Loyola University Chicago Law Journal

Volume 3
Issue 1 *Winter 1972*

Article 8

1972

# Non-Tenure Teachers: Procedural Rights Upon Dimissal

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# NON-TENURE TEACHERS: PROCEDURAL RIGHTS UPON DISMISSAL

The tenure system of hiring and retaining teachers is a common practice throughout the United States.[1] The system distinguishes between those teachers who are hired on a permanent basis, generally removable only for "cause," and the temporary or probationary teacher who has a year to year contract. Tenure is not a simple concept to describe. It is not a job guarantee as such. It might best be described as a relationship between a school and a teacher who has the required amount of teaching experience and time in the educational hiring unit. Tenure has been descriptively defined as that point in employment which:

> [O]nce attained, *does not* give the teacher a *legal right* to his teaching position. However, the attainment of the tenure status does guarantee the teacher certain procedures when he or she is being dismissed or removed from his teaching position.[2]

At the present time there are tenure or fair dismissal laws in thirty-nine states and the District of Columbia.[3]

Unlike the teacher with tenure, the probationary or non-tenure teacher's rights are sharply limited. The probationary teacher must look to his contract or to various state statutes for protection of his right to employment. Ohio's code provision is typical of the type of system with which the non-tenure teacher deals:

> Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed, re-employed under the provisions of this action at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice

1. See dissenting opinion in Roth v. Board of Regents, 446 F.2d 806, 810 (7th Cir. 1971), *cert. granted* 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971).

2. Vacca and O'Brien, *Teacher Tenure: What Does It Mean?*, 47 PEABODY JOURNAL OF EDUCATION, 280, 281 (1969); *see also* E. BOLMIER, THE SCHOOL IN THE LEGAL STRUCTURE 157-8 (1968).

3. Research Division, National Education Association, NEA Research Bulletin, March 1971, at 17. For a comprehensive study and compilation of teacher tenure laws in the states *see*: Research Division, National Education Association, Teacher Tenure and Contracts (1971) (in process).

> of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly.[4]

Generally, under the provisions of the statutes, the teacher has no right to demand and receive reasons for the non-renewal of a contract. One might suggest that the teacher has contracted for no more. Over the last few years a number of cases have litigated the issue of whether the probationary teacher's rights are confined to the contract. Should a teacher have a right to know the reasons for non-renewal of a contract? What if the teacher alleges that the school board has fired him for exercising the constitutional right to speak? Is the question as the Fifth Circuit Court of Appeals expressed in *Pred v. Board of Public Instruction* that:

> The right sought to be vindicated is not a contractual one, nor could it be since no *right* to re-employment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights.[5]

As recent cases show, teachers without tenure are not limiting their demands for procedural safeguards to situations involving alleged first amendment violations. They are seeking to find the extent of their procedural rights as professional educators and employees of the state. They are asking the courts to decide who should shoulder the burden of going forward with reasons and evidence when there is a dispute over continued employment. The courts' answers have not been consistent, and the issue remains unresolved.

The arguments offered by the teachers involve two areas of controversy: rights of employment in general, and the protection of constitutional rights ancillary to teaching. The teachers argue that by state action they are being deprived of a right to pursue their profession.[6] Further, they contend that before the state should be able to deprive a teacher of the right to teach, he has at least the right to know the reason for his dismissal, and quite possibly should have the

4. OHIO REV. CODE § 3319.11 (Supp. 1970).

5. 415 F.2d 851, 856 (5th Cir. 1969). This article is limited to a discussion of the procedural rights of non-tenure public school teachers. There is no attempt to deal with the situation of private schools where a lack of state action may remove the issue of job protection from the scope of the due process clause of the fourteenth amendment.

6. Sinderman v. Perry, 430 F.2d 939 (5th Cir. 1970) *cert. granted* 403 U.S. 917 (1971).

right to a hearing on the issue. The argument as expressed in *Roth v. The Board of Regents of State Colleges* and *Drown v. Portsmouth School District* is that the interest of the teacher in a continuation of employment outweighs the limited degree of inconvenience to the school boards to provide the teacher with reasons for dismissal.[7] In the development of the argument some teachers might go so far as to say that they have a right to the collection of rights usually summarized in the term due process. Courts, and particularly federal courts of appeals, have answered these claims in a conflicting—or apparently conflicting manner.

The controversy among circuits may be resolved by the Supreme Court when it decides the case of *Sinderman v. Perry*.[8] The *Perry* court has said in substance that if a teacher alleges that he can show a violation of a constitutionally guaranteed right under the fourteenth amendment, the teacher may seek relief in federal court.[9] Sinderman, a junior college teacher, had become active in a teacher's association. He contended that this activity and his criticism of the administration of the school were the bases for the non-renewal of his contract. The district court granted summary judgment in favor of the school administration. The court of appeals, reversing the district court, concluded that where a teacher claims that he has been denied re-employment by reason of his exercise of constitutional rights, the school, if requested, should establish a tribunal to hear the teacher's complaint.[10] In response to the suggestion that a teacher has a right to a hearing even if first amendment freedoms were not involved, the court's answer was short and direct:

> [T]hat a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any re-employment obligation. . . . Courts do not make contracts for colleges or teachers any more than for any other litigants.[11]

In a somewhat similar vein, the Eighth Circuit in *Freeman v. Gould Special School District of Lincoln County, Ark.*, with the current Jus-

7. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971); Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970).
8. The Court has also granted cert. in Roth v. Board of Regents, 92 S. Ct. 530 (1971).
9. Sinderman v. Perry, 430 F.2d 939, 942 (5th Cir. 1970).
10. *Id.* at 944.
11. *Id.*

tice Blackmun sitting on the case, rejected the argument that a group of teachers in Arkansas had a right to redress for what they considered arbitrary action on the part of the school board which fired them.[12] The opinion of the court, while denying relief, is similar to that of the *Perry* court in holding that in the absence of a clear ancillary constitutional issue the teacher has no right to redress. The *Freeman* court noted that in the absence of statutory or contractual provisions restricting a school board, the board could follow any method of review it decided upon.[13]

The dissent in *Freeman* felt that the majority had erred in concluding that in the absence of a racial discrimination issue, the teachers had failed to state a claim upon which relief could be granted under the Civil Rights Act.[14] Referring to *Slochower v. Board of Higher Education*,[15] Judge Lay added another factor to the question by basing his dissent not upon tenure laws or contract theory, but rather upon the question of "denial of the 'protection of the individual against arbitrary action.' "[16] In reference to the majority's attempt to distinguish the cases which have granted professionals, such as attorneys, rights to review, Judge Lay argued that the "focal stake is the personal liberty to pursue one's employment without arbitrary vilification and reckless exclusion by the state."[17]

A Tenth Circuit Court of Appeals per curiam decision affirmed the dismissal of a college professor's complaint which was based upon expectancy of employment and first and fourteenth amendment grounds.[18] The court concluded that as long as the state authority was acting within the bounds of the Colorado statute, which gave the Board of Trustees complete discretion, the professor had no basis upon which to establish his claim. The court recognized the necessity of granting school boards discretion in dealing with the hiring and rehiring of teachers. The court summarized its point of view by stating that absent statutory or contractual rights: "[O]ne has no con-

12. 405 F.2d 1153 (8th Cir. 1969).
13. *Id.* 1161.
14. Title 42 U.S.C. § 1983 is as follows: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
15. 350 U.S. 551 (1956).
16. 405 F.2d 1153, 1163 (8th Cir. 1969).
17. *Id.* at 1165.
18. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied* 397 U.S. 991 (1970).

stitutional right to a 'remedy' against the lawful conduct of another."[19] The dissent concluded that the dismissal of the complaint was premature since it would deprive the plaintiff teacher of an opportunity to show a potential violation of his constitutional rights.[20]

A more recent case, *Orr v. Trinter*, has summarized the split of authority among the circuits, and has held against the teachers.[21] Besides deciding the issue for the Sixth Circuit, the *Orr* court attempted to define the holdings of some of the other circuits. The court referred to an "expectancy of reemployment test" and dismissed it as an unsound basis for decision.[22] The court explicitly stated that the very purpose of the probationary period of teaching is to give the school board sufficient discretion in its hiring and firing policy. The failure to give reasons for dismissal is not arbitrary and it is a recognized system.[23]

Some circuits have decided not to follow the *Freeman* or *Orr* decisions. The First Circuit, to a limited degree, and the Seventh Circuit have held in favor of the teachers in the dispute over procedural due process requirements and rehiring policies of school boards.[24] In *Drown*, the First Circuit applied a balancing test and decided that the teachers have a right to a statement of reasons for not being rehired as well as a right to access to reports submitted as evaluation of their work. The court felt that:

> [T]he interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for nonretention, together with access to evaluation reports in the teacher's personal file.[25]

The court refused to agree that a teacher has a right to a hearing, however. In a series of well argued points, the court noted that hearings might well inhibit the right of the school board to fire a teacher, thus taking away a valid degree of discretion, by making the board feel that the administrative fight might not be worth the effort. Secondly, the court warned that hearings might lead a school board to be

19. *Id.* at 1329.
20. *Id.* at 1330-32.
21. 444 F.2d 128 (6th Cir. 1971).
22. *Id.* at 133, *petition for cert.* filed 40 U.S.L.W. 3121 (U.S. Sept. 28, 1971).
23. *Id.* at 134-35.
24. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971); Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970).
25. Drown v. Portsmouth School District, 435 F.2d 1182, 1185 (1st Cir. 1970).

"over-cautious in their hiring practices," thereby decreasing opportunities for employment.[26] Finally, the *Drown* court implied that the teachers need not be bound to the current system, since further effort in negotiations between teachers' unions and school boards might well eliminate much of the problem.[27]

The Seventh Circuit decision of *Roth v. Board of Regents* represents the most extensive defense of the teachers without tenure. The issue presented in *Roth* was procedural:

> [W]hether the state university, in deciding not to retain a non-tenured professor, must initially shoulder the burden of exposing to the limited test ordered by the district court the reasons on which its decision is predicated, and to that extent demonstrate that its reasons are not impermissible, or whether the first recourse of the professor is to attempt to establish in the judicial forum that the reasons are impermissible.[28]

The court held by a two to one vote that a teacher, whether tenured or not, has a right to know the reasons for dismissal and a right to an impartial hearing.[29] Unlike the decision in *Perry*, the right to a hearing in *Roth* does not depend upon the alleged violation of ancillary constitutional rights.[30]

The majority in *Roth* did not go unanswered. Judge Duffy, dissenting, wrote an extensive opinion. The judge was careful to point out that neither Roth's contract nor the applicable Wisconsin statute required any form of hearing.[31] He contended that Roth had failed to exhaust his administrative remedies by failing to appeal to the Board of Regents. Judge Duffy pointed out that no reason existed for the federal courts to become the arbiters of any and all problems facing school districts.[32] Additionally, the judge reasoned that the costs

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26. *Id.* at 1186.
27. *Id.* at 1187-88.
28. Roth v. Board of Regents, 446 F.2d 806, 808 (7th Cir. 1971).
29. *Id.* at 809.
30. In Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971), the Seventh Circuit applied the *Roth* rationale to the complaint of an Illinois high school teacher. There apparently was no allegation by the plaintiff of a violation of any of her constitutional rights other than the right to continued employment unless she received reasons for her contract's non-renewal and a hearing. In Fooden v. Board of Governors, 272 N.E.2d 497, the Illinois Supreme Court refused to reverse the trial court's decision to deny two teachers relief on the ground that they had failed to state a valid claim for relief (the relief sought in the form of a class action by the union). The court concluded that the Board's duty was limited to giving probationary teachers notice of non-retention. The teachers also appear to have failed to offer any response to the facts as presented by the Board, and were unable to show that there was any basis to the argument that the teachers were fired for union activity.
31. Roth v. Board of Regents, 446 F.2d 806, 810 (7th Cir. 1971) (dissenting opinion).
32. *Id.* at 811.

to the school boards would be prohibitive, and that implementation of the standards set by the majority would destroy the tenure system.[33]

One finds the circuits split on the question of the application of procedural due process to the problems facing the non-tenure teacher. There is an intermingling of various problems at various levels in the issue. The federal courts are faced with the prospect of interfering with the statutory and contractual system of the state schools. They are, however, entrusted with the responsibility of guaranteeing due process of law to all citizens. The Supreme Court has held that no one has a right to public employment; yet, the qestion remains whether that is really what the probationary teachers are seeking.[34]

## The Issues Confronting the Supreme Court

Apparent differences exist in the cases of *Roth v. Board of Regents* and *Freeman v. Gould.* The real issue in these two cases is whether procedural due process to the problems facing the non-tenure teacher. One problem in attempting to reconcile these cases is the obvious fact differences which faced the courts. In *Roth* there was an allegation of a denial of first amendment freedoms. While the court expressly limited its decision to the procedural issue, there was ever present in the background the respect granted first amendment rights by the courts.[35] Although the *Roth* court notes this fact, the decision stands upon the question of due process. The *Freeman* court, on the other hand, was faced with an uncomfortable decision. On the record, as expressed in that case, there appears to have been a considerable dispute existing between a school principal and a group of teachers.[36] The board had indicated that if the principal and the teachers resolved their differences they would rehire the teachers. The court indicated that the case may have been improperly prepared because the initial claim of racial discrimination was shown to be unfounded.[37] This inaccuracy may have affected the attitude of both the trial and appellate courts.[38]

*Freeman v. Gould* leaves many questions unanswered. It is diffi-

33. *Id.* at 811-12.
34. Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 896-97 (1961).
35. Roth v. Board of Regents, 446 F.2d 806, 809-10 (7th Cir. 1971).
36. 405 F.2d 1153, 1155 n.2.
37. *Id.* at 1157.
38. The factual differences, however, do not reconcile the two cases. The Seventh Circuit in *Roth* has found an area in which it is determined to protect the rights of the non-tenure teacher by procedural safeguards. That the court recognized its stance is

cult to ignore Judge Lay's dissent. The testimony of the school principal apparently responsible for the dismissal of the teachers certainly indicates a strong probability that arbitrary action was the cause of the dismissal of the teachers. The court's conclusion that the issue in *Freeman* is merely an internal matter may be too simple an answer.[39] Freedom of contract presents a rational basis on which to rest the decision. However, reliance on it alone disregards the existence of constitutional issues in the area. The majority's attempt to distinguish cases involving other professions from that of the teacher may be weakened by the quote referred to by Judge Lay in his dissent: "A State cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."[40] The dissent went on to say that "officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards."[41] Is Judge Lay saying merely that, in his opinion, the action of the school board in *Freeman* was arbitrary? If that is all he is saying, the difference between the *Freeman* case and *Sinderman v. Perry* may simply be a question of facts.

While the outcome for the plaintiffs in *Perry* and in *Freeman* is opposite, it may well be that there is no basic distinction between the cases. Both courts appear to say that one must establish an adequate collateral basis before he can claim a violation of the fourteenth amendment. It can be contended that the courts are in accord. Both courts place the burden of proof upon the individual teacher. *Perry* concludes that where there is an allegation of a violation of constitutional rights, the school board should provide for adequate means to resolve the issue.[42] The *Freeman* court points out there was no evidence that the plaintiffs ever requested an opportunity to confront their "accuser."[43] Thus, it could be implied from the facts as pre-

already evidenced by the circulation of the majority and minority opinions to all the circuit's judges, and the four to four vote split on the question of a rehearing of the case *en banc* (Roth v. Board of Regents, 446 F.2d 806, 810 n.10 (7th Cir. 1971) ). Undoubtedly, the *Roth* decision causes problems for the school boards.

39. One must also note that in Arkansas there was no tenure system which offered any protection to teachers (ARK. STAT. ANN. § 80-1304(6) (1969) ). One may question whether the court in the majority opinion is not accepting the idea that the absence of statutory provisions relieves the board of responsibility in developing a system of review for its decisions.

40. Freeman v. Gould Special School District of Lincoln County, Ark., 405 F.2d 1153, 1163 (8th Cir. 1969) quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

41. *Id.*

42. 430 F.2d 939, 944 (5th Cir. 1970).

43. 405 F.2d 1153, 1160 (8th Cir. 1969).

sented that, due to the record before the court, as well as the apparent lack of thoroughness on the part of the plaintiffs in pursuing the issue with the school board, the court felt compelled to affirm the district court, absent statutory or contractual provisions favorable to the plaintiffs. This issue is presented: what guarantees of procedural due process do non-tenure teachers have? By placing the issue in constitutional perspective, an insight may be gained in which direction the Court should go. No longer will a court answer that "The servant cannot complain, as he takes the employment on the terms which are offered him."[44]

### Some Constitutional Perspectives on Government Employment

In none of the cases discussed to this point has there been an attempt to persuade the court that a teacher has a right to any specific job. The Supreme Court has noted the existence of a distinction between private and public employment. The Court in *Cafeteria And Restaurant Workers Union Local 473 v. McElroy* stated:

> [T]he state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed.[45]

The decision in *Cafeteria Workers* has been used by both proponents and opponents of granting the rights of procedural due process to non-tenure teachers. The case merits closer attention.

Rachel Brawner was the plaintiff in *Cafeteria Workers.* She was deprived of her security clearance to work at a military installation. Upon the refusal of the security officer to grant her access to the base, she was offered alternative locations for work by her employer. Finding these alternatives unacceptable, she sought relief in federal court. The issue raised was similar to that confronting the probationary teacher—the extent of protection provided by the guaranty of due process of law. Brawner, like the teachers, had requested a formal hearing, but her request was denied. Subsequently, the Supreme Court, in applying a balancing test, concluded that "The Fifth Amend-

44. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).
45. 367 U.S. 886, 897 (1961).

ment does not require a trial-type hearing in every conceivable case of government impairment of private interest."[46] In addition to noting the greater degree of discretion afforded the government in protecting a security installation, the Court concluded that the plaintiff's interest did not require an administrative hearing prior to the revocation of her security clearance. The Court was careful to point out that she was not barred from further employment. She could continue to work for the same company she had worked for.

Closely akin to *Cafeteria Workers* is another security case decided two years earlier. In *Greene v. McElroy*, an aeronautical engineer was deprived of his security clearance apparently due to the affiliations of his former wife with alleged communist agencies.[47] By his loss of security clearance, Greene was unable to find similar employment in his field. All such jobs required some degree of security clearance. After a number of years of administrative hearings and appeals on his part, the Supreme Court eventually upheld Greene's right to confrontation. Unlike the situation in *Cafeteria Workers*, where the Court found a basis for the expulsion of Rachel Brawner in naval regulations which had been approved by President Truman, the Court held that: "[I]n the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."[48] The Court was careful to note that it had left the issue of the effect of presidential or congressional action undecided.

Another indication of the Court's interpretation of the limitation upon discretionary dismissal of government employees arose in *Slochower v. Board of Higher Education*.[49] While dealing with the fifth amendment self-incrimination clause, the Court expressed a view on the contention that no person has a right to government employment. In Justice Clark's words: "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities."[50]

In summary, therefore, the Court has concluded that the right to government employment is not absolute, but the federal or state gov-

46. *Id.* at 894.
47. 360 U.S. 474 (1959).
48. *Id.* at 555.
49. 350 U.S. 551 (1956).
50. *Id.* at 555.

ernments are not as free to deal with their employees as is a private employer. Some cases have required that hearings with the usual rights of procedural due process be provided prior to termination of employment. Where the non-tenure teacher's claim fits in the constitutional framework is the question.

There appears to have been only one passing reference by the Supreme Court to the status of a non-tenure teacher. The remark is certainly dictum, but nevertheless is of interest. Justice Stewart, for the majority in *Shelton v. Tucker*, made a passing reference to the system of retaining teachers in Arkansas.[51] The Justice stated that interference with associational freedoms of a teacher was a greater danger where "the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without hearing, without affording an opportunity to explain."[52] Although this statement by Justice Stewart in a 1960 case is of little value as precedent, it does indicate that, at that time, the Court may have considered the non-tenure teacher as not deserving procedural due process protection absent a claimed violation of constitutional rights such as freedom of speech or association. Whether the Court will accept this dictum in some manner as future policy remains to be seen.

## The Cases and the Constitution

As the Seventh Circuit pointed out in *Roth*, the teacher tenure cases have the added factor of involving the academic world.[53] Certainly the courts will exercise great care in insuring that there is no denial of basic constitutional rights in a profession which has such a substantial impact upon society.[54] In *Jones v. Hopper*,[55] however, the Tenth Circuit gave the discretionary rights of school boards full force and effect. The opinion failed to recognize any real constitutional issue. In light of *Cafeteria Workers*, a dismissal of a teacher's complaint without a hearing appears to be improper. As dissenting Judge Seth argued, it would seem quite impossible to apply

51. 364 U.S. 479 (1960).
52. *Id.* at 486.
53. Roth v. Board of Regents, 446 F.2d 806, 809 (7th Cir. 1971).
54. For some indication of the importance the Court places in deciding questions relating to the academic world *see*, Adler v. Board of Education, 342 U.S. 485, 493 (1952).
55. Jones v. Hopper, 410 F.2d 1323, 1331 (10th Cir. 1969).

any balancing of interests tests when a party has been refused the opportunity to establish a case.[56] To some degree it would appear that *Jones* is a modern application of the *Lochner v. New York* rationale.[57] Dismissing the issue as a mere contractual matter between two parties seems to overlook the real issues involved.

A contract theory is not the sole basis for giving a school board a free hand in negotiating with a teacher without tenure. In *Jones, Perry*, and *Freeman*, for example, discretionary statutory authority is vested in the various school boards. In light of the holding in *Greene v. McElroy*, there may be a sound basis for stating that the non-tenure teacher has no grounds for objecting to not having a general right to a hearing or other procedural protection. However, the Supreme Court limited the *Greene* decision to the facts before it. The Court held that in the absence of statutory provision, the government's review of Greene's complaint was invalid absent more adequate procedural safeguards.[58] In the non-tenure teachers' cases, the Court is presented with a statutory scheme which specifically provides that the boards are granted extensive discretion to act as they see fit to preserve a good and functional system. In light of this expressed policy, the Supreme Court may well be reluctant to overturn the legislative scheme. The Supreme Court may find it difficult to declare that in the words of the *Slochower* court, the standards established by the boards are not "reasonable, lawful, and non-discriminatory."[59]

The cases which have permitted the teacher's complaint to stand, or which have implied that a complaint would stand if the teacher were able to allege that a constitutional right rather than the question of the competency of the teacher was at issue, would appear to be in a stronger position to receive the approval of the Supreme Court. Cases like *Perry* and *Freeman* have at least the superficial advantage of preserving the existing legislative scheme while assuring the individual teacher that the federal courts will be available for redress of a denial of constitutional rights by the school board. As the Supreme Court suggested in *Cafeteria Workers*, due process may not require the trial-type procedure in every circumstance.[60] Lack of any crystallized

56. *Id.* at 1331.
57. Lochner v. New York, 198 U.S. 45 (1905). The analogy drawn here is admittedly a loose one, but the importance of placing real contractual rights in their perspective necessitates this comparison. It is suggested that a teacher's rights to contract freely are severely limited by statute and state regulation.
58. Greene v. McElroy, 360 U.S. 474, 508 (1959).
59. Slochower v. Board of Higher Education, 350 U.S. 551, 555 (1956).
60. 367 U.S. 886, 895 (1961).

structure might facilitate compromise in those cases which would not require a formal hearing. In the case of a teacher who has been released with good cause, it may well be to his advantage not to have a public record of the reasons for dismissal. The ability of the court to deal with each case individually may, therefore, serve the teacher's interest.

Undoubtedly, some proponents of a formalized process short of a judicial hearing may argue that it is asking too much of the teacher to go to the trouble of filing suit to receive relief. There is probably some basis for this argument, although the number of cases which have been filed might indicate that the teachers are not reluctant to defend their interests when they have a substantial basis for questioning the process which has eliminated them from the payroll.

The courts which have granted relief and have required some formal procedural protection of the non-tenure teachers have established a tenable position in light of the *Cafeteria Workers* and *Greene* cases. With the exception of the *Jones* court, there is a definite attempt on the part of the circuits to balance the interests involved. The Seventh Circuit in *Roth* has decided upon the facts presented to it that the interest of the teacher is sufficient to merit some inconvenience on the part of the school boards.[61] It may well be, as one author has suggested, that absent some formal process of redress there is little way that a teacher will be able to discover whether a school board has in fact denied him a contract renewal upon adequate professional grounds.[62] There appears to be at least some statistical basis for claiming that a teacher's past employment record is the most important factor in securing another teaching position.[63] Are the free access to a teacher's records and the danger of permitting a school board to bury unjust reasons for non-renewal of a contract sufficient bases to require a hearing for a teacher? A majority of circuits have decided that, in and of themselves, these factors are not adequate grounds for such relief.

In light of the need to protect the interests of the teacher and yet preserve the integrity of the school board and tenure system, the

61. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971).
62. Van Alstyne, *Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1453 (1968).
63. Dropkin and Castiglione, *Teacher Credentials: Item Preferences of Recruiters*, 43 THE CLEARING HOUSE, 474, 476 (1969). The study concluded that the most important factor to teacher recruiters was the "reports of the candidates, most recent observed teaching behavior, and the conditions under which that behavior was exhibited."

*Drown* decision would appear to have some marked advantages.[64] *Drown* avoids both extremes, and yet would appear to serve the interests of both the school boards and the teachers adequately. The First Circuit would require the school board to give a statement of reasons for dismissal and permit access to evaluation reports of the teacher. By this method, the court is protecting the interests of the non-tenure teacher. He is not confronted with the necessity of having his records made public. There would also be a record of the decision of the school board which would aid the teacher in making his decision of whether to seek judicial relief. This procedure has advantages for the school board as well. There is a degree of protection in having notified the teacher of the reasons for not rehiring him. The board may be doing a service to the individual by informing him of those reasons. The board can hardly complain that it is required to go to any degree of added expense of funds and energy.

The position in *Down*, therefore, has the dual advantage of balancing the interests of the non-tenure teacher and the school board. The First Circuit seems to have taken to heart the words of the Supreme Court in *Cafeteria Workers* by adapting a procedure to the specific needs of the situation.[65] There is a minimal degree of general procedural protection established by the court in *Drown* and a conscious attempt to preserve the administrative system which the states have decided to implement.

As recently as 1968, there was some indication that a hearing—at least a hearing which is conducted by the school board itself—may be of little value in protecting the rights of a teacher. In *Pickering v. Board of Education of Township High School District*, a teacher was dismissed from his job, after receiving a hearing, for a letter he had written to a local newspaper criticizing the school board's handling of funds.[66] The Supreme Court held that the teacher had the same right to question the action of a school board as any member of the general public. One might be inclined to argue that the hearing the school teacher had before an apparently irate school board served no protective purpose. Conversely, it may be suggested that the crux of the issue is that the requirement that a school board establish itself as a review board is simply inadequate because it does not go far enough.

64. Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970).
65. Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961).
66. 391 U.S. 563 (1968).

To insure procedural due process should not the courts require the establishment of an impartial tribunal? There is some evidence of a trend in this direction in recent developments in some states' statutes.[67] However, any change has generally been limited to tenure teacher's rights. The most liberal of these provisions, which requires the active participation of the courts, is the California system. Under that system, if any teacher demands a hearing, the board must file a complaint in the state court asking the court to investigate the situation and to determine whether there were adequate grounds to merit dismissal.[68] While the fact remains that this procedure is limited to one state, there is the sound implication that a board hearing is considered too likely to be partial to merit being entrusted with the responsibility of decision.

For the purposes of the non-tenure teacher the implications are clear. The action of some eight states should require the courts to take serious consideration of the fact that mere procedural due process "guaranteed" by a board hearing may not serve any real purpose.[69] It might be in the best interests of all in the long run not to create such hearings and require instead that the board give reasons for its non-renewal of the contract. If the reasons are considered to be inadequate by the non-tenure teacher, and if constitutional rights are involved, the road to the courts will remain open; absent the necessity of pursuing administrative redress further, the case may be resolved more quickly.

Some idea of the Supreme Court's possible attitude concerning the necessity of a hearing for termination of government employment may be inferred from a recent case involving a welfare recipient. In *Goldberg v. Kelly*, the Supreme Court held that welfare recipients were entitled to a pretermination evidentiary hearing when the right to continue receiving payments was brought into question.[70] The circumstances of the welfare recipient and the problems facing the non-tenure teacher are similar in that both parties are requesting a determination of their continuation to certain public benefits—the teacher seeking government employment and the welfare recipient seeking a means of support from his government. However, the comparison between the

67. *See e.g.*, WEST. ANN. CAL. EDUC. CODE §§ 13435 to 13443 (1965); N.J. STAT. tit. 18A §§ 6-10 to 6-30 (1971).
68. *See*, for an example of how the review system is intended to operate in California, Ramey v. Board of Trustees, Coalinga Junior College District, 239 Cal. App. 2d 256, 48 Cal. Rptr. 555 (1966).
69. NEA Research Bulletin, March, 1971, at 20-22.
70. 397 U.S. 254 (1970).

plight of the non-tenure teacher and the welfare recipient breaks down. The Court states:

> Thus the crucial factor in this context—a factor not present in the case of . . . the discharged government employee, . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.[71]

The *Goldberg* case gives an indication of the Court's attitude toward an extension of procedural safeguards. The teacher undoubtedly will be able to show some inconvenience and possibly great difficulty due to a failure to receive a contract renewal. It is doubtful, however, that the teacher will be able to show a deprivation of the right to a subsistence level of income. Moreover, welfare recipients, unlike the teacher without tenure, have a statutory basis for their claims.[72] It might also be important that the Court determined that while there should be notice given with the reasons for termination, an opportunity to present and cross-examine witnesses, and a right to produce evidence, there was no need to furnish counsel for the recipient nor did the hearing have to be of a judicial or quasi-judicial type.[73] Prior involvement in the case would not preclude the same party from sitting on the hearing board as long as the official had not made the determination being reviewed.[74] One might attempt to distinguish the *Goldberg* case as applicable only to pretermination hearings, and argue that the teacher without tenure seeks review of a completed decision. It would seem, however, that the teacher requesting a hearing is actually requesting a pretermination hearing. The non-tenure teacher wants a determination of the facts relating to re-employment before the job is lost. The question remains whether the teacher can show an interest sufficient to merit review.

Another factor which has plagued this issue is the effect of a dismissal upon the reputation and future chances of employment for the individual teacher. Admittedly, the contract that the non-tenure teacher signs makes no provision for what the *Orr* court referred to as an expectancy of future employment.[75] Some advocates of the status quo will undoubtedly suggest that, as is the case in other areas of employment, absent discrimination on the basis of race, creed, or similar

71. *Id.* at 264.
72. *Id.* at 262.
73. *Id.* at 270-71.
74. *Id.*
75. Orr v. Trinter, 444 F.2d 128, 132-33 (6th Cir. 1971).

factors a contract for a specific service is just that. Unlike private industry, however, a teacher cannot simply pick up and find another school board where he may get employment. There is a certain element of deprivation here—much more than that which faced the Court in *Cafeteria Workers*. The Court will have to find a substantial interference in the interests of the teacher far outweighing any inconvenience to the various school boards. The degree to which the courts find that the interests of the teacher must be served above and beyond those of the school board may well mark the degree to which the Court will attach elements of what is referred to as due process of law. The degree of this extension will now be considered in detail.

In a recent article, William Van Alstyne outlined the traditional factors usually considered to be included in the concept of procedural due process.[76] He suggested that general rules of operation should be established; that in the event of a dispute a notice of charges and a statement of facts be given to the injured party;[77] that there be an impartial trier of fact; that there be a right to appeal; that the parties know the evidence and be able to confront witnesses; and, lastly, that there be a right to counsel.[78] It was his opinion that in the case of the non-tenure teacher some combination of the above factors should be required for due process to be assured. Some of the additional factors which Van Alstyne would have the Court consider in evaluating the problem presented to it were the number of teachers who do not have their contracts renewed; whether the non-renewal of contracts occurred during a political controversy; and the necessary impact of

76. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841.

77. If the rights of the non-tenure teacher are purely contractual, absent any provision in the contract, there may be no reason beyond common courtesy why a school board would inform a teacher that his services are no longer needed. *Cf.* the dissenting opinion of Judge Stevens in Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1970): To require reasons to be given in light of the contract might be the equivalent of rewriting it and expressly contradicting the power vested in the school board.

78. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 865 (1970). The question of the right to counsel has not arisen in any of the cases decided by a court and it is unlikely that it will. If the Supreme Court were to decide that some type of formal hearing will be required, there is some recent indication that the right to have an attorney provided for the teacher will not be upheld. As mentioned in Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970), the Court outlines what it considered to be adequate procedural safeguards for a welfare recipient who was in danger of losing his right to benefits. Even under these circumstances where it was clearly evident to the Court that there were no alternatives to welfare for the plaintiff, there is no suggestion of a need to provide counsel. In light of the specific outline provided by the Court this absence may be an indication that the Court feels the need to provide counsel would be lacking for a non-tenure teacher.

job relocation by a failure of the teacher to receive a new contract.[79] How the courts have handled the specific enumeration of due process attributes and whether they have taken into account to some degree the factors suggested by Van Alstyne will be of considerable importance in deciding the questions that face the Supreme Court on this issue. One might preface this discussion by noting that Van Alstyne may have limited his second independent factor too greatly. The Court should probably attempt to be aware of what we can refer to as any unusual circumstances giving rise to discrimination.

IMPARTIAL TRIER OF FACT

A considerable amount has already been said about the merits and the disadvantages of requiring a hearing—and especially a hearing before an impartial trier of fact. With the exception of the Seventh Circuit in *Roth* and *Shirck v. Thomas*,[80] no federal court of appeals has gone so far as to say that a teacher should generally have a right to any administrative hearing absent alleged ancillary violations of civil rights. Under the current statutory scheme in most states, the Supreme Court would be making a giant step forward, disrupting the status quo to a considerable degree if they required such a hearing. To require a hearing in such circumstances would be insuring the non-tenure teacher of substantially the same *procedural* right as the tenure teacher possesses. The substantive standard which would be applied would be less than the "cause" standard of the tenured teacher, but would certainly be no small gain for the teacher. In an earlier article, Van Alstyne suggested that an administrative hearing is a sure way of defining the dispute and increases the probability that unconstitutional reasons are not the bases of a decision. There would be a more adequate record for any reviewing court if there were hearings.[81]

Another commentator suggests that hearings might be dispensed with except in the situation where the basis for non-renewal of the teacher's contract relates to extra-curricular activities of the teacher.[82] The school board would retain a broad degree of discretion by im-

79. VanAlstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 872-74 (1970).
80. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971); Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971).
81. Van Alstyne, *Demise of The Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).
82. Frankt, *Non-Tenure Teachers and the Constitution*, 18 U. KAN. L. REV. 27 (1969).

plementation of this suggestion. There would likewise be assurance that the teacher would be protected as a person in the school system. Arthur N. Frankt's proposal seems to suggest that we render unto the school boards the affairs that belong there, and leave constitutional issues in their proper perspective. Such a system would have the advantage of granting protection to the non-tenure teacher in that area of the academic world where there is the greatest danger of a "chilling effect" upon freedom. This suggestion would seem to be in line with the rationale of the *Perry* decision in that where ancillary rights are at issue, a hearing will be required.[83] It would seem that Frankt wishes to see the burden of establishing the right to a hearing placed upon the school board.[84] That would definitely go beyond the requirements established by the *Perry* court. The suggestion does have the advantage of clarifying the issues, however. In implementing such a procedure, no party would be totally left without concrete rights. The suggestion avoids the blanket provision of the *Roth* decision, and the dangers of depriving the school boards of their statutory discretion. At the same time, the procedure would clearly encompass the question of extraneous circumstances which might have an impact upon the situation faced by the teacher who wishes to become involved in the community or in other school activities beyond that of the classroom.

Above and beyond the question of requiring a hearing, the courts would be faced with the question of the type of hearing. Can an impartial tribunal be formed by the school board or must there be the use of outside personnel? To this time no circuit has gone so far as to suggest that the school board cannot be an adequate judge of the issue. In the case of tenure teachers some of the states have provided by statute for the intervention of an impartial trier. California uses the state court. New Jersey requires the state commissioner of education or his appointee to make a finding of fact and a final determination of the dispute.[85] For a hearing to be truly valuable, there should be a degree of insulation between those who are attempting to dismiss or not rehire a teacher and those who decide whether such action is merited. No one should be a judge in his own cause. The extent of insulation would probably have to depend upon the framework of the local school board. In some situations the local board might be as

83. Sinderman v. Perry, 430 F.2d 939, 944 (5th Cir. 1970).
84. Frankt, 18 U. KAN. L. REV. 27, 40 (1969).
85. N.J. STAT. tit. 18A §§ 6-10 to 6-30 (1968).

impartial a group to decide the question as would a court. It would seem presumptuous to attempt to define any hard and clear rules in this area. As long as there is a degree of disinterest in the body of the tribunal, it should be adequate to protect both parties.

### Rules of Procedure to Be Followed

Courts denying the teacher any procedural redress have relied upon the fact that the teacher knows, when he signs a contract, that his rights are limited by his contract and the statutory framework under which the school board operates. If a system of formal procedure is either adopted by the school board or is required by statute or court order, it would be a simple process to make public the rules which would be followed in case of a dispute. Inter-office and department memoranda, unions, and various other associations might aid the school board in this respect.

### Knowledge of the Evidence and Confrontation of Witnesses

At least two courts to this time have required that a considerable amount of the evidence used to base a decision of non-retention of a teacher be made available. The First Circuit has required that the non-tenure teacher be provided with access to confidential reports.[86] By implication, the "glimpse at the reasons for dismissal" suggestion of the court in *Roth* would permit the teacher to view and evaluate the school board's decision.[87] The courts which have decided that the teacher is entitled to a hearing where there is some evidence of a violation of ancillary rights would also appear to have incorporated the notice that a teacher will be provided with the proof used to substantiate the dismissal. The *Perry* court specifically includes "the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition."[88]

Quite obviously, the courts which have decided that the non-tenure teacher has no right to a hearing have avoided this issue altogether. The courts which have found the need for a hearing have not questioned the right of a teacher to produce and confront witnesses. Absent evidence and witnesses the right to a hearing would be illusory.

Interestingly, however, there exists a split between those circuits

86. Drown v. Portsmouth School District, 435 F.2d 1182, 1185 (1st Cir. 1970).
87. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971).
88. Sinderman v. Perry, 430 F.2d 939, 944 (5th Cir. 1970).

which would provide the teacher without tenure access to reports, which undoubtedly would be used as evidence for a hearing, and those circuits which would provide for the production of recorded evidence, but would deny the right to a hearing before a teacher's contract is terminated for professional reasons.[89] The apparent rationale of the *Drown* court would be that the non-tenure teacher's access to the reports would enable him to make a determination of his shortcomings and to possibly prepare for judicial action.

### Right to Review

A point suggested by the dissent in *Roth* and by the majority in *Freeman* offers some insight into the question of right to review. Both opinions were critical of the apparent failure of the "alleged" injured party to pursue what these judges viewed as alternative and additional administrative remedies. By the fact that these cases have arisen and have been heard in the federal courts, there would seem to be no reluctance on the part of the courts to review the decision of a school board. Under the Civil Rights Act if the teacher were able to show an obvious violation of rights which would merit jurisdiction there would be, in effect, review of the school board's decision.[90]

### Conclusion

In light of recent procedural due process Supreme Court cases, one can only suggest that the procedural rights of the teacher without tenure rest somewhere between those of Rachel Brawner in *Cafeteria Workers* and the rights granted a welfare recipient in *Goldberg v. Kelly.* In this area of procedural due process, the Supreme Court has apparently not swayed from its use of the balancing test. The Court has placed great emphasis on the question of what rights are being taken away from the injured party. If the Court views the teacher's rights as simply contractual or professional, there will probably be no procedure required to investigate the non-renewal of a contract. If, however, the Court determines that the state may not cease to employ a teacher without giving reasonable grounds for the decision, the Court might also require the state, through its school boards, to provide for procedural safeguards for state teachers.

89. *Compare* Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970), *and* Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971).
90. Title 42 U.S.C. § 1983. *See,* for example, Freeman v. Gould Special School District of Lincoln County, Ark., 405 F.2d 1153, 1157 (8th Cir. 1969).

If the Supreme Court finds the balance weighing in favor of the teacher without tenure, in light of the *Goldberg* decision, there appears to be a basis for believing that the degree of procedural guarantee would be tailored to the specific circumstances. The standard adopted by the Court would probably be something less than that required in *Goldberg*, since there is such a disparity between the plight of the welfare recipient and that of the teacher who fails to have a contract renewed. By this analysis, the Seventh Circuit's decision in *Roth* and *Shirck* have gone beyond what the Supreme Court would consider a sufficient degree of procedural protection since the question as viewed by the court was one of general competency of the teacher rather than one of alleged violations of his constitutional rights. The more moderate solution offered by the First Circuit in *Drown*, is a standard which the Court could accept. The teacher's right to protection merits, at least, this minimal standard provided by the *Drown* decision.

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