaceful mediocrity. Often the reasons have nothing to do with the candidate himself (he may indeed be satisfactory), but rather with the possibility that better candidates, with wider backgrounds, more versatility, or specialties which are more likely to be of use to the department in the years to come, may be available, and the department does not desire to foreclose the opportunity to attract such candidates. More importantly, any requirement that reasons be given for non-appointment would have the effect of instituting a type of presumptive tenure inimical to the conduct of the colleges as institutions of higher learning. It is sufficient that reasons or cause must be proven to terminate the services of a tenured person. If it is not too paternalistic in tone, still another argument against the giving of reasons for non-reappointment may be urged: it is really not in the best interest of the candidate himself, for it makes a matter of record a negative evaluation which may come back to plague him later.

On balance, we have decided to recommend *against* ever assigning reasons for non-reappointment or non-promotion. We likewise believe that it would be professional misconduct for a member of a P & B committee to disclose the substance or even the nature of the discussion at the P & B meeting. As far as the actions of a Department and/or its committees in respect to a candidate are concerned, only the president of the college or his designee should be empowered to discuss these actions with a candidate."—Board of Higher Education Minutes, December 18, 1967, Cal. No. 3(b) pp. 599-601. It must be realized that if the *Roth* case is affirmed and gains widespread recognition in other courts, its policy will probably be extended to the disappointed applicant.

granting a statement of reasons and a hearing were: (1) The assigning of reasons with the subsequent receipt of rebuttals and opposing opinions would place the college official in the position of defendant rather than judge with the result that mediocrity would be accepted; (2) the amount of time which would have to be expended on this process would prevent officials from taking care of other responsibilities (the number of applicants and nominees for reappointment is enormous); (3) the reason for rejection is often that the college wishes to keep open the opportunity to obtain a person more suited to the job, or in the case of reappointment leading to tenure, of not foreclosing for a substantial period of time the possibility of employing a person of much greater value to the college or of changing the nature of the college's offerings; (4) assigning reasons would have the effect of "presumptive tenure," something not conducive to the operation of a university and (5) it is in the interest of most applicants not to have a negative evaluation on record.

The *Sinderman* case summed up the first four arguments above by stating that a policy of giving rseaons and a hearing "would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any reemployment obligation." [25] A result of having to give reasons and a hearing would be that college officials would become increasingly reluctant not to reappoint someone for fear of becoming involved in time-consuming and arduous procedures in defense of their positions, eventually reducing colleges to the level of mediocrity.[26] If the *Roth* position were adopted "we would have little need of tenure or merit laws as there could be only . . . a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason." [27] In sum, the procedure outlined in the *Roth* case would "nullify" the probationary system[28] and the practice of one year contracts. It would give all teachers "tenure" immediately upon initial appointment.

In deciding that a non-tenured teacher was entitled to a statement of reasons and a hearing upon non-reappointment, the *Roth* court[29] was influenced by the unfairness apparent in a procedure which allows a

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[25] Sinderman v. Perry, 430 F.2d 939, 944 (5th Cir. 1970).

[26] This result is already occurring in the New York City public school system where these rights have been gained by the teacher's union which has gone out on long strikes a number of times and threatened others, to be granted its demands.

[27] Freeman v. Gould Special School District, 405 F.2d 1153, 1160 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969).

[28] Thaw v. Board of Public Instruction, 432 F.2d 98 (1970). The President of the New Jersey Association of School Attorneys, in discussing the judicial, legislative and contractual faculty demands for a statement of reasons and a hearing for non-reappointed, non-tenured teachers has stated:

> The request for "fair play," while intended to tug at the heart strings, may in reality be a plea for immediate tenure. Anyone who has ever tried to get rid of a tenure employee knows what headaches are involved. I see no point in inviting Excedrin Headache No. 251.

Evers, *The Legal Rights of the Non-Tenured Teachers*, 1 NOLPE SCHOOL L. J. 103, 108 (1970). Indeed, if the *Roth* procedures are mandatory, the average administration will avoid the headaches of not reappointing a faculty member unless there are extreme circumstances.

[29] 310 F. Supp. 972 (W.D. Wisc. 1970).

teacher to be dismissed for no reason at all or for reasons which may be unsubstantiated. The court was convinced that once a teacher is not rehired, he will have an arduous burden obtaining another job. The *Drown* court mistakenly stated that the requirement of only giving a statement of reasons would not impose any significant administrative burden on the college.[30] The *Drown* procedure would ultimately necessitate the establishment of a complete quasi-judicial system within a university.

University Administrative Discretion

The non-reappointment of a teacher, admittedly, will necessitate the same personal readjustments which an engineer, fireman, secretary, or unskilled laborer would encounter in a similar situation. The risk of not being hired or reappointed is one which is taken by every prospective employee. The university, however, must be given at least the same administrative discretion as any other body. If excellence is to be the standard by which universities are to be judged, then they should be given more discretion than is given to bodies governed by a lesser standard. University administrators are chosen on the basis of their expertise and the trust that, in the long run, their decision-making will produce an excellent institution. Imposing upon them the burden of issuing a statement of reasons will inhibit their discretion. Department chairmen and appointment committees will retreat from recommending a non-reappointment when they are told to issue a statement of reasons, and university boards and administrators will be helpless in the face of human nature, which dictates that human beings take the line of least resistance. Issuing a statement of reasons by itself has the appearance of being very simple, but it will carry with it the onus of defending that position before peers, hearing panels, arbitrators, commissions on human rights, the Department of Health, Education and Welfare, and courts simultaneously and/or serially.

The disappointed teacher has the option of seeking employment in a new university with the freedom to explain his departure from his former employment in the best manner. If a statement of reasons is issued, subsequent employers will demand to see the same. If a statement is issued, it will likely contain matters which will appear as factual statements although they are really personal judgments. A termination resulting from a personality conflict which accounts for a poor working relationship may contain allegations of teaching faults which result primarily from the personality clash. A relatively blank record would, on the other hand, be beneficial to the great majority of teachers seeking new employment.

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[30] Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970).

Conclusion

It has been our belief throughout this article that the resolution of these conflicting interests is *not* in the domain of the courts. Traditionally, it has been the duty of the legislatures, governing boards, and colleges, with extensive experience in dealing with the appointment process and observing its results, to make changes in the tenure system.[31] The state legislatures and universities have adopted varying tenure systems throughout the country, which they believe best suit their needs. In general, these systems have proved workable and have produced many outstanding public universities. Suggestions for improvement in such systems should be properly addressed to and considered by these bodies. If, in their judgment, too many injustices have resulted from not giving a statement of reasons and a hearing thereon to non-reappointed teachers, they may then find ways to improve the system. Where substantial constitutional rights have been impinged in the appointment process, the courts must be and have in the past been, prepared to protect these rights while preserving the ultimate authority of the university to choose its faculty.

Traditionally, universities have maintained an extensive degree of autonomy to regulate themselves and preserve academic freedom. If the values of higher education are to be preserved, the legislatures and courts must allow universities to discover and maintain their own machinery governing appointments, and the universities must abstain from conduct which may invoke the anger of legislators and bring the vise of outside control upon them. This awesome task of maintaining an atmosphere of autonomy will be greatly increased if universities are compelled by the courts to adopt regulations governing non-tenured faculty likely to insure their reappointment, ultimately resulting in the dilution of the university's power to govern itself. To date, universities and legislatures have been able to work out systems of tenure which have proved acceptable to both. In considering the balance of interests governing procedures for the reappointment of non-tenured faculty, they have chosen to maintain university administrative discretion. The combination of a period of one-year appointments at pleasure followed by tenure with removal thereafter only for cause has proved to be defensible against objections and oppressive measures. While the current system should frequently be examined for reforms, this should be left to the university which must maintain a watchful eye for legislative action prompted by the public ire against inefficiencies and inequities within the system.

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[31] *See* brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, the American Council on Education and the Association of American Colleges as *amici curiae* on the appeal of Roth v. Board of Regents, *appeal docketed*, No. 18490, 7th Cir.; see above, n. 12.