

# **The Fourteenth Amendment, Fundamental Fairness, the Probationary Instructor, and the University of California —An Incompatible Foursome?**

## **I. INTRODUCTION**

Traditionally only those faculty members at the University of California with tenure were entitled to a dismissal based on “cause” and appropriate procedures for challenging the institution’s decision.<sup>1</sup> The teacher who had not yet completed his probationary period was without a forum for his grievance if his employment contract was not renewed. He could go to court, but that was futile until recently.

Several recent assaults on the lot of the probationary teacher have met with success and, coupled with an evertightening job market for Ph.D.’s, have prompted an increasing number of suits demanding a defensible reason for the institution’s action and various procedures by which to challenge the vast discretion exercised by the government employer.

This article will trace the course of the recent developments and will attempt to point out the policy arguments underlying the constitutional battles. The courts have not handled this matter with any degree of consistency; but hope for resolution is bright, as the United States Supreme Court has heard oral

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<sup>1</sup>See preceding article at 593-94.

arguments on two of the most important cases in the area.<sup>2</sup>

The article commences with a look at the traditional civil service system and the rationale for its existence in order to get some insights into a subtle refinement of civil service: the tenure system at schools and colleges. It then moves on to explore academic tenure and the relative rights of tenured and non-tenured instructors re dismissal. The next step traces the erosion of the system in which only tenured professors may be dismissed for "cause" by examining the "guaranteed freedoms" cases and then the "fundamental fairness" cases. Next the various procedural protections proposed to safeguard the non-tenured teacher are scrutinized for their need and their effectiveness. The article concludes with a look at what the future may and should hold for probationary instructors at the University of California.

## II. THE CIVIL SERVICE

In order to fully understand the reasons for the probationary and tenure employment schemes in educational institutions, one must know something about civil service in general. Government employment at the local, state and federal levels is regulated by various civil service arrangements; and the teacher's situation is only a nuance of the general plan.

### A. RATIONALE

Civil service schemes invariably commence with a tribute to themselves and their lofty ideals.<sup>3</sup> Normally entitled "Merit Systems,"<sup>4</sup> they generally state that they were enacted for two primary purposes: to insure that government jobs would not be doled out as political prizes but rather would be filled on the

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<sup>2</sup>*Sindermann v. Perry*, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 403 U.S. 917 (1971), argued 40 U.S.L.W. 3348 (1/18/72); *Roth v. Board of Regents of State Colleges*, 446 F.2d 806 (7th Cir. 1971), *cert. granted*, 404 U.S. 909 (1971), argued 40 U.S.L.W. 3348 (1/18/72); discussed in Note, *Teachers' Rights*, 40 *FORDH. L. REV.* 342 (1971) and Comment, *Constitutional Problems in the Nonretention of Probationary Teachers*, 1971 *ILL. L. FOR.* 508.

<sup>3</sup>71 *PA. STAT. ANN.* § 741.2 (1962); *ORE. REV. STAT.* § 240.010 (1971 Replacement Part).

<sup>4</sup>7A *UTAH CODE ANN.* § 67-13 *et. seq.* (1953); *ANN. MO. STAT.* § 36.010 (1969).

basis of merit,<sup>5</sup> and to attempt to make government employment competitive with the private sector in order to attract the high caliber people otherwise alienated by government salaries.<sup>6</sup> The government is an ongoing body destined to outlive any temporary occupants; and the framers of the federal and the state schemes planned on having a core of workers who would have a permanent job once they had shown their ability to handle the work during a probationary period, except in the face of good reasons for dismissal. Thus the daily services that must be provided by government would theoretically be provided by fit and efficient workers no matter which political party was in power.<sup>7</sup>

## B. MECHANICS OF THE SYSTEM

### 1. GENERALLY

The foundation of the civil service system is the probationary period which culminates in a permanent appointment. The probationary period normally lasts six months to a year<sup>8</sup> and is designed to allow the employer an opportunity to see the prospective employee in action before making the binding decision of whether or not to grant job security. After the initial hiring, normally accomplished by written and oral examinations,<sup>9</sup> the probationary employee assumes the duties of the job for which he was hired and then hopes that when evaluation time comes around, he will be recommended for permanent status. If he is not recommended, he will normally be given a terse statement of reasons and an opportunity to refute them before a depart-

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<sup>5</sup>KAN. STAT. ANN. § 75-2925 (1969); COLO. REV. STAT. § 26-5-1 (1963). See *Gogerty v. Department of Institutions*, 71 Wash. 2d 1, 426 P.2d 476 (1967); *Caldaro v. Ferber*, 39 N.J. 314, 188 A.2d 576 (1963); *Coopersmith v. City and County of Denver*, 156 Colo. 469, 399 P.2d 943 (1965).

<sup>6</sup>KAN. STAT. ANN. § 75-2925 (1969); CONN. GEN. STAT. ANN. § 5-194 (1967).

<sup>7</sup>*Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955); *Metropolitan Government of Nashville and Davidson County v. Poe*, 215 Tenn. 53, 383 S.W.2d 265 (1964); *Dufault v. Hebert*, 99 R.I. 181, 206 A.2d 456 (1965).

<sup>8</sup>ME. REV. STAT. ANN. Title 5, § 676 (1964) (6 months or more); 7A UTAH CODE ANN. § 67-13-6(11)(b)(3) (1953) (one year).

<sup>9</sup>ANN. MO. STAT. § 36.170 (1969); OHIO REV. CODE Title 1, § 143.16 (1970 Supp.); ME. REV. STAT. ANN. Title 5, § 673 (1964).

ment head or panel.<sup>10</sup> This is most often a futile exercise, however, as the employer is not bound by any concrete standards and exercises tremendous discretion at the culmination of the probationary period.

Once permanent status is attained however, the employee is almost insured of a job for life so long as he maintains good behavior. He can be dismissed only for "cause," with the government employer carrying the burden of proof.<sup>11</sup> "Cause" is a slippery concept, each statute giving several examples and then concluding with a general statement aimed at covering anything else the legislature failed to include. The normally enumerated reasons are incompetency, cruelty, inefficiency, insubordination, negligence, moral misconduct, and along another vein, layoffs for budgetary considerations such as program cut-backs.<sup>12</sup>

The permanent civil service employee is also provided with broad procedural safeguards. He is entitled to written reasons for his dismissal, often a pretermination conference with his superiors, and almost always an administrative hearing at which the employer must prove that the charges are accurate. A typical schema is Utah's, which grants the discharged permanent civil servant notice of the reasons in writing, a right to apply to the department head for reconsideration of his actions, a hearing before the department head, and finally a hearing before the state merit system council.<sup>13</sup>

Thus the contrast: the permanent employee is cloaked with procedural protections, while the probationary employee is entitled to little more than illusory safeguards. While no one would now assert that a probationer could overtly be denied permanent status due to his union activity, membership in a splinter political party or his ethnic background, the probationary period remains a short try-out term; and in order for it to remain productive, the government still exercises tremendous discretion.<sup>14</sup>

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<sup>10</sup>ANN. MO. STAT. § 36.250 (1969); ORE. REV. STAT. § 240.410(2) (1971 Replacement Part).

<sup>11</sup>71 PA. STAT. ANN. § 741.807 (1971 Supp.); ARK. STAT. ANN § 19-1305 (1968 Replacement); ANN. CODE MD. Art. 64A, § 33 (1972).

<sup>12</sup>CONN. GEN. STAT. ANN § 10-151(b) (1967) (for teachers).

<sup>13</sup>7A UTAH CODE ANN. 67-13-14 (1953).

<sup>14</sup>But see ME. REV. STAT. Title 5 § 751-53 (1972 Supp.) for its scheme which establishes an arbitral state employees appeals board.

## 2. CALIFORNIA

The California schema is similar to that of most other states and the federal government. The system is enshrined in the state Constitution as an attempt to promote "...merit, efficiency and fitness."<sup>15</sup> The Government Code contains a lengthy legislative enactment of the high ideals set out in the Constitution.<sup>16</sup> The length of the probationary period is determined by the State Personnel Board but is normally six months and never longer than a year.<sup>17</sup> The probationary employee may be rejected at any time during the period but must be served with written notice of the reasons for rejection.<sup>18</sup> Although the reasons available to the employer are vague enough to include virtually anything, the probationer may not be dismissed due to his race, sex, marital status, blindness, religious creed or political affiliation.<sup>19</sup> The enumerated reasons must relate to "...the probationer's qualifications, the good of the service, or [the] failure to demonstrate merit, efficiency, fitness, and moral responsibility."<sup>20</sup> The probationer may request the state board to investigate the matter; and the board is given the discretion to hold a hearing. At the hearing and during the investigation the burden of proof is on the probationary employee to show that the reasons are impermissible (under the United States or California Constitutions or under GOV'T. CODE § 19702) or that they have no basis in fact, or that they were created in bad faith.<sup>21</sup> If the board agrees with the probationer, it may restore his name to the employment list for reassignment to another position; or if it is determined that the dismissal sprung from fraud or bad faith, the board may reinstate him in the position from which he was rejected.<sup>22</sup>

Thus California's civil servants fare better than their brethren in most other states, as they at least have some narrow

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<sup>15</sup>CAL. CONST. ART. XXIV, § 1.

<sup>16</sup>CAL. GOV'T. CODE § § 18500-19765 (West 1963).

<sup>17</sup>CAL. GOV'T. CODE § 19170 (West Supp. 1971). The Board may also extend the period under special circumstances.

<sup>18</sup>CAL. GOV'T. CODE § 19173 (West 1963).

<sup>19</sup>CAL. GOV'T. CODE § 19702 (West Supp. 1971).

<sup>20</sup>CAL. GOV'T. CODE § 19173 (West 1963).

<sup>21</sup>CAL. GOV'T. CODE § 19175 (West 1963).

<sup>22</sup>CAL. GOV'T. CODE § 19175(b)(c) (West 1963).

standards to protect them from arbitrary or whimsical dismissal and also a procedure by which to challenge that dismissal. Once the probationary period has successfully been traversed and the employee is granted "permanent status,"<sup>23</sup> he is assured of a job during good conduct; and the people of the state are presumably insured of having a professional, competent, ongoing civil service free from political considerations at every level below the appointive offices.<sup>24</sup>

### III. GOVERNMENT EMPLOYMENT AND THE UNIVERSITY PROFESSOR

The instructor at a state college or university is just as much a civil servant as the employee who mails out drivers licenses or types appellate briefs for the Attorney General. Yet professors have traditionally been treated differently than other government employees. Public school teachers, too, have received special statutory treatment.<sup>25</sup> The disparate handling of teachers is due to a belief that academia has problems and concerns apart from those of the regular civil service. The following will analyze the rationale for this treatment and will inspect the mechanics of the academic civil service system, focusing on tenure arrangements and the probationary period and its trappings.

#### A. ACADEMIC FREEDOM—THE IVORY FOXHOLE

...The function of the University is to confront power with conscience while ensuring its thousand-year commitment to the preservation, transmission and creation of knowledge. The intellectual does not now, if indeed he ever did, live in an ivory

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<sup>23</sup>CAL. GOV'T. CODE § 18528 (West 1963); Pennsylvania terms him a "regular employee", 71 PA. STAT. ANN § 741.3(k) (1971 Supp.).

<sup>24</sup>Critics claim that although the system grants job security to all who can handle the position, it fosters and shelters mediocrity.

<sup>25</sup>CAL. EDUC. CODE § 13101 *et. seq.* (West 1969). The complex statutory schema results in problems apart from those of the university professor. See Coan, *Dismissal of California Probationary Teachers*, 15 HAST. L.J. 284 (1963); FLA. STAT. ANN. § 231 *et. seq.* (1961); See Developments in the Law—*Academic Freedom*, 81 HARV. L. REV. 1045, 1084-1104 (1968), and Pettigrew, *Constitutional Tenure: Toward a Realization of Academic Freedom*, 22 CASE W. RES. L. REV. 475, 477-83 (1971)(hereinafter cited as Pettigrew).

tower. Rather he lives and works and learns in an ivory fox-hole.<sup>26</sup>

The traditional rationale for a protective tenure system for teachers, in both colleges and public schools, is that their job entails communicating thought; and in order to enable them to communicate what their conscience and scholarship compels, they must be protected against reprisals from a disagreeing superior. Courts are quick to protect the right of a teacher to speak his mind and often pay homage to the idea of academic freedom, stressing that it is society which benefits from students who "...deal discriminatingly with ideas and develop habits of openminded, critical thought."<sup>27</sup> This is a value which transcends the immediate benefit of job security for the teacher.<sup>28</sup>

The difference between the university professor and the typist is that the professor often must research and then speak out on a controversial topic. The classical definition of a college professor is a person "who thinks otherwise."<sup>29</sup> Thus, in 1915, the American Association of University Professors (A.A.U.P.) appointed a Committee on Academic Freedom and Tenure to create a policy by which continued employment would not be contingent upon the right of a professor to speak his mind.<sup>30</sup> The courts concur, stressing that the exchange of ideas is vital to the learning process. Fearing the chilling effect the lack of job security would have on the instructor, they argue that "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher."<sup>31</sup>

<sup>26</sup>A. L. SACHAR, ON FIGHTING DOGMAS WITH STIGMAS 22 (1966).

<sup>27</sup>CALIFORNIA SCHOOL BOARDS ASSOCIATION, ACADEMIC FREEDOM 15 (W.N. Potter ed. 1968). See Note, *Academic Tenure: The Search for Standards*, 39 S. CAL. L. REV. 593, 595 (1966).

<sup>28</sup>"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>29</sup>J. L. MORRILL, THE ONGOING STATE UNIVERSITY 54 (1960).

<sup>30</sup>F. C. ROSECRANCE, THE AMERICAN COLLEGE AND ITS TEACHERS 76-80 (1962).

<sup>31</sup>*Adler v. Board of Education of the City of New York*, 342 U.S. 485, 508 (1952) (Mr. Justice Douglas, dissenting); For an overview of the area see A.C.L.U., ACADEMIC FREEDOM, ACADEMIC RESPONSIBILITY, AND ACADEMIC DUE PROCESS IN INSTITUTIONS OF HIGHER LEARNING (September, 1966) (hereinafter cited as A.C.L.U.); Comment, *Teachers and the First Amendment*, 7 WILLIAMETTE L.J. 435 (1971); G. STEWART, THE YEAR OF THE OATH, THE FIGHT FOR ACADEMIC FREEDOM AT THE UNIVERSITY OF CALIFORNIA (1950).

## B. TENURE ARRANGEMENTS

Like the civil service statutes, state teacher employment plans vary in scope and effectiveness. While most treat college professors and public school teachers separately, the courts usually blur the two when discussing the rights of tenured and non-tenured plaintiffs.<sup>32</sup> Thus, although the scope of this article is limited to the present and emerging rights of public college and university instructors,<sup>33</sup> many of the precedents cited will be those involving public school teachers.<sup>34</sup>

### 1. NO POSSIBILITY OF TENURE

Some states do not permit their public university professors to ever attain tenure status. Employment is handled by annual contracts, with the teacher having no guaranty that he will receive a contract for the next year. The absence of a tenure plan works against an institution, despite granting it ease in shuffling its faculty. Many potential job candidates will not risk the annual evaluation; and thus many good teachers will go to institutions which offer job security, leaving those not offering

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<sup>32</sup>While Judge Doyle treated university professors (*Roth v. Board of Regents*, 310 F. Supp. 972 [W.D. Wisc. 1970]) and public school teachers (*Gouge v. Joint School District*, 310 F. Supp. 984 [W.D. Wisc. 1970]) in separate cases, it may be a distinction without a difference. The cases typically do not differentiate between the two levels. See *Roumani v. Leestamper*, 330 F. Supp. 1248 (D. Mass. 1971) citing as authority cases of high school teachers and college teachers.

<sup>33</sup>It should be stressed that the federal cause of action relates only to state and other government-run institutions. However private colleges, in which tenure is contractual, might be embraced by a federal court which uses the federal grants and loans almost all private schools receive as a basis for jurisdiction. The A.A.U.P. and the National Education Association might also be able to exert pressure through members at private institutions. *But see Brownley v. Gettysburg College*, 338 F. Supp. 725 (M. D. Pa. 1972). See generally O'Neill, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970).

<sup>34</sup>While both levels involve "teaching," the similarity often ends there. The college instructor deals with adults (in the eyes of the law) and the school teacher works with minors. The college instructor is faced with greater extracurricular burdens such as publishing and civic work. The college instructor deals with adults (in the eyes of the law) and the school teacher works with minors. And finally, the college instructor faces a much stiffer challenge in finding another job if he is discharged from his present one.

job security with only second choices. In today's buyers' market however, this is not an immediate problem.

In *Ferguson v. Thomas*,<sup>35</sup> the defendant Prairie View A & M, operating under such a system, conceded that its decision not to rehire a professor required a showing of cause and denominated the non-renewal a "termination." The 5th Circuit held that when the institution, through its prior dealings with the instructor, has created an expectancy of reemployment, he will be accorded full tenure rights even if the result contradicts a state statute or the employment contract.

This court-created system of tenure by estoppel is not likely to be of much solace to teachers in the future, however. Boards of regents and trustees at schools such as Prairie View will certainly learn by their errors and change their form contracts to stress that the teacher will not be rehired unless the board so decides and that every firing will be a "non-renewal of an expired contract."

## 2. STATUTORY TENURE

While many states have statutory tenure schemes for public school teachers, the extent of the scheme for university or college instructors is normally a delegation of the power to the appropriate board of regents or trustees.<sup>36</sup> The board usually sets up a probationary period during which the probationer may be removed "at will" or "at pleasure"<sup>37</sup> followed by a form of tenure which provides that an instructor can be removed only for "cause," with the institution bearing the burdens of pleading, proof and preponderance, and the disgruntled tenured professor being accorded full procedural protections, including reasons, notice and a hearing.

The statutes invariably stress that employment is at the

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<sup>35</sup>430 F.2d 852 (5th Cir. 1970). The court held that the minimum would be reasons for the nonrenewal, a hearing before an impartial tribunal at which to rebut the reasons, and the opportunity to present evidence and cross-examine witnesses; followed in *Thaw v. Board of Public Instruction*, 432 F.2d 98, 99 (5th Cir. 1970); *Callaway v. Kirkland*, 334 F. Supp. 1034 (N.D. Ga. 1971).

<sup>36</sup>WIS. STAT. ANN. § 37.31, (1971-72 Supp.); CONN. GEN. STAT. ANN. § 10-122 (1971-72 Supp.); COLO. REV. STAT. §§ 124-5-1, 124-17-5, 124-17-1 (1963).

<sup>37</sup>WIS. STAT. ANN § 37.11(3) (1971 Supp.).

will of the board until tenure has been attained, and that after any contract has expired on its own terms, the probationer is entitled to no new contract or employment.<sup>38</sup> Such provisions have been disregarded by the courts, however, if the probationer pleads and proves that the contract has not been renewed for a constitutionally impermissible reason. This will be discussed in detail in Part V, *infra*.

California has no statutory tenure scheme for professors at the University of California but does have an extensive one for the massive State College system.<sup>39</sup> The University is governed by a Board of Regents; and the board is given complete control over its affairs by ARTICLE IX, § 9 of the California Constitution. Like a state agency, it may legislate by-laws and delegate power whenever it deems it necessary, subject only to the United States and California constitutions. The board has enacted a complex tenure process which follows the models set out in most statutory schemes.<sup>40</sup>

## C. THE PROBATIONARY PERIOD

### 1. THE SYSTEM

The probationary period allows the institution to shop around for the best possible man or woman for the job, without being bound to retain everyone hired for the term of his good behavior. If one accepts the premise that a tenure-job security device is necessary to attract good teachers and to protect academic freedom, then the idea of first looking around and trying out numerous candidates before settling on one to keep permanently "...who will add to the strength of [the] faculty and will raise the average of competence..." is logical.<sup>41</sup> Since the primary advantage of tenure is its protection from arbitrary dismissal by forcing the institution to prove that the teacher is not fit to teach, it should be granted only to those candidates whom the

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<sup>38</sup>WIS. STAT. ANN. § § 37.31, 37.11 (1971-72 Supp.).

<sup>39</sup>CAL. EDUC. CODE § § 24301-16 (West 1969); CAL. ADM. CODE tit. 5, § § 42701-02, 43560-61, 43566-67.

<sup>40</sup>See preceding article at 595-99.

<sup>41</sup>J. S. DIEKHOFF, *THE DOMAIN OF THE FACULTY IN OUR EXPANDING COLLEGES* 98 (1956) and R. WILLIAMS, *THE ADMINISTRATION OF ACADEMIC AFFAIRS IN HIGHER EDUCATION* 7-9 (1965).

employer feels are superior in their field. Although resumes and articles in scholarly journals are helpful in determining ability to teach, the only way for an institution to determine exactly how well Dr. X will assimilate with its faculty and student body is by giving him a trial run.

The probationary system also serves to maintain vitality in the university. It allows departments to shuffle in new faces and ideas annually. Aside from the cost of this practice—human destinies—the drawback is that often a good teacher might be lost due to budgetary considerations if there are already too many high-priced tenured professors in a department; and he will not be granted tenure because there is neither room nor money for new blood. Visiting professor programs pump some vitality into sagging departments, but they are rarely adequate.

Closely related is the problem of “expectancy.” If an individual is led to believe that the probationary period is a simple first step in the eventual and certain granting of tenure, save any major slip-up on his part, he will naturally be upset if he is summarily dismissed at the end of an academic year. And while many institutions employ a policy that stresses that an appointment to probationary status is a mere try-out for tenure, the regulation is normally conceived of as a formality by faculty and administration alike and may often be buried in an administrative manual or in some equally obscure place.<sup>42</sup> Thus when a probationer is dismissed and the university points to one of these manuals and says that he has no right to be upset because that is the official policy, he fails to understand and runs to court to seek justice.<sup>43</sup>

In order to avoid litigation after each tenure denial, schools could stress upon hiring that the employment is for a given term only, with tenure being only a faint possibility. Thus, the instructor would have no cause for surprise after his probationary period when he learns that he is being let go in favor of a recent Yale Ph.D. This allows the university to take advantage of the

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<sup>42</sup>See proceeding article at 594.

<sup>43</sup>See Judge Doyle's opinion in *Roth v. Board of Regents*, 310 F. Supp. at 974 where he points out that of 422 non-tenured instructors on the Wisconsin State University-Oshkosh faculty, only four were notified that their contracts would not be renewed for the 1969-70 school year.

tight job market and is analogous to the situation of a visiting professor: he knows that he will not be asked to stay or accept a tenured position after his year or two and thus would not be prone to charge into court after being informed that he is now free to return to his home institution.<sup>44</sup>

This is similar to the Harvard approach, which features each department hiring many more faculty probationers than there are tenure openings. The probationers are aware of this practice from the day they are hired; thus while the department is constantly revived with fresh blood, the probationers are receiving exactly what they expected. There is also little stigma involved with such a dismissal, as others in academia are well aware of this practice.<sup>45</sup>

The University of California is attempting to move to such a system but is meeting with much opposition from the faculty, which claims that although the new procedure would reduce the stigma of the denial of tenure, it would also create a "sucked orange brigade"<sup>46</sup> which would live in a constant state of doubt as to the future.<sup>47</sup> A very good, but not excellent professor might end up serving numerous probationary periods before finally finding an institution which is satisfied with him, or might end up forsaking teaching altogether. He would have no legal or moral right to expect tenure and therefore theoretically would not be harmed as much at the time he is dismissed. But he would also live an extremely unstable life, never knowing which, if any, school would finally select him.<sup>48</sup> Procedural protections would be of no avail.

The University is faced with a dilemma. In the 1969-70 school year 60 percent of the budgeted faculty positions were held by tenured personnel.<sup>49</sup> Many of the remaining positions are held

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<sup>44</sup>*But see* Thomas v. Kirkwood Community College, 448 F.2d 1253 (8th Cir. 1971).

<sup>45</sup>Interview with Paul Goodman, Professor of History, University of California, Davis, on the Davis campus, October 12, 1971.

<sup>46</sup>The California Aggie, University of California, Davis, quoting Professor Goodman, *supra* note 45, January 6, 1972, at 8.

<sup>47</sup>See preceding article at 595.

<sup>48</sup>*But see generally* Flaherty, *Probationary Teachers and the "Expectancy of Continued Employment,"* 20 CLEV. ST. L. REV. 533 (1971).

<sup>49</sup>J. GARBARINO, *CREEPING UNIONISM AND THE FACULTY LABOR MARKET* (draft for a report sponsored by the Carnegie Commission on the Future of Higher Education), at 10 (hereinafter cited as GARBARINO).

by probationary employees hired before the new system goes into effect. Thus it is likely that many departments will someday be totally staffed with tenured professors. Compounding the problem is the possibility that many tenured professors within a department may be of the same age. This could force the department to practically start anew when they all retire. Educational budgets are tight and there is no money available to expand departments, so where can the University put the probationer once his trial period is over? What if two probationary instructors within a small department come up for tenure at one time and there is only enough funds for one? Faced with a tight budget and a glutted job market, should not the University be able to create jobs for an express period of time with no possibility of them evolving into permanent positions? While this period could not last beyond seven years and still conform to A.A.U.P. requirements,<sup>50</sup> if the job market were so glutted as to result in Ph.D.'s accepting this type of employment set-up, the University would be able to revive stagnant departments and keep costs down. Until the number of Ph.D.'s and available positions level off, this might be the University of California's only choice.

## 2. RESULTS OF THE SYSTEM

In California, as in the rest of the nation, there is a buyer's market in college professors, as the number of new Ph.D.'s increases and the number of positions decreases.<sup>51</sup> So now, more than ever in the past, the courts are being besieged with suits from non-renewed probationary instructors. The reasons for the increased amount of litigation in the area are numerous; but probably the greatest reason is that jobs are scarce, and once a probationer is released from one institution he might have to move his family across the country in order to get another teaching job, or he might have to enter another line of endeavor altogether.

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<sup>50</sup>The A.A.U.P.'s 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE holds that the probationary instructor, with a few exceptions, must be either granted tenure or fired within 7 years.

<sup>51</sup>Roth v. Board of Regents, 446 F.2d 806, 811 (7th Cir. 1971) (Judge Duffy, dissenting); Garbarino, *supra* note 49, at 10.

Almost without significant exception, the federal courts have become the battleground.<sup>52</sup> They offer a cause of action for the "...deprivation of any rights, privileges, or immunities secured by the Constitution and laws..." caused by "Every person... [acting] under color..." of governmental authority in § 1983 of the Civil Rights Act of 1871<sup>53</sup> and have jurisdiction under 28 U.S.C. § 1343(3) (1970). The courts have had little problem with the doctrine of sovereign immunity,<sup>54</sup> but the United States Circuit Courts of Appeal are split over whether there has been a deprivation of anything protected by the Constitution. The 14th Amendment of the United States Constitution dictates no state shall "...deprive any person of life, liberty, or property without due process of law,"<sup>55</sup> and § 1983 protects "...rights, privileges, or immunities,"<sup>56</sup> Some courts see in the probationer a person who has no "right" to be offered a new contract and who has lost neither life nor liberty by the refusal to renew. If being rehired is denominated a privilege, courts traditionally have held that a privilege bestowed by the government may be revoked without ceremony for any or no reason.<sup>57</sup> Thus the tyranny of labels – rights are protected and privileges are not.<sup>58</sup>

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<sup>52</sup>Cases coming out of the state courts have been crashing and unmitigated defeats for the teachers. See *DeCanio v. School Committee of Boston*, 70 A.S. 1223, 260 N.E.2d 676 (Mass. 1970), *appeal dismissed sub. nom.*, *Fenton v. School Committee*, 401 U.S. 929 (1971); *Fooden v. Board of Governors*, 48 Ill. 2d 580, 272 N.E.2d 497 (1971), petition for *cert.* filed 40 U.S.L.W. 3092 (8/31/71).

<sup>53</sup>42 U.S.C. § 1983 (1970).

<sup>54</sup>See *Pettigrew*, *supra* note 25, at 487-88. Although equitable relief is readily accessible under § 1983 there is a split of authority on money damages. See *Callaway v. Kirkland*, 334 F. Supp. 1034 (N.D. Ga. 1971); *contra*, *Wall v. Stanley County Board of Education*, 378 F.2d 275 (4th Cir. 1967). *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970) held that a teacher's claim for back pay is not a prayer for money damages, but rather an element of the equitable remedy of reinstatement. See also *Connell v. Higgenbotham*, 305 F. Supp. 445 (M.D. Fla. 1969) (3-judge court), *aff'd* 403 U.S. 207 (1971); *Smith v. Sessions*, Docket no. 1684, United States District Court, S.D. Ga. Augusta Div., February 21, 1972.

<sup>55</sup>U.S. CONST. AMEND. XIV., § 1.

<sup>56</sup>42 U.S.C. § 1983 (1970).

<sup>57</sup>*Sindermann v. Perry*, 430 F.2d at 944. For an overview of the right-privilege doctrine see *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); and Justice Tobriner's dissent in *Bogacki v. Board of Supervisors of Riverside County*, 5 Cal. 3d 771, 786-804, 489 P.2d 537, 545-60, 97 Cal. Rptr. 657, 667-80 (1971), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 92 S.Ct. 1301 (1972).

<sup>58</sup>The vitality and the possible erosion of the right-privilege doctrine will be discussed in parts II. A and II. B. *infra*.

## IV. CONFLICT IN THE COURTS

The facts in the non-renewal cases routinely fall into one of two repeating patterns: either the teacher whose contract was not renewed claims that the reason for the dismissal was his exercise of his freedom of speech (or another of the constitutionally-guaranteed freedoms), or he claims that there was no reason or basis in fact for the action. The first type of case has generally been greeted sympathetically by courts, which normally compel the institution to grant the disgruntled teacher a hearing in order to attack the charges.

But when there are no collateral constitutional rights involved, the Federal Courts are split as to rights and remedies. The 1st Circuit in *Drown v. Portsmouth I*<sup>59</sup> held that although a school board may not discharge a probationer for no reason or upon unsubstantiated allegations, it must have the utmost discretion. The teacher is entitled to the reasons for the firing, but nothing more unless there has been some constitutional irregularity. If this is the case, the doors of the federal court swing open.

The 5th Circuit has borne the lion's share of litigation.<sup>60</sup> Having heard so many suits, it has developed a large body of case law. Summarized briefly, that case law holds that if an institution creates an expectancy of reemployment similar to tenure through its prior dealings with the probationer, it must provide him with reasons and a hearing if it decides not to keep him.<sup>61</sup> However, if no expectancy has been created, the probationer's employment may be terminated without any reasons being given or any other ceremony. Firings for the exercise of any of the guaranteed freedoms, however, are impermissible;

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<sup>59</sup>*Drown v. Portsmouth School District I*, 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

<sup>60</sup>*Pred v. Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Sindermann v. Perry*, 430 F.2d 939 (5th Cir. 1970); *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970); *Thaw v. Board of Public Instruction*, 432 F.2d 98 (5th Cir. 1970); *Fluker v. Alabama State Board of Education*, 441 F.2d 201 (5th Cir. 1971); *Chisley v. Richland Parish School Board*, 448 F.2d 1251 (5th Cir. 1971).

<sup>61</sup>*Pred v. Board of Education*, 415 F.2d 851 (5th Cir. 1969); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

and if the teacher alleges such a firing, the institution may be compelled to provide an administrative hearing.<sup>62</sup>

The 6th Circuit has held that the probationer who was denied a new contract or tenure for any reason other than a constitutionally impermissible one (constitutionally-guaranteed freedoms) is not entitled to a hearing or reasons for the action, and that the decision-making body must necessarily have tremendous discretion in choosing its faculty in the manner it desires.<sup>63</sup>

The 7th Circuit has taken a contrary position, stating that a teacher may neither be cast off for no reason at all nor for one without a basis in fact, and that the institution must afford the probationer reasons and a hearing at which to challenge the board's determination if he so desires. The board is still given wide latitude in its freedom of choice; but the court in two cases has held that there are constitutional limits on this discretion above and beyond those dictated by the 1st Amendment.<sup>64</sup>

The 8th Circuit is aligned with the 6th in holding that although a school may not dismiss a teacher due to his race, political beliefs or religion, it may exercise otherwise unfettered discretion in renewing or not renewing teachers' contracts.<sup>65</sup>

The 10th and the 4th Circuits go father than the 6th and 8th Circuits in embracing the right-privilege doctrine. The 10th Circuit, in its 5-2 *per curiam* decision in *Jones v. Hopper*, affirmed the dismissal of a complaint for money damages in which a non-tenured associate professor alleged that his contract had not been renewed because of his criticism of the war in Vietnam.<sup>66</sup> Over a strong dissent the court held that since the con-

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<sup>62</sup>*Sindermann v. Perry*, 430 F.2d 939 (5th Cir. 1970); *Fluker v. Alabama State Board of Education*, 441 F.2d 201 (5th Cir. 1971).

<sup>63</sup>*Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971), *rev'g* 318 F. Supp. 1041 (S.D. Ohio, E.D. 1970), petition for *cert.* filed 40 U.S.L.W. 3081 (8/18/71).

<sup>64</sup>*Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971); *Shirck v. Thomas*, 447 F.2d 1025 (7th Cir. 1971), petition for *cert.* filed 40 U.S.L.W. 3321 (12/21/71), cross-petition for *cert.* filed 40 U.S.L.W. 3375 (1/21/72).

<sup>65</sup>*Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969). Criticized in Note, *Arbitrary Dismissal By School Board*, 44 N.Y.U. L. REV. 836 (1969).

<sup>66</sup>*Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *accord*, *Hagen v. St. Paul Board of Education*, 333 F. Supp. 1355 (D. Minn. 1971); *Schultz v. Palmberg*, 317 F. Supp. 659 (D. Wyo. 1970); *Jones* criticized in Note, *Refusal to Rehire a Nontenured Teacher*, 1970 WISC. L. REV. 162 (hereinafter cited as Note).

tract had expired on its own terms, there was no legal interest to be protected. The 1st Amendment issue may have been poorly pleaded,<sup>67</sup> but nevertheless the case represents a contemporary example of a court applying a conclusory name tag to a set of facts and reaching its result by the mere choosing.<sup>68</sup>

The 4th Circuit reached a similar result in 1965, and no major case has reached the circuit court level there since.<sup>69</sup>

Thus, the muddled state of the law. The remaining circuits have not been faced with similar problems recently. But if they were to be confronted with one tomorrow, almost any choice they might make would align them with some other circuit. The United States Supreme Court, by deciding *Roth* and *Sindermann*, may bring some order to this chaos. The problem is a multifaceted one, and any answer will be unsatisfactory to a great many of the untold thousands of the nation's academics. The remainder of this article will discuss possible routes towards a reasonable response to the imbroglio.

## V. THE SUBSTANCE OF DUE PROCESS

### A. THE GUARANTEED FREEDOMS

The first successful attack on the doctrine that absent a "right", an individual is vulnerable to the will of government came in the guaranteed freedoms cases. The guaranteed freedoms are those enumerated in the four corners of the United States Constitution itself, such as the 1st Amendment's guaranty of freedom of speech.<sup>70</sup>

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<sup>67</sup>See Note, *supra* note 66, at 166.

<sup>68</sup>And *cert.* was denied soon afterwards, 397 U.S. 991 (1969); *c.f.* the curious majority decision in *Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971).

<sup>69</sup>*Parker v. Board of Education*, 348 F.2d 464 (4th Cir. 1965), *aff'g.* 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), *reh. denied* 383 U.S. 939 (1966). But see *Parker* narrowly limited to its facts in order to reach a contrary result in *Holliman v. Martin*, 330 F. Supp. 1, 7-8 (W.D. Va. 1971).

<sup>70</sup>Denominated "First Amendment Rights" by Judge Doyle in *Roth v. Board of Regents*, 310 F. Supp. at 976 and "collateral constitutional rights" by Judge Coffin in *Drown v. Portsmouth*, 435 F.2d at 1183.

## 1. EVOLUTION OF THE DOCTRINE

Everyone's archetype is Justice Holmes' classical epigram in *McAuliffe v. City of New Bedford*<sup>71</sup> where he upheld a city police ordinance which forbade members of that agency from becoming involved in political activities. He stated that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>72</sup> That the release of otherwise guaranteed freedoms could be the condition upon which government employment was obtained was the law for the next fifty years.<sup>73</sup>

The doctrine began to erode in 1947 when Judge Learned Hand held that a high school teacher could not be discharged for missing school while serving on a federal jury. He looked to an "expectance of continued employment" in holding that her job could not be conditioned upon the relinquishment of a federal privilege.<sup>74</sup> He created another label—"interest"-dominating expectancies other than those the courts had traditionally protected.

The next challenges to the doctrine came in the witch hunting days of the 1950's. Employment contracts containing loyalty oaths and state statutes requiring a listing of past and present group affiliations of teachers and other civil servants resulted in a great deal of litigation.<sup>75</sup> In *Slochower v. Board of Higher Education of New York City*<sup>76</sup> the court was faced with the dismissal of a professor who had invoked the 5th Amendment in testifying before a legislative committee regarding his prior associations. The court held the firing invalid, claiming that the institution could not infer any guilt from Slochower's silence

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<sup>71</sup>155 Mass. 216, 29 N.E. 517 (1892).

<sup>72</sup>*Id.* at 220, 29 N.E. at 517.

<sup>73</sup>Leahy, *From McAuliffe to McLaughlin: A Revolution in the Law of Constitutional Rights of Public Employees*, 57 ILL. B. J. 910 (1969).

<sup>74</sup>*Bomar v. Keyes*, 162 F.2d 136, 139 (2nd Cir. 1947); *cert. denied*, 332 U.S. 825 (1947).

<sup>75</sup>See especially *Adler v. Board of Education of the City of New York*, 342 U.S. 485 (1952); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960). See generally, D. GARDINER, *THE CALIFORNIA OATH CONTROVERSY* (1967).

<sup>76</sup>350 U.S. 551 (1956).

and that any such inference would be in derogation of the 5th Amendment.<sup>77</sup>

The court moved on to decide that the 1st Amendment protects a teacher from dismissal as a reprisal for its exercise. In *Pickering v. Board of Education*<sup>78</sup> and *Keyishian v. Board of Regents*<sup>79</sup> the court treated this proposition as already settled, stating that “[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”<sup>80</sup>

The Equal Protection cases traditionally featured a plaintiff who claimed his dismissal stemmed from his race or religion; but sex discrimination has been the claim in several recent suits.<sup>81</sup> The courts have unanimously been sympathetic in this area. The case of primary importance in the equal protection area is crucial for a reason coincidental to that of similar treatment for those similarly situated. In *Johnson v. Branch*<sup>82</sup> a black high school teacher with twelve years experience, who had been given excellent ratings the year before by her supervisor, was notified that her contract for the upcoming year would not be renewed. The stated reasons were that her homeroom closets were messy and that she had arrived fifteen minutes late to supervise an athletic event. Coincidentally, Ms. Johnson was active in civil rights and voter registration activities in that small North Carolina town, and the two school board members who voted against rehiring her were openly opposed to integration. The

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<sup>77</sup>*Id.* See generally Buchanan, *The Privilege Against Self-Incrimination: To What Extent Should it Protect a State Employee or Professional Licensee Against the Loss of His State-Created Status?* 7 HOUSTON L. REV. 297 (1970), which probes this complex area, one this article will not attempt to discuss.

<sup>78</sup>391 U.S. 563 (1968).

<sup>79</sup>385 U.S. 589 (1967).

<sup>80</sup>391 U.S. at 568, citing *Keyishian v. Board of Regents*, 385 U.S. at 605-606. See *Sherbert v. Verner*, 374 U.S. 398 (1963), “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Id.* at 404.

<sup>81</sup>See *Green v. Board of Regents of Texas Tech University*, 335 F. Supp. 249 (N.D. Tex. 1971) where the court deferred to the reasonable discretion of the institution in answering sex discrimination charges. See also *League of Academic Women v. University of California*, United States District Court, N.D. Cal., docket no. C72-265CBR, filed 2/15/72, alleging sex discrimination in promotion (including the tenure decision) of faculty and staff. The complaint withstood a motion to dismiss the § 1983 action by order of Judge Renfrew on March 31, 1972.

<sup>82</sup>364 F.2d 177 (4th Cir. 1966) *cert. denied*, 385 U.S. 1003 (1967).

court refused to take the board's express reasons and instead looked behind them to the actual cause of the non-renewal. This is the course courts have taken since and administrative hearing panels must take in the future<sup>83</sup> (if the courts decide that administrative hearings are required to protect the probationer's substantive interests).

## 2. TENURE STATUS AND THE FREEDOMS

Not only do the recent cases hold that there can no longer be any doubt that teaching jobs may not be contingent upon the relinquishment of the 1st Amendment,<sup>84</sup> 5th Amendment,<sup>85</sup> and 14th Amendment<sup>86</sup> guarantees, but they also reflect the courts' eagerness to look past the tenure status of the individuals asking for relief. Most have let loose of the easy intellectual handles such as "tenure" or "contract" or "right" in order to protect the teacher from dismissal for a constitutionally impermissible reason.

That some of the plaintiffs in *Wieman*, *Bomar*, *Keyishian*, *Pickering*, *Shelton*, and *Johnson* did not have tenure (Ms. Johnson and Shelton could never attain tenure under the statutory schemes of their states) is deemed irrelevant and often not even mentioned. Judges are now inclined to look beyond the label to protect the individual from arbitrary governmental treatment. In *Parducci v. Rutland*, Chief Judge Johnson said:

That teachers are entitled to First Amendment freedoms is an issue no longer in dispute... These constitutional protections

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<sup>83</sup>*But see* *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *See generally*, Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

<sup>84</sup>*McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970); *Abel v. Gousha*, 313 F. Supp. 1030 (E.D. Wis. 1970).

<sup>85</sup>*Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *But see* *Parker v. Board of Education*, 348 F.2d 464 (4th Cir. 1965).

<sup>86</sup>*Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); an interesting case authored by the then Judge Blackmun regarding teachers and the ramifications of desegregation: *Smith v. Board of Education*, 365 F.2d 770, (8th Cir. 1966); *But see* the firing of a homosexual librarian affirmed in *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971) *rev'g* 316 F. Supp. 809 (D. Minn. 1970), *cert. denied* \_\_\_\_\_ U.S. \_\_\_\_\_, 92 S.Ct. 1312 (1972).

are unaffected by the presence or absence of tenure under state law... Although academic freedom is not one of the enumerated rights... the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and to study is fundamental to a democratic society.<sup>87</sup>

## B. FUNDAMENTAL FAIRNESS – ANOTHER GUARANTY?

[T]here is no place in our constitutional system for the exercise of arbitrary power...<sup>88</sup>

The guaranteed freedoms cases stand for the proposition that the government employer can no longer fire or choose not to renew the contract of a civil servant for “any” reason. The assault in the courts today is whether he must have a good reason or any reason at all. In other words, does due process require that a standard of fundamental fairness be imposed on the government in its treatment of employees?<sup>89</sup> As will be discussed *infra*, fundamental fairness can refer to either the standard upon which the non-renewal decision is based, the procedure by which the probationer may attack the decision, or both. Judge Doyle, in his District Court *Roth* opinion adopted by the 7th Circuit Court of Appeals,<sup>90</sup> deemed a dismissal based on no reason an arbitrary one. He questioned whether the employer was benefited by a nonrenewal decision which rests “...upon a basis wholly without support in fact, or by a decision upon a wholly unreasoned basis...”<sup>91</sup> and proceeded to weigh the probationer’s interest in knowing the reasons and having a hearing against the interest of the institution in affording none. While this analysis is comforting to many probationary instructors, it is wrought with problems: What is “arbitrary?” Certainly very few cases are clearly arbitrary under Judge Doyle’s definition. Does this mean that the employer must prove that the probation-

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<sup>87</sup>316 F. Supp. 352, 354-55 (M.D. Ala. N.D. 1970); *accord*, *Hetrick v. Martin*, 322 F. Supp. 545, 546 (E.D. Ky. 1971).

<sup>88</sup>*Garfield v. U.S. ex rel. Goldsby*, 211 U.S. 249, 262 (1908).

<sup>89</sup>Other text writers have labeled this emerging doctrine “Due process as fair play” (Comment, *Applied Due Process*, 3 U.W.L.A. L. REV. 135, 139 [1971]) and “Constitutional tenure” (Frakt, *Non-Tenure Teachers and the Constitution*, 18 U. KAN. L. REV. 27 [1969]) (hereinafter cited as Frakt). *See generally* Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 980-88 (1969).

<sup>90</sup>446 F.2d at 807.

<sup>91</sup>310 F. Supp. at 979.

er is not qualified for the position? Do the procedures set down in the *Roth* decision to safeguard the probationer from arbitrary action in fact protect him? Do they grant him a quasi-tenure from the date of hiring? On what basis can Doyle say that the 14th Amendment Due Process clause protects an individual from arbitrary governmental action? The following analysis will attempt to wrestle with these problems and others posed by the *Roth* decision.

### 1. THE DOCTRINE AND ITS ROOTS

The doctrine that an individual must be treated fairly by government stretches back to the Due Process clause of the 5th Amendment. But historically, as evidenced by *McAuliffe, supra*, and its progeny, fair treatment by government was thought to encompass only traditionally-conceived rights of individuals such as life, liberty,<sup>92</sup> and property.<sup>93</sup>

The guaranteed freedoms cases furnish broad dictum for a finding that the government employer is restrained from dismissing an employee arbitrarily.<sup>94</sup> The cases generally hold that since the employer may not terminate the employee's services for a constitutionally impermissible reason, he may not dismiss him for no reason at all. Thus the *Roth* court and others seek to establish a constitutionally-guaranteed right to be free from arbitrary treatment at the hands of government.

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<sup>92</sup>See generally *Duncan v. Louisiana*, 391 U.S. 145 (1968) for its interpretations of due process, life and liberty, and the criminal law. In *Miller v. Parsons*, 313 F. Supp. 1150 (M.D. Penn. 1970), the theory that the plaintiff, a teacher at Lock Haven State College, could not be denied his "civil right to teach" without due process of law survived the college president's motion to dismiss; Discussed in Comment, *Due Process Restrictions on the Employment Power and the Teaching Profession*, 50 NEB. L. REV. 655, 664 (1971) (hereinafter cited as Comment).

<sup>93</sup>*Barron v. Mayor and City Council of Baltimore*, 7 Pet. 242 (1833); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *But see* government largess as property in Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>94</sup>Mr. Justice Clark, in *Wieman v. Updegraff*, 344 U.S. 183 (1952), said:

To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. ... We need to pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion...is patently arbitrary or discriminatory. *Id.* at 191-92.

## 2. *RIGHT v. PRIVILEGE—A STUDY IN CLASSIFICATION*

The drive for such an interpretation of the Due Process clause is blocked by the right-privilege distinction as was the drive to prevent the government from conditioning employment on the abandonment of 1st Amendment guarantees prior to the 1950's. The battle is a two step one: First its advocates must convince the courts that since the guaranteed freedoms cases demonstrated that the right-privilege doctrine is no longer totally applicable, this classification cannot remain a barrier to the fair treatment by government which the Due Process clause dictates; and, secondly, that the interest of the individual in being accorded fair treatment is so great, and the interest of the government in acting arbitrarily is so slight, that the doctrine of fair play rises to a constitutional level.

### a. *The Right-Privilege Doctrine Today*

The *Roth* court, and others<sup>95</sup> have held that the old labels do not stick anymore, and that the duty of the court is to look beyond the classification of "right", "privilege," "expectance" and investigate whether an individual should be treated fairly by government. Much like the standing doctrine used by the Supreme Court in determining whether one may bring suit,<sup>96</sup> fundamental fairness compels courts to inquire whether an individual will be harmed by the act or omission of government. In addition, it scrutinizes whether the government has cause to foresee harm to the individual and whether the government will be damaged as a result of according certain benefits to him.

Those courts which have attempted to shuck the classifications of past case law are in the minority, however. Most of the courts faced with the choice of extending the substantive protections of the Due Process clause have opted for resurrecting the right-privilege doctrine when confronted with a probationer who does not allege that his traditionally-construed guaranteed rights

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<sup>95</sup>*Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969); *Orr v. Trinter*, 318 F. Supp. 1041 (S.D. Ohio E.D. 1970), *rev'd.* 444 F.2d 128 (6th Cir. 1971); *Newcomer v. Coleman*, 323 F. Supp. 1363 (D. Conn. 1970); *Auerbach v. Trustees of the California State Colleges*, 330 F. Supp. 808 (C.D. Cal. 1971); *Roumani v. Leestamper*, 330 F. Supp. 1248 (D. Mass. 1971).

<sup>96</sup>*Flast v. Cohen*, 392 U.S. 83 (1968).

have been impeded.<sup>97</sup> Once a judge is given a logical hook upon which to hang his decision, it is easy for him to say that "...the Fourteenth Amendment protects only against the State depriving one of life, liberty, or property..."<sup>98</sup>

*b. Interests and the Balancing Test*

Once the court has found that an individual has an interest to be protected which will be balanced against the government's interest in arbitrariness, the inquiry turns to the definition of "interest". Literally, the interest of an individual is what he stands to lose by being dismissed for a reason unsubstantiated in fact, by not being able to challenge an adverse decision of his employer, or both. In the case of the probationary college instructor, this is much more than his immediate job. It is also the chance of getting a similar job in the future without having to relocate in another part of the country, the professional reputation of a practitioner of a liberal art in which repute is important, and the stigma of not being rehired without knowing the official reason why.<sup>99</sup> The concept of the interest of the individual being more than the job at hand is announced in *Birnbaum v. Trussel*, in which the court stated:

The principle to be extracted...is that, whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist.<sup>100</sup>

The interest of the government in summary adjudication lies primarily in efficient operation of the probationary system. If

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<sup>97</sup>*Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969); *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971); *DeCanio v. School Committee*, 260 N.E.2d 676 (1970); *Fooden v. Board*, 272 N.E.2d 497; *Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971).

<sup>98</sup>*Orr v. Trinter*, 444 F.2d at 134.

<sup>99</sup>Comment, *supra* note 92, at 661.

<sup>100</sup>371 F.2d 672, 678 (2nd Cir. 1966). The case involved the dismissal of a doctor from a city-owned hospital. *Accord*, *Olson v. Regents of the University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969); *Holliman v. Martin*, 330 F. Supp. 1, 10 (W.D. Va. 1971); *Frakt*, *supra* note 89, at 35-36.

an employer is permitted to remove a probationer upon the exercise of pure subjective reflection, without resort to any standards save those of the Bill of Rights, the tenure-granting process would be simplified. Not only would the cost and bother of having to compile reasons for the dismissal (and then holding a hearing on them) be avoided, but the necessity of even having a reason would be obviated. The glaring problem with the government's interest is that it is primarily one of ease of operation opposed to the time-consuming process which would require some defensible reason for non-retention of a probationary employee who had a valid expectancy of reemployment.

Theoretically, the universities' interest lies in assimilating the best possible faculty and not in unilateral termination. In *Roth*, Judge Doyle points out that a university is not at all served by dismissing a probationer upon a false assumption or upon an administrator's whim. Again the argument turns to cost. But if protection against whim of government is to be considered a fundamental constitutional guaranty, can the cost of detecting violations even be considered?<sup>101</sup>

The *Roth* court resorted to a weighing process in order to determine whether the government interest or the individual's interest was paramount.<sup>102</sup> It relied on *Cafeteria Workers v. McElroy*,<sup>103</sup> a case not arising within the educational context. There an employee of a lunch stand in a factory which did contract work for the Department of Defense and which required a security clearance for employees had her clearance revoked unilaterally by an agent of the government. Although her employer offered her another job elsewhere in the city, her union brought suit against the Secretary of Defense for a hearing on the matter. In affirming the granting of the defendant's motion for summary judgement, the court stressed that the interest of

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<sup>101</sup>"We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency", *United States v. Fay*, 247 F.2d 662, 669 (2nd Cir. 1957). *But see* Brief for Appellee at 34, *Roth v. Board of Regents* 446 F.2d 806 (7th Cir. 1971) arguing that "University presidents are very busy and harassed men."; *Accord* *Roth v. Board of Regents*, 446 F.2d at 811 (dissenting opinion).

<sup>102</sup>*Roth v. Board of Regents*, 446 F.2d at 809; *See* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 (hereinafter cited as Van Alstyne).

<sup>103</sup>367 U.S. 886 (1961), *reh. denied*, 368 U.S. 869 (1961).

the government was in national security while the individual's interest was merely a job at that one place. The court acknowledged that due process is no rigid concept, stating, "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."<sup>104</sup> It went on to propose the balancing test later interpreted in *Roth*:

[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.<sup>105</sup>

Applying the test to the facts of the case, the *Cafeteria Workers* five-man majority, speaking through Mr. Justice Stewart, said the governmental interest weighed heavier. The decision leaves open to speculation how the balancing test is to be applied. As distinguished from the school cases, the governmental interest involved in that case was national security. And Ms. Brawner had been offered another job in the same city, with the same duties, under the same employer.

One commentator urged that the balancing test will yield the same result in the school cases because the professor's interest "...is solely that of teaching at *one* college and is certainly no greater than that of the average government employee."<sup>106</sup> This ignores the fact that in the field of higher education the government is by far and away the primary employer and dismissal might result in a professor not being able to ply his trade, especially in today's buyers' market.<sup>107</sup> And the thrust of the balancing test is that there is more to the individual's interest than the one job.

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<sup>104</sup>*Id.* at 895.

<sup>105</sup>*Id.*

<sup>106</sup>Kahn and Solomon, *Untenured Professors' Rights to Reappointment*, 20 CLEVE. ST. L. REV. 522, 526 (1971) (hereinafter cited as Kahn).

<sup>107</sup>Judge Doyle, in *Roth v. Board of Regents*, answered the charge that the type of job in question does not matter under *Cafeteria Workers*: "Without disrespect, I think it fair to say that the discharge from one job is a lesser impediment in the search for another in the case of short order cooks than in the case of university professors." 310 F. Supp. at 978; and see *Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 800 n. 15, 489 P.2d 536, 557-58, 97 Cal. Rptr. 657, 677-78 (1971) (Justice Tobriner, dissenting).

### 3. SUBSTANCE OR PROCEDURE

*The Cafeteria Workers* balancing test was interpreted by the Supreme Court nine years later in *Goldberg v. Kelly*.<sup>108</sup> In holding that due process requires a pretermination hearing for welfare recipients the court said:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss and depends on whether the recipient's interest in avoiding that loss outweighs governmental interest in a summary adjudication.<sup>109</sup>

*Goldberg* exposes perhaps the biggest enigma surrounding the fundamental fairness controversy—does “arbitrary” refer to the lack of reasons and a procedure by which to test their factual basis, or to the quality of the reasons themselves?

The *Goldberg* court was not specifically faced with this question as the reasons for termination of welfare benefits were statutorily defined. But the court did look to *Cafeteria Workers* where the reasons for the removal of Ms. Brawner's security clearance were never articulated; and the court held that they need not be. The relief sought there was a hearing; but a hearing would have been futile if in the end the government could remove the security badge for any or no reason. The hearing may have been requested to determine whether the act resulted from Ms. Brawner's exercise of her 1st Amendment or other guaranteed rights.<sup>110</sup>

From the face of the *Roth* opinion it is difficult to determine where substance ends and procedure begins. Certainly the majority felt that a non-renewal based upon no or false facts was arbitrary; but the court did not go on to discuss the type of decision based upon fact which might be objectionable to fundamental fairness and unchallengeable at any hearing: For example, what if the department told the teacher “We don't like

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<sup>108</sup>397 U.S. 254 (1969).

<sup>109</sup>*Id.* at 262-63; see Comment, *supra* note 92, at 675.

<sup>110</sup>*Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (Mr. Justice Brennan, dissenting) “She is not told what she did wrong; she is not given a chance to defend herself. She may be the victim of the basest calumny, perhaps even the caprice of the government officials in whose power her status rested completely.” *Id.* at 900-01.

you"? The *Roth* court says that the standard for removing probationers is "considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure."<sup>111</sup> How severe is it? Would the above be an arbitrary decision? Even if there were factual bases for the feeling? Should a department be forced to retain a social pariah?

Arbitrariness might refer solely to lack of procedures for determining the reasons for a non-renewal. But once the reasons are determined, is the probationer without a further remedy unless the school boldly admits that Professor X was let go because he was a union activist? *Drown v. Portsmouth I*<sup>112</sup> held that while a teacher could not be dismissed for no reason at all, and clearly not for one which violated his collateral constitutional rights, he was entitled to no more than the reason(s) for the dismissal with the option to challenge them in federal courts. As a result of the opinion Patricia Drown received a list of reasons for her non-renewal.<sup>113</sup> She then came back to court and claimed that the reasons were arbitrary and capricious in violation of the 14th Amendment. The court held that the reasons were not arbitrary as a matter of law and went on to lay out what it considered to be arbitrary reasons.<sup>114</sup> The case eroded the traditional notion that no reason at all is needed; but for all practical purposes, the definition of "arbitrary" remains open.

## VI. PROCEDURAL DUE PROCESS

Once it is determined that the probationer has an interest which cannot be arbitrarily terminated by the government,

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<sup>111</sup>446 F.2d at 808 citing Judge Doyle in *Roth v. Board of Regents*, 310 F. Supp. at 976.

<sup>112</sup> 435 F.2d 1182 (1st Cir. 1970).

<sup>113</sup>*Drown v. Portsmouth School District II*, 451 F.2d 1106 (1st Cir. 1971). There were three reasons: missing class one day and giving a false reason, her "uncooperative" attitude, and the failure to attend a meeting at which her future was to be discussed by the board. *Id.* at 1107-08.

<sup>114</sup>*Id.* There are essentially three types given by the court:

- a. "...unrelated to the educational process or to working relationships within the educational institution." (example: for the kind of car she drives.)
- b. "...a reason may be arbitrary in that it is trivial..." citing *Johnson v. Branch* (see text at note 82, *supra*).
- c. "...wholly unsupported by a basis in uncontested fact..." citing *Roth. Id.* at 1108.

procedures must be established in order to protect against arbitrary treatment. The establishment of procedures is itself a check against arbitrariness; because once the decision-making body knows that its order may be examined for its evidenciary basis, that body will probably make the decision with more care.<sup>115</sup> And since the procedures will examine the reasons for the decision, then *a fortiori* there must be a reason for the termination.

The procedural protections normally sought in prior cases have included detailed reasons for the decision and a hearing at which to challenge them.

#### A. REASONS FOR NON-RENEWAL TRANSMITTED TO THE PROBATIONER

Timely communication of written statement of reasons<sup>116</sup> to the dismissed probationer is the minimum prayed for by the professors. Requiring reasons not only forces the institution to have a basis for its decision, but also gives the probationer a framework upon which to build his attack against the dismissal. If no reasons are given and the professor attempts to challenge the decision in court, he will have to plead and prove that he should be granted either tenure or another contract—an almost insuperable burden. But if he is given reasons for the non-renewal, he may at least respond to specifics.

Reasons pose practical problems, however. How specific must they be? If they are too explicit, they might not only be time-consuming and expensive for the institution to produce, but they may harm the probationer as to future jobs if he cannot carry his burden of proof in the instant case. Also, requiring very specific reasons might erode the traditional distinction between tenure and non-tenure by forcing the institution to prepare a case in both instances, the only difference being that the case against the tenured professor would have to be more artfully drawn due to the allocation of the burden of proof. The other

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<sup>115</sup>Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

<sup>116</sup>But see Henson v. City of St. Francis, 322 F. Supp. 1034, 1038 (E.D. Wis. 1971) holding that oral communication of the reasons was sufficient to satisfy the demands of procedural due process. *Accord*, Holliman v. Martin, 330 F. Supp. 1, 12 (W.D. Va. 1971).

major problem, discussed *infra*, is that a written statement of reasons may cause more harm to the probationer than no reasons at all.

### 1. REASONS AND THE GUARANTEED FREEDOMS

If in its reasons the institution said that the probationer's contract was not renewed because he was a Democrat, the local U.S. District court would have no problem in reinstating him. But neither life nor university governing boards are that simple. Whenever a probationer alleges that he has been dismissed in retaliation for the exercise of his guaranteed freedoms, the school may counter with other reasons such as "inadequate publication" or "argumentative personality." Conversely, a teacher undeserving of tenure may intentionally align himself with unpopular causes in order to allege his subsequent dismissal was improperly motivated.<sup>117</sup> The issue is then framed—the probationer's reasons against the board's.

However, the giving of reasons will serve as a "...prophylactic against non-retention decisions improperly motivated by exercise of protected rights."<sup>118</sup> Thus, if the institution wants to rid itself of a probationer who persists in voicing political views contrary to its own, it will not be able to fail to renew his contract *sub silentio*. It will have to give reasons which will later have to stand up in court or at an administrative hearing.

A danger in the requirement for reasons is the possibility that the institution will fabricate reasons in order to make a clean exorcism and in the process foreclose possible future jobs to the probationer. A related problem is the chance that the institution will begin preparing a file on an instructor from the day he is hired, looking toward possible litigation at the end of his probationary period. These dangers are less of a menace in the area of guaranteed freedoms than in the realm of arbitrariness, though, because the courts have been willing in the past to look

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<sup>117</sup>See Machlup, *On Some Misconceptions Concerning Academic Freedom*, in JOUGHIN, *ACADEMIC FREEDOM AND TENURE, A HANDBOOK OF THE A.A.U.P.* (1967) (hereinafter cited as JOUGHIN); *Hopkins v. Board of Education*, 330 F. Supp. 555 (N.D. Ill. E.D. 1971).

<sup>118</sup>*Roth v. Board of Regents*, 446 F.2d at 810.

beyond the reasons given by the schools in order to protect those fundamental rights.<sup>119</sup>

## 2. REASONS AND FUNDAMENTAL FAIRNESS

Once a reason is given, the decision not to rehire can no longer be denominated as totally arbitrary. The issue then becomes how specific the reasons need be. The *Roth* court vaguely said that the probationer must be given "...a glimpse at the reasons and a minimal opportunity to test them."<sup>120</sup> *Roth, Drown*, and others see them as the first step in the eventual challenge of the nonrenewal decision.<sup>121</sup>

Realistically, the reasons should be complete enough to inform the probationer of the real basis or bases for the decision but should not work to force the institution to compile a case against him as it must do when it assigns "cause" to rid itself of a tenured professor. While this is easy to theorize, it is difficult to implement. Imagine that Professor X is told that the reason for his nonrenewal is that he is "...difficult to get along with."<sup>122</sup> That bare statement does not give X much to work with in preparing his case for the administrative hearing or federal litigation that might follow. But if the university is obligated to provide evidence to support its reason, then the probationer's protections would almost parallel those of a tenured professor. Yet if the institution does not make the reason more specific, how will the probationer ever be able to successfully challenge it at an administrative or judicial hearing?

Critics argue that since the giving of reasons for dismissal was traditionally reserved only for the tenured, bestowing them upon probationers is an erosion of that hallowed institution. They claim the distinction between tenure and no tenure will be

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<sup>119</sup>*Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

<sup>120</sup>*Roth v. Board of Regents*, 446 F.2d at 809. One educator urged the institutions to give as little as the law permits. See Furniss, *Giving Reasons for Non-renewal of Faculty Contracts*, 52 *EDUCATIONAL RECORD*, 330 (Fall, 1970). (note: The Educational Record is the voice of the American Council on Education, *Amicus Curiae* for the Regents in *Roth*).

<sup>121</sup>*Sindermann v. Perry*, 430 F.2d at 944; *Drown v. Portsmouth I*, 435 F.2d at 1187. The *Drown* court also required access to teaching evaluation reports.

<sup>122</sup>*McEnteggart v. Cataldo*, 451 F.2d 1109, 1111 (1st Cir. 1971).

narrowed, if not effaced, by a judicial determination that reasons are required.<sup>123</sup> But this bootstrapping analysis misses the thrust of the guaranteed freedoms cases, all of which erode the traditional distinction between the probationer and the annointed. The single most important aspect of tenure is that once it vests, the burden of proof is on the institution to show why the professor should be dismissed.<sup>124</sup> This burden of proof, crucial in determining the outcome of the battle over renewal, is still on the probationer under the *Roth*, *Drown*, and *Sindermann* decisions.<sup>125</sup>

### 3. WHO BENEFITS?

The more "due processy" dismissal and non-renewal procedures become, the more likely it is that the probationer will have a difficult time securing another job. Present procedures at most universities respect the right of privacy of the professor; and when another institution writes asking the non-renewing school about the terminated instructor, it normally receives a letter from the chancellor or college president that neglects to discuss the circumstances surrounding the termination. Direct inquiries about the separation are "The polite questions that would never be asked"<sup>126</sup> (or answered). However, with the availability of reasons the next institution might learn about sloppy teaching or undesirable extramural (but nonetheless job-related) habits.

The probationer would assuredly be within his rights to waive the reasons; but this might act as some sort of tacit admission, albeit an inference improperly drawn. This is a definite possibility; but teachers groups have recently endorsed the giving of

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<sup>123</sup>Kahn, *supra* note 106, at 522, calls it a "...trend for the obliteration of the distinction..." between tenure and non-tenure. *Accord*, *Shields v. Watrel*, 333 F. Supp. 260, 264 (W.D. Pa. 1971); *Orr v. Trinter*, 444 F.2d at 128; *Thaw v. Board of Public Instruction*, 432 F.2d at 100; *But see* M. Lieberman, *Why Teachers Will Oppose Tenure Laws*, SATURDAY REVIEW, March 4, 1972, at 55, 56 (hereinafter cited as Lieberman).

<sup>124</sup>JOUGHIN, *supra* note 116, at 5-6.

<sup>125</sup>*Sindermann v. Perry*, 430 F.2d at 944.

<sup>126</sup>Telephone conversation with Ms. Doris McKnight, Administrative Assistant to the Academic Senate, University of California, Davis, November 18, 1971.

reasons, arguing that the risk is superior to the alternative, namely summary adjudication.<sup>127</sup>

Balanced against the potential benefit to the instructor is the cost to the university. Financially, the burden is slight; it would only require a few typewritten lines on the terminal appointment form letter.<sup>128</sup> But it would place an emotional strain on the university not felt today. Presently the non-renewed probationer knows only those reasons for his dismissal that the institution wants him to know, as the determination is made in secret. But, if reasons must be furnished, the probationer may learn who it was that spoke out against him. To counter the argument would require an assault on the institution of confidentiality.<sup>129</sup> Proponents of confidentiality assert that without it tenure decisions could not be made candidly. At present the initial decision to rehire is made at the department level by a secret ballot vote of the tenured faculty. The result then becomes the recommendation of the department. Each professor voting for non-renewal might be motivated for a different reason. Each is protected by the rule of confidentiality and each would fear a subsequent public or private confrontation at which he might be forced to explain and defend his reasons. This system provides a very persuasive argument for the institution; but in the end it is an unconvincing one. It may be a good system; but what it does is rescue professors and administrators from potentially distasteful situations by essentially saying "you can trust us to do good" while the fate of a probationer is held in the balance.<sup>130</sup>

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<sup>127</sup>See A.A.U.P., *Statement on Procedural Standards in the Renewal or Non-Renewal of Faculty Appointments*, A.A.U.P. BULLETIN, Summer, 1971. There the A.A.U.P. reversed past policy and supported the giving of reasons. The Legislative Assembly (the reorganized Academic Senate) at U.C.L.A. passed a resolution adopting the A.A.U.P. position on February 8, 1972. It has been tentatively approved by U.C.L.A. Chancellor Charles Young pending the passage of collateral matters by the Legislative Assembly. Letter from David S. Saxon, Executive Vice Chancellor, U.C.L.A., to Marc Levinson, April 5, 1972. (On file at the U.C.D. Law Review office).

<sup>128</sup>See appendix to preceding article.

<sup>129</sup>Discussed in detail in the preceding article at 601-03.

<sup>130</sup>See Kahn, *supra* note 106, at 532 where he asserts that "in general, these systems [i.e., no procedural rights for probationer] have proved workable and have produced many outstanding public universities,"; but Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) stressed that "...fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."; also Lieberman,

#### 4. COMPANIONS TO REASONS

If due process does demand procedural protections for the probationer, reasons are the minimum necessary. There are, however, several preventive devices that should be employed in order that the professor's disqualifying features are pointed out to him prior to the time of his dismissal. It is possible that a good teacher being dismissed so the department can infuse some new blood (at a lower salary) might erroneously believe his teaching or research skills were subpar and mistakenly alter good habits and qualities.

If reasons are to be required, a necessary although not constitutionally-mandated companion must be an annual or semi-annual conference with the department head. These periodic evaluations would not only allow the probationer to change his habits midstream and perhaps after his fate, but it would also take the sting out of the inevitable tenure fight at the end of the probationary period. One danger with ongoing reporting, however, is the opportunity for the institution to misuse it by building a case against the probationer, instead of using the file and discussions for correction.

#### B. THE HEARING

In most cases brought to date the probationer has requested an administrative hearing as well as the reasons for his non-renewal. Few have received them.<sup>131</sup> Aside from the threshold argument that hearings are not constitutionally required because a probationer is entitled to nothing, the primary point of controversy is that when a balancing test is applied, and the interests of the individual are weighed against those of the institution, it is a toss up. In addition, a hearing is a costly, time-consuming device that might be unnecessary due the availability of the courts.<sup>132</sup> Also, the heavy burden of proof on the

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*supra* note 123, at 56, places the blame on incompetent administrators for not being capable of documenting a case against an unworthy probationer.

<sup>131</sup>Auerbach v. Trustees, 330 F. Supp. 808 (C.D. Cal. 1971); Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971).

<sup>132</sup>Drown v. Portsmouth I, 435 F.2d at 1187. Accord, Holliman v. Martin, 330 F. Supp. 1, 12 (W.D. Va. 1971).

probationer might turn the hearing into a rubber-stamp of the decision-making body.<sup>133</sup>

### 1. THE HEARING AND THE GUARANTEED FREEDOMS

No institution is going to admit that it refused to renew the contract of a probationer because of his political affiliation or race. Indeed, that is rarely the cause of a dismissal. But often the dismissed probationer is also a politically controversial figure on the campus and it becomes a difficult factual question to determine whether that was the cause of the non-renewal. Should not the institution be able to fire a probationary teacher whose political views interfere with his objectivity? An administrative hearing might not be the right vehicle for dealing with such a subtle question of fact and constitutional law. If it cannot, the probationer will end up in federal court, anyway, and the hearing would only stall a final decision for another term or year.<sup>134</sup>

A hearing might be a good device to ferret out trivial reasons used to cover up a constitutionally impermissible non-renewal as in *Johnson v. Branch, supra*. But again, quicker and more efficient recourse might lie in the federal courts, especially in light of the possibility that the hearing might be conducted by the body that made the decision.<sup>135</sup>

Regardless of whether an administrative hearing is practical, the United States Supreme Court on occasion has required that a hearing be held in the face of a possible constitutionally impermissible non-renewal.<sup>136</sup> Perhaps the rationale is to allow the

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<sup>133</sup>But see A.C.L.U., *supra* note 31, at 16-17 strongly urging disgruntled probationers to seek hearings.

<sup>134</sup>See *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Steele v. Haley*, 451 F.2d 1105 (1st Cir. 1971); *Chilsey v. Richland Parish School Board*, 448 F.2d 1251 (5th Cir. 1971) on exhaustion of state administrative and arbitral remedies. See also *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1295 (5th Cir. 1971), (concurring opinion) *aff'd en banc* docket no. 29013 at 10 (Judge Wisdom specially concurring) March 27, 1972.

<sup>135</sup>See text at note 151, *infra*.

<sup>136</sup>*Slochower v. Board of Higher Education of New York City*, 350 U.S. 551 (1956); *Connell v. Higgenbotham*, 403 U.S. 207 (1971). The deference the United States Supreme Court has given to administrative hearings is reflected in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

probationer to challenge the decision once before making the expensive, time-consuming trek to federal court.<sup>137</sup>

## 2. THE HEARING AND FUNDAMENTAL FAIRNESS

Graver doubts arise as to whether a hearing is necessary or even helpful in determining whether a non-renewal is arbitrary or capricious. The strongest argument for a hearing is that by merely having it, the decision can no longer be arbitrary in the sense of caprice. The option for a hearing might be enough to shock the decision-making bodies into giving more consideration to each case, especially if the hearing will be a public one. The threat of the probationer going to court is not as viable, due to the cost, time, and emotional strain of cleaning one's linen in public.

### a. Burden of Proof

Although one of the purposes of a hearing is to prepare a transcript for future litigation,<sup>138</sup> its primary function is to provide the probationer with an opportunity to show that the reasons given for the non-renewal are impermissible. As in any other judicial or quasi-judicial proceeding, one party must bear the burdens of proof and persuasion. In order to dismiss a tenured professor the burden of proof is on the university to show that he is no longer fit to teach.<sup>139</sup> The courts have universally held that in the absence of an institution-created expectancy, the burden is on the probationer to prove that the decision not to renew his contract was based upon an arbitrary reason, no reason at all, or a reason without factual basis.<sup>140</sup>

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<sup>137</sup>See Van Alstyne, *supra* note 102, at 859-60.

<sup>138</sup>Sindermann v. Perry, 430 F.2d at 944.

<sup>139</sup>Discussed in part III.B., *supra*.

<sup>140</sup>Roth v. Board of Regents, 446 F.2d at 808 states that the University must furnish some credible reasons and a hearing and then the burden is on the instructor. See Judge Doyle's opinion at 310 F. Supp. 972 (W.D. Wisc. 1970):

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 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. *Id.* at 980.

Coupled with this strict burden of proof requirement is the wide discretion given the board in deference to the idea of a workable probationary period.<sup>141</sup> Confronted with this combination, the probationer may face such an insurmountable hurdle that he will never prevail save in the case of a factual mix-up or a clear-cut 1st Amendment violation. How could a probationer ever carry his burden when he is facing reasons such as “you’re not an inspiring teacher”<sup>142</sup> or “you lack self-direction,”<sup>143</sup> or “you’re nettlesome,”<sup>144</sup> or “we realize that you’re a fine teacher, but we need more Ph.D.’s on our staff for accreditation?”<sup>145</sup> So long as a subsequent reviewing court is satisfied that at least one of the reasons listed against the probationer is not trivial, he will have failed to carry his burden.<sup>146</sup>

*b. Standards*

*Lewis v. Chicago State College* posed another problem: “A professor’s value depends upon his creativity, his rapport with students and colleagues and various other intangible qualities which cannot be measured by objective standards.”<sup>147</sup> In judging a university professor, it is practically impossible to describe the necessary qualities of a perfect one. The courts have refused to set concrete standards for the probationer to meet in order to attain tenure status feeling this would be an unwise limitation of the school’s broad discretion during the probationary period.<sup>148</sup> A professor might be compared to the next year’s graduating class and the decision might be made not to retain him

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<sup>141</sup>Text at note 111, *supra*.

<sup>142</sup>*Drown v. Portsmouth I*, 435 F.2d at 1186 n. 9.

<sup>143</sup>*Simcox v. Board of Education*, 443 F.2d 40 (7th Cir. 1971).

<sup>144</sup>*Albaum v. Carey*, 310 F. Supp. 594 (E.D. N.Y. 1969); “negative attitude”, *Callaway v. Kirkland*, 334 F. Supp. 1034 (N.D. Ga. 1971).

<sup>145</sup>*Fluker v. Alabama State Board of Education*, 441 F.2d 201 (5th Cir. 1971); In *Schreiber v. Joint School District*, 335 F. Supp. 745 (E.D. Wisc. 1972) the reason given was “unprofessional conduct.”

<sup>146</sup>*Drown v. Portsmouth II*, 451 F.2d at 1108-09.

<sup>147</sup>299 F. Supp. 1357, 1359 (N.D. Ill. 1969); See *Roth v. Board of Regents*, 310 F. Supp. at 978 where Judge Doyle concedes that the reasons for non-renewal will often be “[S]ubtle and difficult to articulate and to demonstrate.”

<sup>148</sup>*Shirck v. Thomas*, 447 F.2d 1025 (7th Cir. 1971).

because there are numerous new Ph.D.'s from which to choose. How could the probationer ever hope to compare himself to some nameless and as yet unheard of future draft choice at an administrative hearing?

The final problem with standards is the dilemma of the probationer whose theory of education differed from that of the board. If there were no 1st Amendment problem the board would win by default lest the hearing turn into a "...clash of value judgments."<sup>149</sup>

### 3. WHO RUNS THE SHOW?

If the *Roth* decision is affirmed and the University of California must provide reasons and hearings to disgruntled probationers, the inquiry turns to who would and who should hold them.

Under ARTICLE IX, § 9 of the California Constitution the Regents of the University of California have the final say in managing the school. Therefore, they would either have to pass a resolution or delegate the authority to provide for the hearings. The most likely recipients of the delegated power would be the Academic Senates of the various campuses whose decisions would require confirmation by the various Chancellors and the Regents. Whoever made the final decision would be faced with two alternatives re who should conduct the hearing: an intra-campus tribunal or an extramural one.

#### a. *Intracampus*

Several cases have held that any panel drawn from the campus itself is tainted from the onset with the potential for partiality.<sup>150</sup> The panel would probably be composed of an ad hoc group selected from the Academic Senate's Budget or Privilege and Tenure

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<sup>149</sup>*Drown v. Portsmouth I*, 435 F.2d at 1186.

<sup>150</sup>*Duke v. North Texas State University*, 338 F. Supp. 990 (E.D. Tex. 1971); *Culross v. Weaver*, Docket no. 71-C-75, United States District Court, W. D. Wisconsin, July 23, 1971; *Smith v. Sessions*, Docket no. 1684, United States District Court, S.D. Ga. Augusta Div., February 21, 1972. *But see* T. Cunningham, *Tenure and Non-Tenure*, THE COLLEGE COUNSEL, National Association of College and University Attorneys, at 188, (1971) (hereinafter cited as Cunningham).

Committees and would contain no member from the probationer's department, as opposed to the two who presently serve on each Budget Committee ad hoc reviewing committee. The professors on Academic Senate committees assuredly attempt to be objective; but there is always the potential for interdepartmental backscratching or its opposite, with neither resulting in the probationer receiving justice.

Another possibility would be to import professors from other U.C. campuses to make the determination. This would be advantageous because it would permit practitioners of the probationer's own field to participate in the decision. The drawback with this plan is its impracticability. Not only would it be costly to move tenured faculty from campus to campus like so many chess pieces, but it would take them away from teaching, counselling and researching for long periods of time. This procedure might be a valuable one in exceptional circumstances; but with the increasing number of appeals from tenure denials; it would be unworkable for all cases.

*b. Extramural*

The hearing could fall within the jurisdiction of the California Administrative Procedures Act<sup>151</sup> under the guidance of an A.P.A. hearing officer. The predictable objection to this would be the university's history of handling its own business without having to resort to outsiders who lack not only academic expertise, but also a feeling for the peculiarities of academia. A hearing officer might not be the most qualified person to mediate a debate on the merits of a scholarly article or a discussion as to whether Dr. Y is a mediocre teacher who can be replaced by any number of candidates from next year's plethora of job-seekers.

A more satisfactory selection might be a professional arbitrator. Binding arbitration is part of many public school teachers' employment contracts, and arbitrators have the capacity of becoming an expert in practically any realm of human endeavor. But the reaction again would be academia repelling from having outsiders dictate how the university should handle its

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<sup>151</sup>CAL. GOV'T. CODE § § 11370-11528 (West 1966).

own affairs. If the arbitrator or other mediator were bound by a rigid set of standards, the university community might not find him so objectionable.<sup>152</sup>

*c. Other Procedural Protections*

If *Roth* and *Sindermann* were affirmed, state universities and the University of California would have to wrestle with collateral problems as well. Should the hearings be open to the public? Does a hearing require a right to confront witnesses and present evidence?<sup>153</sup> Is counsel required? Optional? May one side be represented and not the other? Must counsel play a passive role?<sup>154</sup> These and other problems could be worked out by a careful decision in either of the cases by the United States Supreme Court, by regental legislation, or by future litigation, the latter being the most probable.

## VII. THE OPPORTUNITY FOR RESOLUTION.

*Roth* and *Sindermann* have been argued before the United States Supreme Court. No matter how the court resolves the many issues involved, more issues will probably emerge and become the source of future litigation. *Sindermann* is a curious case. There the 5th Circuit held that a non-tenured professor with an institution-created expectancy of future employment was entitled to traditional tenure procedural protections. But if he has no expectancy, then he could be cast aside for any or no reason.<sup>155</sup> Whether or not he had a legitimate expectancy, the institution could not refuse to renew his employment contract in retaliation for the exercise of his 1st Amendment or other guaranteed freedoms rights. *Sindermann* alleged this until he was

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<sup>152</sup>Universities are also very concerned with keeping the courts out of the business of teacher selection. See Cunningham, *supra* note 150, at 192.

<sup>153</sup>Ferguson v. Thomas, 430 F.2d at 856 requires, in addition to a full evidentiary hearing before an impartial tribunal, that the probationer be provided with the names and nature of the testimony of adverse witnesses prior to his confronting them at the hearing.

<sup>154</sup>Ortwein v. Mackey, Docket no. 71-523 Civ. T, United States District Court, M.D. Florida, December 2, 1971, held that counsel must be afforded the opportunity to "... actively participate in the hearing," at 3.

<sup>155</sup>Akin to tenure by estoppel, discussed in Part III.B.1., *supra*.

he was blue in the face; but the court still concluded that it was first up to the district court on remand to determine whether he had a valid expectancy. If he did not, then he will have to shoulder the burden of proof in an administrative hearing as to whether or not the non-renewal violated his 1st Amendment rights. If that hearing is unsatisfactory to either party, then they will end up in federal court again, only presumably one term or year later.

*Sindermann* is perhaps the most complex and muddled case to come out of the field. The Supreme Court may have selected it as an appropriate representative of a labyrinthine body of law. Hopefully the court will clear away all the uncertainties that surround the lives and hopes of the nation's probationary instructors.

## VIII. CONCLUSION

Presently at the University of California the probationary instructor may appeal a non-retention decision only to the Privilege and Tenure Committee of the Academic Senate and only on the procedures followed in the non-renewal decision (as opposed to a *de novo* hearing on the merits of the factual findings below).<sup>156</sup> This review could encompass most of the guaranteed freedoms claims, but the committee has rarely chosen to exercise its potential power.<sup>157</sup> Although the dismissed probationer may resort to the courts to challenge an arbitrary or otherwise constitutionally impermissible dismissal, this is never done.<sup>158</sup>

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<sup>156</sup> See preceding article at 599-600.

<sup>157</sup> Interview with Donald Wollett, Professor of Law and Privilege and Tenure Committee member, University of California, Davis, on the Davis campus, February 18, 1972.

<sup>158</sup> A careful search revealed no court case in which a non-renewed faculty member even attempted to sue the University save the Loyalty Oath cases. See Tolman v. Underhill, 39 Cal. 2d 708, 249 P.2d 280 (1952); Fraser v. Regents of the University of California, 39 Cal. 2d 717, 249 P.2d 283 (1952). A related case is the litigation which resulted when the Regents attempted to fire U.C.L.A. Assistant Professor of Philosophy Angela Davis for her open membership in the Communist party, under the authority of a 1949 Resolution of The Regents. See Karst v. Regents of the University of California, Docket no. C962-388, Los Angeles County Superior Court, October 9, 1969. The decision granting summary judgment against the Regents was recently affirmed in an unpublished 2-1 *per curiam* opinion of the California Court of Appeal, 2nd District, 3rd Division.

Although the giving of reasons and especially the holding of an administrative hearing<sup>159</sup> are fraught with practical problems, they might be an improvement over the present system in which the non-tenured faculty member is at the mercy of a tenured faculty upon whose good faith and good judgment he must rely. These procedural safeguards, as complex and potentially unworkable as they may be, should insure the probationer that his fate was being determined with utmost care. A reversal in *Roth* with a complimentary decision in *Sindermann* will only mean that such procedures are not constitutionally mandated. Perhaps the University of California will choose to lead other state schools in implementing the teachings of *Roth*, regardless of the disposition of the case.<sup>160</sup>

*Marc A. Levinson*

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<sup>159</sup>See one approach to the hearing in Pettigrew and Howard, *The Probationary Professor and the Constitution: A Suggested Model Hearing Code for Contract Nonrenewal Cases*, 8 CAL. WESTERN L. REV. 1, 62-74 (1971).

<sup>160</sup>U.C.L.A. has already moved in that direction; see note 127, *supra*.

