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An Illinois Teacher's Right to Retention - Part I: The Substantive Rights of Teachers

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AN ILLINOIS TEACHER'S RIGHT TO RETENTION

PART I: THE SUBSTANTIVE RIGHTS OF TEACHERS

Illinois, like many states, protects public school teachers with a tenure act, sections 24-11 through 24-15 of the school code.[1] The general purpose of the act is to insure competent instruction by protecting teachers from dismissal[2] because of local political pressure or the capricious acts of school boards or administrators.[3] However, the tenure act is procedural, not substantive; it provides a procedure for dismissal without specifying the substantive grounds for dismissal. A procedure, however, is of little value if no substantive rights exist;[4] if a teacher may be dismissed for any reason, procedural protection against dismissal can only delay the inevitable. Thus, the tenure statute must be read together with the statutory grounds for dismissal, section 10-22.4 of the school code; the procedural rights of teachers must be understood in relation to the substantive rights of teachers.

I. SCHOOL BOARDS AS ADMINISTRATIVE AGENCIES

Section 10-20.7 of the school code authorizes school boards to employ teachers; section 10-22.4 of the school code permits school boards to dismiss teachers under certain circumstances. School boards are administrative agencies.[5] As administrative agencies, they have both rule-making and adjudicative authority.[6] First, they are authorized to make reasonable rules regarding the performance of teachers. Second, they are authorized to determine whether a teacher should be dismissed. These two functions must be carefully separated.[7]

Authority to make reasonable rules regarding the performance of teachers is essential to the effective performance of a school board's duties. Although this authority is not specifically provided by statute, authority to make reasonable

[1] Ill. Rev. Stat. ch. 122 (1969).

[2] Dismissal includes non-renewal of a teaching contract. Roberts v. Lake Central School Corporation, 317 F. Supp. 63 (N.D. Ind. 1970); Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1953). *Contra*, Parker v. Board of Education, 237 F. Supp. 222 (D. Md. 1965). The Illinois tenure statute relates only to dismissals; it does not apply to other means of disciplining teachers. *See* Ill. Rev. Stat. ch. 122 § 24-11 to § 24-15.

[3] Alabama State Teachers Association v. County Board, 289 F. Supp. 300 (M.D. Ala. 1968); Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1953); Betebenner v. Board of Education, 336 Ill. App. 448, 84 N.E.2d 569 (1959). Case law frequently limits the application of the intent of the tenure statute solely to tenured teachers. Nonetheless, if the statute was intended to insure quality education, the authority of school boards to dismiss even non-tenured teachers for reasons unrelated to teaching performance must be limited. To hold otherwise might permit school boards to screen their beginning teachers to insure they are docile and thus to subvert the intent of tenure legislation.

[4] *See* Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970).

[5] The Illinois Administrative Review Act applies to school boards. Ill. Rev. Stat. ch. 122, § 24-16. *See* Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Lucia v. Duggan, 303 F. Supp 122 (D. Mass. 1969).

[6] *See* K. Davis, *Administrative Law Text*, ch. 2, 5, 6, 8, (1959).

[7] Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

rules, if not inherent with administrative agencies, may be derived from at least two sections of the school code. Such authority may be included within the additional powers of section 10-23 or may be encompassed in the phrase "other sufficient cause" within section 10-22.4.

The specific limits upon the power of school boards to make rules has not been fully defined. Nonetheless, a few trends have developed. First, rules must be written to be effective.[8] The rationale behind this limitation is to adequately inform teachers of their duties in advance of performance. Without such knowledge teachers would be unable to perform their duties acceptably and administrators would be able to discipline teachers merely by arbitrarily inventing or changing rules without adequate notice. Second, rules must be reasonable.[9] The rationale behind this limitation is to prevent unnecessary conflicts between parties to the education process, conflicts which hinder effective education. Such rules must relate to the primary function the legislature delegated to the school boards. The major legal limitation which insures the reasonableness of school rules is teachers' constitutional rights. A major policy limitation upon school rules are the principles of academic freedom.

Since a school board's enforcement of the law and its rules in specific cases has its major impact upon individual teachers, a school board's adjudicative authority is probably more important than a school board's rule-making authority. Although authority to adjudicate is not specifically provided by statute, the same two sections, 10-23 and 10-22.4, mentioned previously may authorize school boards to adjudicate in appropriate cases. Although other statutory sources of power may exist, school boards, regardless of the statute, have an affirmative duty to scrutinize teachers to insure competence.[10]

The adjudicative authority of school boards is not without limitation; such authority must not interfere with the judiciary's constitutional authority to hear cases and controversies. Nonetheless, although a school board has no jurisdiction to hear questions of law,[11] the courts recognize that school boards are the best forum for the resolution of local educational problems.[12] This policy is based on the belief that school boards have greater expertise than the courts in matters of education, even though local school board members may possess little professional training in education. Therefore, the courts have allowed

[8] Keyishian v. Board of Regents, 385 U.S. 589 (1967); Ramsey v. Hopkins, 320 F. Supp. 447 (N.D. Ala. 1970); Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970); Lucia v. Duggan, 303 F. Supp. 122 (D. Mass. 1969). These rules should be applied with even hand. *See* Ramsey v. Hopkins, 320 F. Supp. 447 (N.D. Ala. 1970). *See also* Comment, 1970 Wisc. L. Rev. 162. The article views the selective application of rules as the criterion for reversing a dismissal on the basis of unequal protection.

[9] Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970). *See* K. Davis, *Administrative Law Text*, § 5.03 (1959).

[10] Shelton v. Tucker, 364 U.S. 479 (1960); Adler v. Board of Education, 342 U.S. 485 (1952); Rackley v. School District Number 5, 258 F. Supp. 676 (D.S.C. 1966).

[11] *See* K. Davis, *Administrative Law Text*, ch. 19, 29, 30. (1959).

[12] Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970).

school boards to be the finders of facts regarding dismissals.[13] A school board thus has authority to determine in the first instance (primary jurisdiction[14]) whether the facts justify dismissal (adjudicative facts[15]).

A school board's findings regarding facts requiring adjudication will generally not be reviewed unless opposed to the substantial weight of the evidence,[16] or unless indicative of an abuse of discretion.[17] Since the courts are always reluctant to substitute their judgment of the facts for that of a school board, a pre-requisite of action on the merits of any case in either state or federal court is that administrative remedies be exhausted.[18]

II. The Substantive Rights of Teachers Regarding Dismissals

Extent of School Board Discretion

Although the discretion of school boards to adjudicate is quite broad,[19] it is probably limited in regard to dismissals to the grounds stated in section 10-22.4 of the school code. However, the limitations upon the discretion of school boards are affected by the existence of two major misconceptions. These misconceptions seem to have led some courts to allow school boards an adjudicative discretion in questions of law which results in unlimited power of school boards to dismiss.

The first major misconception regarding the discretion of school boards, and the most direct expression of the theory of absolute discretion, is that teachers, particularly non-tenured teachers, serve at the will of the school boards. The Illinois Supreme Court has written:

> Under the prior decisions of this Court no person has a right to demand that he or she will be employed as a teacher. The school board

[13] *Id.*; Yuen v. Board of Education, 77 Ill. App. 2d 353, 222 N.E.2d 570 (1966).

[14] Hauswald v. Board of Education, 20 Ill. App. 2d 49, 155 N.E.2d 319 (1959); Jepsen v. Board of Education, 19 Ill. App. 2d 204, 153 N.E.2d 417 (1958). *See* K. Davis, *Administrative Law Text*, ch. 19 (1959).

[15] The reader should note the reference is to facts and not law and he should also note the distinction between adjudicative facts and legislative facts. Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970); Lucia v. Duggan, 303 F. Supp. 122 (D. Mass. 1969). *See* K. Davis, *Administrative Law Text*, ch. 7 (1959). By way of information: an adjudicative fact is a fact of particular or special relevance to a specific person; a legislative fact is a fact of general relevance to a class of people. Interestingly, the determination of adjudicative facts generally requires a hearing.

[16] The substantial evidence rule applies to the review of school board decisions. *See* Administrative Review Act, Ill. Rev. Stat. ch. 110 (1969); *Also see* Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Rackley v. School District Number 5, 258 F. Supp. 676 (D.S.C. 1966); Williams v. Sumter School District Number 2, 255 F. Supp. 397 (D.S.C. 1966).

[17] Abuse of discretion is a commonly cited but vague limitation on the power of school boards. Frequently, this standard is combined with others: "not arbitrary," "not unreasonable," "not capricious."

[18] Bonner v. Texas City Independent School District, 305 F. Supp. 600 (S.D. Texas 1969). *See* K. Davis, *Administrative Law Text*, ch. 20 (1959).

[19] This concept has become a cliché. Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970); Roberts v. Lake Central School Corporation, 317 F. Supp. 63 (N.D. Ind. 1970); Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1969).

> has the absolute right to decline to employ or to re-employ any applicant for any reason whatever. It is no infringement upon the constitutional rights of any future board to decline to employ a teacher in the schools. It is free to contract with whomsoever it chooses. Neither the Constitution nor the statute places any restriction on this right and no one has any grievance which the court shall recognize simply because the board of education refuses to contract with him or her.[20]

To an extent, this theory seems logical: If private employers have an absolute right to hire and fire their employees, why should public employers, like school boards, not have the same right?

In view of the following three considerations, why should the adjudicative authority of the school board not apply to produce absolute discretion? First, since the tenure statute provides no substantive protection for teachers, especially if non-tenured, school boards are apparently free to make any substantive determinations necessary for dismissal. Second, since the statutory grounds for dismissal in section 10-22.4 are extremely vague, the power of school boards to dismiss seems unlimited. Finally the courts narrowly construe the tenure statute in favor of the school boards since new liability in derogation of common laws was created.[21] The school boards rather than the teachers are given the benefit of the doubt regarding dismissals.

The theory that teachers serve at the will of the school board is contrary to the legislative intent of the tenure statute. Absolute power has no place in a democratic society. Indeed, the purpose of the tenure statute was to prevent such absolute power:

> The Teacher Tenure law was enacted primarily for the protection of Illinois teachers who prior to its enactment in 1941, serve at the pleasure of the boards of directors or education. Its object was to improve the Illinois school system by assuring teachers of experience and ability a continuous service and rehiring based upon merit rather than failure to rehire upon reasons that are political, partisan, or capricious.[22]

School boards thus do not have an absolute right to hire and fire employees because the legislature has determined that the society's interest in quality education must prevail over local politics and personal dislike.

The adjudicative authority of school boards is limited to questions of fact and does not extend to questions of law.[23] A school board, untrained in the profession of education and subject to the great pressure of local politics, does not have the expertise to decide questions of law. Therefore, the courts should

[20] Anderson v. Board of Education, 390 Ill. 412, 434, 61 N.E.2d 562, 572 (1954). The court seems to fail to address itself to the question of the constitutional rights of teachers. The reader should note how this theory relates to the right-privilege distinction, the second major misconception.

[21] *Id.* at 422, 61 N.E.2d at 567; Biehn v. Tess, 340 Ill. App. 140, 91 N.E.2d 160 (1950).

[22] Donahoo v. Board of Education, 413 Ill. 422, 425, 109 N.E.2d 787, 789 (1953).

[23] *See* K. Davis, *Administrative Law Text*, ch. 19, 29, 30 (1959).

generally decide, for example, what constitutes incompetence; the school boards should decide in the first instance if the facts fit the legal standard.

Furthermore, the three considerations used to buttress the theory that teachers, especially non-tenured teachers, serve at the will of school boards, do not seem to justify a theory of absolute discretion. First, to view the procedural rights of teachers apart from the substantive rights would result in an incoherent and illogical view of the rights of teachers. Second, vague statutory grounds for dismissal may be unconstitutional and do not seem to justify continued vague interpretation which undermines the security of the teaching profession. Finally, the legislative intent of quality education is subverted by the narrow construction of the tenure statute which gives the benefit of the doubt to school boards rather than teachers.[24]

The second major misconception regarding the discretion of school boards is the theory that there is no right to public employment. The U.S. Supreme Court on one occasion explained: "[T]eachers have no right to work for the state in the school system on their own terms."[25] This argument reflects the theory of absolute discretion as much as the previous theory, but is more subtle since this argument avoids mentioning the term.

The logic of this argument has been refuted.[26] The circular nature of the argument can easily be demonstrated. The logic of the theory is as follows: if there is no right to public employment, then theoretically no injury can occur by dismissal; therefore, since no injury has occurred, no remedy accrues. If one realizes that a right is essentially a legally protected interest for which the law provides a legal remedy, the circle is complete.[27] The United States Supreme Court clearly recognized the fallacy of such logic specifically in relation to teachers:

> To draw from the language [quoted above at note 25] the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue.[28]

Despite the repudiation of the doctrine by the highest Court,[29] the doctrine is so deeply ingrained in the minds of some lawyers that many courts continue to pay it lipservice[30] and some even give it effect.[31] Therefore, many courts merely circumvent the doctrine by arguing that the following principles are exceptions

[24] Hauswald v. Board of Education, 20 Ill. App. 2d 49, 155 N.E.2d 319 (1959).

[25] Adler v. Board of Education, 342 U.S. 485, 492 (1952).

[26] Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

[27] Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[28] Wieman v. Updegraff, 344 U.S. 183, 191 (1960).

[29] *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); Lucia v. Duggan, 303 F. Supp. 122 (D. Mass, 1969).

[30] Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970).

[31] Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1966); Freeman v. Gould Special School

to the doctrine of absolute discretion: unconstitutional conditions or effects,[32] expectancy of further employment,[33] violations of due process,[34] or breaches of contract.[35]

Limiting school boards to the reasonable exercise of their power does not defeat the purpose of locally controlled education; limits on discretion merely check absolute power, protect professionals from arbitrary dismissal, and allow teachers independently to exercise their professional judgments for the benefit of both students and society. A school board has no right to be arbitrary.[36]

No one questions the right and duty of school boards to insure competent instruction; but the discussion does not begin and end with "discretion." When the power of the school board is exercised to the detriment of the teacher, the child, and the society, and when that power unduly infringes upon academic freedom, such power must be limited in the interest of education. The vague and infrequently used safeguards like "abuse of discretion," "good faith," "not arbitrary," and "not unreasonable" provide little guidance. The only truly effective limit to the discretion of school boards is a clear understanding by the courts of what constitutes adequate grounds for dismissal.

Grounds for Dismissal: The Statute

Apparently, the statutory grounds for dismissing non-tenured teachers are identical to the grounds for dismissing tenured teachers. Only the procedure is different.[37] The first sentence of section 24-12 of the school code specifically states that the grounds for dismissal found in section 10-22.4 of the school code apply to any teacher "notwithstanding the entry upon contractual continued service." Also, section 10-22.4 itself makes no distinction between tenured and

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District, 405 F.2d 1153 (8th Cir. 1969); Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970); Shirk v. Thomas, 315 F. Supp. 1124 (S.D. Ill. 1970); Parker v. Board of Education, 237 F. Supp. 222 (D. Md. 1965).

[32] Pickering v. Board of Education, 391 U.S. 563 (1968).

[33] Johnson v. Branch, 364 F.2d 117 (4th Cir. 1966); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947). *Contra.* Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969). *But see* Comment, 1970 Wis. L. Rev. 162.

[34] Thaw v. Board of Public Instruction, 432 F.2d 98 (5th Cir. 1970); Lucas v. Chapman, 430 F.2d 98 (5th Cir. 1970); Orr v. Trinter 318 F. Supp. 1041 (S.D. Ohio 1970); Roth v. Board of Regents, 310 F. Supp. 984 (W.D. Wis. 1970); Gouge v. Joint School District No. 1, 310 F. Supp. 984 (W.D. Wis. 1970).

[35] Compton v. School Directors of District No. 14, 8 Ill. App. 2d 243, 131 N.E.2d 544 (1956).

[36] Wieman v. Updegraff, 344 U.S. 183 (1960); Lucas v. Chapman 430 F.2d 98 (5th Cir. 1970); Johnson v. Branch, 364 F.2d 117 (4th Cir. 1966); Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970); Hanover Township Federation of Teachers v. Hanover Community School Corp., 318 F. Supp. 757 (N.D. Ind. 1970); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970); Allione v. Board of Education, 29 Ill. App. 2d 264, 173 N.E.2d 13 (1961); Smith v. Board of Education, 12 Ill. App. 2d 224, 153 N.E.2d 377 (1958). "Arbitrary" refers not only to procedural arbitrariness but to substantive arbitrariness as well; both problems are within the scope of the due process clause of the fourteenth amendment. Therefore, a dismissal for arbitrary reasons may violate substantive due process.

[37] Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1953). *See also* Meridith v. Board of Education, 7 Ill. App. 2d 477, 130 N.E.2d 5 (1955).

non-tenured teachers regarding grounds for dismissal. Nonetheless, a few Illinois courts have inferred a vague distinction regarding grounds for dismissal from the existence of less rigid procedural protection provided for non-tenured teachers.[38] Such an inference, however, seems unjustified for several reasons. First, Illinois provides an internship period for elementary and secondary teachers, exclusive of the first two years of employment. Thus, in addition to other educational courses, all Illinois teachers, before they are fully certified, must successfully complete a nine-week period of student teaching under the direct supervision of an experienced teacher.[39] Second, non-tenured teachers perform the same work tenured teachers perform. Third, since 1941 the state legislature has expanded the procedural protection provided non-tenured teachers. Most importantly, an inference of substantive differences from procedural differences serves no function, since the federal courts are beginning to enforce the same procedural rights for both non-tenured and tenured teachers.[40] Of course, since the statutory grounds for dismissal for non-tenured teachers are identical to those for tenured teachers, the procedural distinction for the two classes of teachers may constitute unequal protection of law.[41]

Grounds for Dismissal: the Problem

Considerable confusion dominates Illinois law regarding the specific grounds which justify dismissing teachers, whether tenured or non-tenured. Most of this confusion stems from the vague, and thus perhaps unconstitutional, statutory

[38] Elder v. Board of Education, 60 Ill. App. 2d 56, 208 N.E.2d 423 (1965).

[39] Ill. Rev. Stat. ch. 122, § 21-5 (1969).

[40] *See, e.g.* Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970).

[41] All the requirements of declaring the tenure statute unconstitutional on grounds of unequal protection of the law seem to have been met:

(1) The procedural protection afforded those with non-tenured status is different from that for those with tenure status.

(2) The difference in procedural protection has no basis in fact since both tenured and non-tenured teachers perform the same work.

(3) The difference in procedural protection has no rational basis since the statute itself provides that grounds for dismissing tenured and non-tenured teachers are identical.

Nonetheless, no courts have yet recognized the logic of this proposition. Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969); Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970). These cases approached the threshold of recognizing this fact but withdrew holding that tenure had both rational and traditional basis. They argued, along with several Illinois courts, that school districts need a chance to be sure that the people they hire as teachers really can teach. This argument might have validity did Illinois not provide for specialized training in education and for an internship period which Illinois teachers must successfully complete before they are fully certified to teach in Illinois.

Additionally, non-tenured status seems to permit school boards to subvert the legislature's intent of providing quality education by screening beginning teachers to insure they do not exercise their constitutional rights in a displeasing manner. After not exercising their constitutional rights for two or three years, many teachers may have become accustomed to not exercising those rights. Occasional dismissals may reinforce in the minds of even tenured teachers the necessity of not exercising one's constitutional rights in a way critical of the schools. Thus, non-tenured status, in addition to providing unequal protection of the laws, may have a chilling effect upon the exercise of the right to speak.

standards of section 10-22.4 of the school code. Section 10-22.4, which combined two earlier sections,[42] provides:

> The School Board shall have the power to dismiss a teacher for incompetency, cruelty, negligence, immorality, or other sufficient cause and to dismiss any teacher, whenever, in its opinion he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Section 24-10 to 24-15, inconclusive. Marriage is not a cause of removal.

This statute, however, does not define its terms.

The difficulties created by the vague statutory terms are multiplied by the vague judicial interpretation of those terms. One Illinois court's opinion demonstrates such an interpretation:

> School directors are vested by that statute [10-22.4] with authority to dismiss a teacher for, among other specified grounds "other sufficient cause." It is axiomatic that such authority vests a discretion trammeled only by proof of that discretion's abuse.[43]

This opinion shows the relationship of the grounds for dismissing teachers to questions of discretion and other problems of administrative law. To construe the phrase in this manner seems to allow school boards an absolute descretion to determine not only questions of fact but also questions of law. Also, the opinion seems to ignore the meaning of the word sufficient.

Another court has interpreted a similar ambiguous phrase in the statute with the effect of further obscuring the issues:

> The best interest of the schools of the district is the guiding star of the Board of Education and the courts to interfere with the exercise of the powers of the Board in that respect is unwarranted assumption of authority and can only be justified in cases where the Board has acted maliciously, capriciously and arbitrarily.[44]

What constitutes the "best interest of the school"? Does the best interest of the school include bowing to local political pressure, or does the phrase reflect only educational interest? As a result of this vague standard, administrators and boards of education are permitted to claim absolute discretion since almost every dismissal may be rationalized as required by the "best interest of the school," regardless of the real reasons involved.

By interpreting the vague statutory language so freely, the courts have allowed factors unrelated to teaching performance to result in dismissals.[45] The rationale for such a policy has been that factors other than teaching performance

[42] § 6-36 and § 7-16 of the school code of 1945.

[43] Pearson v. Board of Education, 12 Ill. App. 2d 44, 50, 138 N.E.2d 326, 329 (1957). *See* Jepsen v. Board of Education, 19 Ill. App. 2d 204, 153 N.E.2d 417 (1958) (for definition of "cause").

[44] Meridith v. Board of Education, 7 Ill. App. 2d 477, 486, 130 N.E.2d. 5, 10 (1955).

[45] *See* Beilan v. Board of Education, 357 U.S. 399 (1958); Adler v. Board of Education, 342 U.S. 485 (1952); Smith v. Board of Education, 365 F.2d 770 (8th Cir. 1966) (then Appellate Judge Blackmun wrote the opinion).

may result in a loss of respect from students, or may result in conveying the "wrong" values to students. One court explains that:

> [A] teacher is something of a leader of pupils of tender age, resulting in admiration and emulation, . . . the Board might properly fear the effect of social conduct in public, not in keeping with the dignity and leadership they desired from teachers.[46]

Although a teacher's public activities may occasionally justify dismissal, a detrimental effect of such activities on the teacher's performance is frequently never proved. Some courts seem to allow grounds for dismissal to be inferred from unpopular activities.[47] The consequence of such a policy is that teachers are made second class citizens. Everything they do, not just the performance of their job, may constitute grounds for dismissal.[48] Some courts have instinctively recognized that activities unrelated to teaching should not be grounds for dismissal unless a detrimental effect upon teaching performance is shown.[49] When many factors besides teaching performance affect dismissals, the likelihood that political reasons or personal dislikes rather than good education may become the grounds for dismissal is increased, and the purpose of the tenure law of insuring quality education is circumvented.

Although many courts continue to permit this confusion concerning the grounds for dismissal, some have enforced the requirement that the reasons for a school board's dismissal be specific. The Illinois Supreme Court has held that the requirement which states that reasons for dismissal must be specific is mandatory, and not permissive.[50] Another Illinois court has defined a specific reason as a statement sufficient to fairly appraise the teacher of the charges in enough detail to enable the teacher to refute them.[51] The federal courts support this requirement.[52]

Grounds for Dismissal: Constitutional Limitations

Regardless of tenure or contract,[53] dismissals may not be based upon constitutionally impermissible reasons. School boards may not impose unconstitutional conditions upon public employment:[54] they cannot dismiss a teacher because he

[46] Scott v. Board of Education, 20 Ill. App. 2d 292, 296, 156 N.E.2d 1 (1959).

[47] *See, e.g.*, Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), where the lower court permitted dismissal.

[48] Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

[49] Pickering v. Board of Education, 391 U.S. 563 (1968); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Hanover Township Federation of Teachers v. Hanover Community School Corporation, 318 F. Supp. 757 (N.D. Ind. 1970); Yuen v. Board of Education, 77 Ill. App. 2d 353, 222 N.E.2d 570 (1966); Werner v. Community Unit School District No. 4, 40 Ill. App. 2d 491, 190 N.E.2d 184 (1963); Allione v. Board of Education, 29 Ill. App. 2d 261, 173 N.E.2d 13 (1961).

[50] Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1953).

[51] Wade v. Granite City Community School District No. 9, 71 Ill. App. 2d 34, 218 N.E.2d 19 (1966).

[52] *See, e.g.*, Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970).

[53] Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendes, 398 F.2d 287 (7th Cir. 1968); Roberts v. Lake Central School Corporation, 317 F. Supp. 63 (N.D. Ind. 1970); Lucia v. Duggan, 303 F. Supp. 122 (D. Mass. 1969).

[54] Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cafeteria Workers v. McElroy, 367 U.S. 886 (1960); Johnson v. Branch,

exercised his constitutional rights, particularly his first amendment rights, in a way critical of or irritating to the school board.

Pickering v. Board of Education,[55] a United States Supreme Court case which reversed a dismissal which had been affirmed by the Illinois Supreme Court, is the landmark decision in this area. Pickering was dismissed for writing a letter to a local newspaper. In the letter he complained about the school district's financial policies. The United States Supreme Court held that Pickering's freedom of expression outweighed the state's interest in the smooth operation of the schools. Although the result of this balancing process may not always be the same,[56] the court did emphasize the unique position of teachers to comment on school affairs:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools should best be spent. Accordingly, it is essential that they be able to speak out freely on questions without fear of retaliatory dismissal.[57]

The court wrote that freedom of speech must have extremely large breadth since "it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."[58] No chilling effect on freedom of speech will be permitted.[59]

On the basis of this logic, other rights have also been protected. Within limits, a teacher's freedom of association to join even unpopular groups is guaranteed.[60] The associational rights of teachers to unionize without retaliation by the school board or administration has been recognized.[61] Teachers' rights of symbolic speech in growing beards and mustaches and in dressing differently are being protected.[62] The right of teachers not to be discriminated against racially is well-established in law.[63] Such rights are protected whether these reasons are used by the school board as reasons for dismissal, or are merely disguised.[64] The courts thus may look beyond the grounds the board claims justify dismissal.

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364 F.2d 177 (4th Cir. 1966); Jones v. Battle, 315 F. Supp. 601 (D. Conn. 1970). *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

55 391 U.S. 563 (1968).

56 Knarr v. Board of School Trustees, 317 F. Supp. 832 (N.D. Ind. 1970); Jones v. Battle, 315 F. Supp. 601 (D. Conn. 1970).

57 Pickering v. Board of Education, 391 U.S. 563, 572 (1968).

58 *Id.* at 574.

59 Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

60 Keyishian v. Board of Regents, 385 U.S. 589 (1967).

61 McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Hanover Township Federation of Teachers v. Hanover Community School Corporation, 318 F. Supp. 757 (N.D. Ind. 1970); Roberts v. Board of Public Instruction, 317 F. Supp. 63 (N.D. Ind. 1970).

62 Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970); Braxton v. Board of Public Instruction, 303 F. Supp. 958 (M.D. Fla. 1969); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

63 Freeman v. Could Special School District, 405 F.2d 1153 (8th Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Alabama State Teachers Association v. County Board, 289 F. Supp. 300 (M.D. Ala. 1968).

64 Lucas v. Chapman, 430 F.2d 98 (5th Cir. 1970); Johnson v. Branch, 364 F.2d 177 (4th

Grounds for Dismissal: A Possible Solution

This writer believes that the following criteria may be useful when dealing with dismissals or when interpreting the vague statutory grounds for dismissal in Illinois: (1) Does the teacher possess suitable academic qualifications? (2) Does the teacher pursue a reasonable relevant program of planned instruction within the classroom? (3) Does the teacher appropriately supervise students in his charge and maintain appropriate classroom discipline? (4) Does the teacher make a reasonable effort to cooperate with the administration and other faculty? (5) Has the teacher actually acted immorally and has such action affected his teaching performance?

Suitable Academic Qualifications

Teachers must have sufficient knowledge and skill to convey the information necessary to educate students. Only after an internship of student teaching does Illinois license those persons who have sufficient knowledge and skill to teach.[65] Only licensed teachers may teach.[66] A teaching certificate is prima facie evidence of competence.[67]

The initial determination of whether a teacher will be hired is left to the school administrators and school boards.[68] Such determinations should be based upon the educational needs of the district. If a school district has decided that a teacher possesses the requisite academic qualifications, its later claims that the teacher's academic qualifications are lacking would be inconsistent. If a teacher does not possess suitable academic qualifications, he should not have been hired in the first place. Thus, suitable academic qualification is more a factor of initial hiring than a ground for dismissal.

The phrase "not qualified to teach" in section 10-22.4 of the school code should generally be limited to the initial determination of suitable academic qualifications. Since the state determines who is qualified to teach through its certification requirements, a school board's authority to determine qualifications seems to be limited. Nonetheless, the phrase "not qualified to teach" can be used to prevent fraud upon a school district by a teacher who actually does not possess the requisite degree or certificate. Also, it may remedy a teacher's failure to meet a condition of further professional growth.[69]

Although any reason for dismissal indicates that the school board does not believe a teacher is "qualified to teach," such a general meaning smacks

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Cir. 1966); Ramsey v. Hopkins, 320 F. Supp 447 (N.D. Ala. 1970); Hanover Township Federation of Teachers v. Hanover Community School Corporation, 318 F. Supp. 757 (N.D. Ind. 1970); McGee v. Richmond Unified School District, 306 F. Supp. 1052 (N.D. Cal. 1969). A constitutional violation should be specifically alleged. Thau v. Board of Public Instruction, 432 F.2d (5th Cir. 1970).

65 Ill. Rev. Stat. ch. 122, § 21-5 (1969).

66 *Id.* § 21-1.

67 Neville v. School Directors, 36 Ill. 71 (1864).

68 Ill. Rev. Stat. ch. 122, § 10-20.7 (1969).

69 *Id.* § 24-5.

of absolute discretion and obscures the issues of a dismissal case. By interpreting dismissals for lack of qualifications narrowly, the courts do not prevent the district from dismissing teachers on other grounds, such as incompetence, at whatever point it occurs within a teacher's career. Even tenured status does not seem to justify giving teachers a patronage-like job which allows them to slight their students.

Reasonably Relevant Instruction

A teacher's primary responsibility is to educate his students.[70] This responsibility must be the factor of ultimate importance affecting dismissals. The courts, interpreting the intention of the legislature, have ruled that local politics, personal dislikes, and other similar grounds should not interfere with quality education.[71] School boards are free to set reasonable rules regarding the performance of teachers, but a decent respect for academic freedom and for legitimate differences of opinion among professionals requires that only *substantial variations* from such reasonable rules without justification constitute grounds for dismissal.[72]

Reasonably relevant instruction is probably best indicated by student interest in learning, and by adequate planning. Since planning is essentially a mental process that will normally result in student interest in learning, the manner in which a teacher conducts his class is the best manifestation of his planning and his ability to interest students. Good faith written evaluations of performance therefore are important in determining how successfully a teacher achieved a program of reasonably relevant instruction.[73] Written lesson plans, for example, may be helpful to substitutes, but their absence does not necessarily indicate the lack of a reasonably relevant program of planned instruction.[74] The continued use of class time for irrelevant matters, however, may justify dismissal if severe.[75]

Incompetence, within the meaning of section 10-22.4 of the school code, should be interpreted as the absence of a reasonably relevant program of

[70] *See, e.g.*, Yuen v. Board of Education, 77 Ill. App. 2d 353, 222 N.E.2d 570 (1966).

[71] Alabama State Teachers Association v. County Board, 289 F. Supp. 300 (M.D. Ala. 1968); Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1953); Betebenner v. Board of Education, 336 Ill. App. 448, 84 N.E.2d 569 (1959).

[72] *See* Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Hanover Township Federation of Teachers v. Hanover Community School Corporation, 318 F. Supp. 757 (N.D. Ind. 1970); Hauswald v. Board of Education, 20 Ill. App. 2d 49, 155 N.E.2d 319 (1959).

[73] *See, e.g.*, Roberts v. Board of Public Instruction, 317 F. Supp. 63 (N.D. Ind. 1970); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); McGee v. Richmond Unified School District, 306 F. Supp. 1052 (N.D. Cal. 1969); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969); Teel v. Pitt County Board of Education, 272 F. Supp. 703 (E.D.N.C. 1967); Williams v. Sumter School District No. 2, 255 F. Supp. 397 (D.S.C. 1966); Scott v. Board of Education, 20 Ill. App. 2d 292, 156 N.E.2d 1 (1959); Wells v. Board of Education, 85 Ill. App. 2d 312, 230 N.E.2d 6 (1967).

[74] Wells v. Board of Education, 85 Ill. App. 2d 312, 230 N.E.2d 6 (1967); Hauswald v. Board of Education, 336 Ill. App. 448, 84 N.E.2d 569 (1959).

[75] Robbins v. Board of Education, 313 F. Supp. 642 (N.D. Ill. 1970); Cadman v. School Directors of School District No. 14, 288 Ill. App. 627, 6 N.E.2d 246 (1937).

planned instruction. Although incompetence has frequently been used as grounds for dismissal, and even as an excuse to disguise constitutionally impermissible reasons for dismissal, the term has never been defined regarding teachers. Since teachers are professionals, screened by the state for competence, legitimate differences of opinions regarding methods of instruction are expected. If the difference of opinion is legitimate, academic freedom requires that the benefit of the doubt be given to the teacher.

Appropriate Supervision

Appropriate supervision and classroom discipline refer both to the presence of the teacher within the classroom and to the available methods of disciplining students. Although a teacher is not a policeman, appropriate supervision and classroom discipline generally require the presence of the teacher in his classroom. However, temporary periods of non-attendance in the classroom for legitimate reasons are probably justified.[76] Students are unsupervised for short periods of time when sent on errands or passing in the halls. Sending trustworthy students to other parts of the building for valid reasons is common practice and may be appropriate educational technique.[77] Appropriate supervision and classroom discipline limit the available means of disciplining students. The physical abuse of a student, corporal punishment, is probably unacceptable.[78] Of course, a teacher does not waive his right to self-defense by becoming a teacher. Mental cruelty, a terribly vague criterion in other areas of law, probably does not justify dismissal unless a teacher maliciously intended harm by actions over an extended period of time.[79]

Appropriate supervision and classroom discipline may be related to several statutory grounds for dismissal: incompetence, cruelty, or negligence. Appropriate supervision and classroom discipline may be related to incompetence to the extent that a noisy and uncontrolled classroom prevents learning. However, considering recent educational theories regarding individualized instruction, noise, and apparently uncontrolled behavior, may not be incompetence but valid educational technique. Appropriate supervision and classroom discipline are related to cruelty and negligence to the extent that the student was injured by inappropriate supervision and discipline. When due care is supported by lack of injury, no legitimate grounds for dismissal exist.

At any rate, Illinois courts have held that since lack of discipline and control are remediable causes for dismissal, tenured teachers are entitled to a written warning and opportunity to correct their errors.[80] The federal courts have begun to enforce the requirement of a warning for non-tenured teachers

[76] Hauswald v. Board of Education, 20 Ill. App. 2d 49, 155 N.E.2d 319 (1959). *See* Thau v. Board of Public Instruction, 432 F.2d 1153 (8th Cir. 1969).

[77] Allione v. Board of Education, 29 Ill. App. 2d 264, 173 N.E.2d 13 (1961).

[78] Miller v. Board of Education, 51 Ill. App. 2d 20, 200 N.E.2d 838 (1964).

[79] Lusk v. Board of Education, 20 Ill. App. 2d 252, 155 N.E.2d 319 (1959).

[80] Werner v. Community School District No. 4, 40 Ill. App. 2d 491, 190 N.E.2d 184 (1963).

as well as tenured teachers, as an incident of the due process requirements of adequate notice.[81] Just as a matter of good policy, a written warning seems necessary in most problems of discipline.

Reasonable Effort at Cooperation

The state has an interest in the smooth functioning of its educational system.[82] Therefore, teachers must try to cooperate with administrators. Teachers have been dismissed for insubordination or failure to cooperate with the administration.[83] Failure to cooperate or insubordination frequently seems to be a make-weight argument cut from the cloth of absolute discretion.

The charges of failure to cooperate often result from disagreement regarding policies between teacher and administrator, from local political pressure or union activity, or from personal caprice.[84] The following quotation amply demonstrates this fact:

> Although he was a devoted, highly skilled and imaginative teacher, he has difficulty in developing new programs and in carrying out school policies because of substantial and continuing disagreements with administrators and supervisors. Denial of tenure was caused by a desire on the part of Dr. Carey, the school superintendant, to eliminate from the school system a nettlesome individual who created annoying administrative problems. Nothing the plaintiff said or did in connection with labor negotiations on behalf of the Jeriche Teachers Association contributed to Dr. Carey's decision.[85]

This court's rationale seems to justify administrative caprice. How can a teacher perform his teaching duties in a "devoted, highly skilled, and imaginative" way, yet be dismissed for failing to cooperate? A teacher's job is to teach, not to vie for administrative approval. Another court writes:

> This accusation [that a teacher threw a paper towel out a window] and denial creates a situation that would be detrimental to the school if permitted to remain unheeded.[86]

If mere disagreement with the administration creates grounds for dismissal, as in the case just cited, any teacher can be dismissed at any time, at the pleasure of administrators, regardless of good educational technique.

Tenure legislation was enacted with the intent of preventing the capricious acts of administrators which hinder effective education. Disagreements between

[81] *See* Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

[82] Shelton v. Tucker, 364 U.S. 479 (1960); Adler v. Board of Education, 342 U.S. 485 (1952); Knarr v. Board of School Trustees, 317 F. Supp. 832 (N.D. Ind. 1970).

[83] *See, e.g.*, Knarr v. Board of School Trustees, 317 F. Supp. 832 (N.D. Ind. 1970); Robinson v. Community Unit School Dist. No. 7, 35 Ill. App. 2d 325, 182 N.E.2d 770 (1962); Jepson v. Board of Education, 19 Ill. App. 2d 204, 153 N.E.2d 417 (1958); Pearson v. Community Consolidated School Dist. No. 95, 12 Ill. App. 2d 252, 155 N.E.2d 650 (1959).

[84] *See* Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Roberts v. Board of Public Instruction, 317 F. Supp. 63 (N.D. Ind. 1970); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

[85] Albaum v. Carey, 310 F. Supp. 594, 596 (E.D.N.Y. 1969).

[86] Robinson v. Community Unit School Dist. No. 7, 35 Ill. App. 2d 325, 328, 182 N.E.2d 770, 772 (1962).

teachers and administrators are expected and even desirable since only with the open discussion of policies can the most effective education result. Disagreements between professionals, teachers, and administrators do not justify dismissal unless a serious detrimental effect upon the teacher's performance is demonstrated. The teacher's constitutional and professional right to speak, publicly or privately, cannot be limited even within the school by an administration's over-sensitivity to adverse comment.[87] Nonetheless, a teacher, even as a professional, is not entitled to disregard the legitimate rules of his superiors;[88] however, the right of administrators to make rules, in view of tenure legislation, the professional and constitutional rights of teachers, and academic freedom, is not unrestricted.

Section 10-22.4 of the school code, the section regarding grounds for dismissal, contains no specific provision justifying dismissals for insubordination or failure to cooperate. Nonetheless, two of the vaguest statutory grounds, other sufficient cause and the interests of the schools, have been used to justify dismissals for failing to cooperate. As mentioned previously,[89] these grounds for dismissal establish no actual standard for use in dismissal cases and may justify the kind of absolute discretion which tenure legislation was designed to prevent.

Failure to cooperate or insubordination, since more likely to result from personality conflict or administrative caprice than from poor educational technique, seems insufficient to justify dismissal ordinarily.[90] A transfer to a different building may be appropriate.

Actual Immorality

A school board has no inherent right to interfere with the conduct of its employees outside the performance of their jobs.[91] However, some types of conduct, inside or outside the school, may be so harmful that a school district may be justified in dismissing a teacher who participates in such conduct. The sexual misconduct of a teacher toward a student is sufficient grounds for dismissal, if proved.[92] Conviction of a felony or of a violation of the sex laws pro-

87 Pickering v. Board of Education, 391 U.S. 563 (1968); Roberts v. Board of Public Instruction, 317 F. Supp. 63 (N.D. Ind. 1970).

88 *See* Hauswald v. Board of Education, 20 Ill. App. 2d 49, 155 N.E.2d 319 (1959).

89 *Supra* at n. 86, 87, 88.

90 *Contra*, McLain v. Board of Education, 36 Ill. App. 2d 143, 183 N.E.2d 7 (1962); Jepsen v. Board of Education, 19 Ill. App. 2d 204, 153 N.E.2d 417 (1958). These cases argue that collectively many minor violations may justify dismissal. *But see* Chandler v. East St. Louis School District 189, 35 Ill. App. 2d 317, 182 N.E.2d 774 (1962). Only substantial variations should justify dismissal. *Supra* n.71. Good teachers may violate minor rules in their zeal to educate their students. *See* Lusk v. Community Consolidated School District No. 95, 20 Ill. App. 2d 252, 155 N.E.2d 650 (1959).

91 School boards were not authorized by a delegation of state power to interfere with the personal lives of their teachers outside the school. Regulating a teacher's personal life away from the school is unrelated to the primary function for which a school board exists—educating students. To allow such regulation would make teachers second-class citizens and may constitute a taking of liberty without due process of law.

92 Lombardo v. Board of Education, 100 Ill. App. 2d 108, 241 N.E.2d 495 (1968); Chandler v. Community Unit School District No. 7, 35 Ill. App. 2d 325, 182 N.E.2d 770 (1962).

tecting children seems sufficient for dismissal. The phrase, actual immorality, as a grounds for dismissal should probably be limited to immorality of this caliber.

Immorality is yet another vague statutory term hanging over the heads of teachers. Some abuse has resulted from the indefiniteness of the term. Simple misdemeanors allegedly affecting reputation have occasionally resulted in dismissal even without demonstrating a detrimental effect upon teaching performance.[93] Acts of civil disobedience have been used by school boards as grounds for dismissal, although not always successfully.[94] The conduct of others, especially spouses, has occasionally been permitted to justify dismissal.[95]

The use of the term immorality as a statutory grounds for dismissal does not entitle school boards to censor the morals and conduct of teachers, particularly outside the schools. Immorality or moral turpitude, in a country which preaches freedom of conduct, is difficult to define, particularly if the conduct involved is non-criminal. If the conduct complained of as immoral is criminal, the school board must be compelled to await the outcome of criminal proceedings because the school board has no jurisdiction to hear such charges and the presumption of innocence applies to teachers equally with other citizens. Additionally, even conviction of less serious offenses does not seem to justify dismissal unless a serious detrimental effect upon the teacher's performance of his duties is demonstrated. If the conduct complained of as immoral is non-criminal, an even greater detrimental effect upon the teacher's performance seems necessary before branding a teacher immoral and thus irreparably and permanently damaging his career.

Academic Freedom

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of openmindedness and critical inquiry which alone make for responsible citizens who, in turn, make possible enlightened and effective public opinion.[96]

This concurring opinion of a former Justice of the United States Supreme Court clarifies the proper role of teachers in society and demonstrates why teaching is considered a profession. A free society's great interest in encouraging the free exchange of ideas is protected by the constitutional guarantee of freedom of speech. Teaching is a profession[97] which specializes in encouraging the free

[93] Bradford v. School District No. 20, 364 F.2d 185 (4th Cir. 1966); Scott v. Board of Education, 20 Ill. App. 2d 292, 156 N.E.2d 1 (1959).

[94] *See, e.g.*, Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Williams v. Sumter School District No. 2, 255 F. Supp. 397 (D.S.C. 1966).

[95] Henry v. Coahoma County Board of Education, 353 F.2d 648 (5th Cir. 1965).

[96] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter).

[97] Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970); Alabama State Teachers Association v. County Board, 289 F. Supp. 300 (M.D. Ala. 1968).

exchange of ideas. Admittance to the profession is limited to those who have successfully completed specialized training in the field of education and been licensed to teach. In Illinois, such training involves at the very least one additional semester of college work including a period of internship as a student teacher.[98] Since the teaching profession specializes in the exchange of ideas, all teachers require extraordinary protection to insure that ideas may be exchanged free from local pressure to adopt one view over another, based upon the power to dismiss. Academic freedom thus reflects a policy decision that the society and the student are benefited by the exposure to many points of view and methods of instruction. Since the policies behind academic freedom are so closely related to freedom of speech, the courts may view academic freedom as within the penumbra of the first amendment. Although few courts have, as a practical matter, protected this basic right, the United States Supreme Court in *Keyishian v. Board of Regents* wrote:

> 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. That freedom is therefore a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of the multitude of tongues (rather) than through any kind of authoritative selection.'[99]

As a result of the reluctance of some courts to recognize the professional status of teachers and the right of academic freedom inherent in that status, the mere accusation of grounds for dismissal has an *in terrorem* effect upon a teacher's career.[100] If the accusation results in dismissal, the chance of being rehired as a teacher, regardless of success in court and particularly in a competitive market, is very small. School boards and administrators frequently, and perhaps with good reason, view dismissal as meaning proven inability to teach or to cooperate. Even if a teacher who has been dismissed is lucky enough to find another teaching position, the position is not likely to be very desirable, and the teacher would be especially vulnerable to administrative pressure of all kinds. The record of a dismissal will follow a teacher everywhere. In view of the practice of requiring recommendations prior to employment and since teachers require school boards to employ them, a dismissal in a very real way is a badge of infamy.[101] Because of the momentous effect of a dismissal

[98] Ill. Rev. Stat. ch. 122 § 21-1 (1969).

[99] 385 U.S. 589, 603 (1967). *See also* Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

[100] Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969) (dissent); Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970); Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970); Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wis. 1970); Lucia v. Duggan, 303 F. Supp. 112 (S. Mass. 1969).

[101] Freeman v. Gould Special School District, 405 F.2d 1153, 1166 (8th Cir. 1969) (dissent).

upon a teacher's career, the mere accusation of grounds for dismissal may convince timid teachers to resign rather than face the charges, regardless of the truth of the accusations. Thus, school boards or administrators can rid themselves of teachers they dislike and circumvent the intention of tenure legislation. They may dismiss the teacher and force him to petition unreceptive and expensive courts; or they may extort a forced resignation, through assignment to unpleasant duties or otherwise, which may allow a teacher to teach in other districts if the effects of an adverse recommendation could somehow be minimized.

Since teaching, unlike the other professions, ordinarily requires employment by school boards, teachers are particularly vulnerable to the effects of arbitrary dismissal. As indicated, a teacher's livelihood and career is probably cut short by dismissal, regardless of the validity of the grounds. The courts may view this effect as the taking of liberty without due process of law.[102] Also, a teacher's specialized training in teaching is virtually useless if he cannot teach as a result of a dismissal, whether or not erroneous. The courts may eventually view this effect as a taking of property without due process of law.[103] Although only insufficient grounds for dismissal affect the substantive due process rights of teachers, few courts have protected such rights. Nonetheless, a few courts have held, perhaps inferring from the professional status of teachers and their appropriate role in society, that teachers sometimes have an expectancy of further employment regardless of any particular contractual or statutory status.[104] Judge Learned Hand has written in *Bomar v. Keyes*, regarding teachers:

> The wrong is independent of any breach of contract and would be the same, if Keyes had induced the Board not to employ the plaintiff; indeed, we assume that her discharge by the Board was not a breach of contract at all. Nevertheless it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal interest.[105]

This decision has been supported by several significant cases including *Johnson v. Branch*[106] and *Pred v. Board of Public Instruction.*[107] Contrary to the advice of some authorities that a federally protected interest in teaching should be established,[108] some courts have dismissed the expectancy argument with little discussion.[109]

[102] *See* Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969). *See also* Comment, *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1080 (1967).

[103] *See* Comment, *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1080 (1967).

[104] *See* Lucas v. Chapman, 430 F.2d — (5th Cir. 1970).

[105] 162 F.2d 136, 139 (2nd Cir. 1947).

[106] 364 F.2d 177 (4th Cir. 1966).

[107] 415 F.2d 851 (5th Cir. 1969).

[108] *See* Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969); Comment, *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1080 (1967).

[109] Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969); Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969).

In view of the considerable weight of the society's interest in the free exchange of ideas, and the teacher's interest in his career as a professional, this writer believes that teachers must have a right to be retained unless dismissed in a proper manner with a clear showing of sufficient grounds.

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