Fairfield UNIVERSITY

North East Journal of Legal Studies

Volume 1 *Spring 1993* Article 5

Spring 1993

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Robert S. Weiner
rsweiner@gmail.com

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## Recommended Citation

Weiner, Robert S. (1993) "Moral Turpitude and the Tenured Teacher: Discharge of College and University Faculty," *North East Journal of Legal Studies*: Vol. 1 , Article 5.
Available at: https://digitalcommons.fairfield.edu/nealsb/vol1/iss1/5

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# MORAL TURPITUDE AND THE TENURED TEACHER: DISCHARGE OF COLLEGE AND UNIVERSITY FACULTY

by

Robert S. Wiener*

## INTRODUCTION

Although college and university faculty often see tenure contracts as iron-clad, there are a number of ways by which we can lose the protection tenure affords. This paper explores the path of moral turpitude.

## I. HISTORY

The history of tenure is a long one, going back to the Middle Ages.[1] More recently, representatives of the American Association of University Professors (AAUP) and of the Association of American Colleges, in a series of conferences begun in 1934, discussed tenure. On 7-8 November 1940 they agreed to the 1940 *Statement of Principles on Academic Freedom and Tenure and Interpretive Comments*. "Institutions of higher education are conducted for the common good . . . . [which] depends upon the free search for truth and its free exposition. Tenure is a means to: "(1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability." The service of teachers who "have permanent or continuous tenure . . . should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies." Examples of cause referred to in passing are "incompetence" and "moral turpitude". The reference to "moral turpitude" suggests that "[t]eachers on continuous appointment who are dismissed for reasons . . . involving moral turpitude [need not] receive their salaries

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* Assistant Professor, Lubin Schools of Business, Pace University Westchester



for at least a year from the date of notification of dismissal . . . ."

Additional interpretive comments on the 1940 Statement, drafted by a 1969 Joint Committee of the AAUP and the Association of American Colleges, were endorsed by the AAUP in 1970. They note "relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 Statement; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment."[2] These comments also elaborate on moral turpitude.

## II. FACULTY QUALIFICATIONS

As the cases show, courts typically defer to the judgment of school administrators when teachers are dismissed. Legislative language establishing the foundation for dismissal for cause is often quite broad, such as "evident unfitness for service"[3] and is interpreted broadly by judges.

> [T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy of fail are so numerous that they are in capable of enumeration in any legislative enactment.... His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his official utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention.[4]

With standards such as these and discretion placed in the hands of the colleges and universities, teachers may well find it difficult to prove their fitness.

At least one case seems to put the burden of proof for discharge on the school.

> [A]n individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by actions as a teacher.[5]

## III. MORAL TURPITUDE

As observed in 1958, "[o]ne persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure* and subsequent attempts to build upon it, considerable ambiguity and

misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter."[6] This observation is, if anything, more true of moral turpitude than incompetence.

What is moral turpitude? According to the 1970 Interpretive Comments

> The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.[7]

This standard differs from the 1973 Miller v. California obscenity test of "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . ."[8] Here the community is not the average person but the academic community. The comment suggests that this academic community is not local, but national.

The 1966 AAUP *Statement on Professional Ethics* speaks of the enforcement of ethical standards. In this context, it discusses a professor's responsibilities to his subject, students, colleagues, institution, and community. Issues of possible moral turpitude raised are sexual misconduct, a professor "avoids any exploitation of students for his private advantage . . . ." and plagiarism, a professor "acknowledges his academic debts".[9]

Standards for dismissal include: "(1)incompetence (including inefficiency); (2)immorality (including dishonesty); (3) neglect of duty (such as violating institutional rules and missing classes); and (4)insubordination (including excessively disruptive behavior)."[10] Although several of these standards are often used together, this paper investigates immorality.

What does a teacher's morality have to do with teaching? "One of the prerequisites of a teacher is good moral character.... It need not be found in the Education Law. It is found in the nature of the teaching profession. Teachers are supposed not only to impart instruction in the classroom but by their example to teach students."[11] "If adherence to a code of proper personal conduct is not essential in all callings, it is in the teaching profession."[12]



### *A. Sexual Misconduct*

#### *1. With a current student*

A case of sexual misconduct by a male teacher to a female student is Cockburn v. Santa Monica Community College Dist. Personnel Comm'n.[13] Donald Cockburn, a physical sciences laboratory technician and instructor for about 17 years, was responsible for hiring and supervising laboratory assistants.

> Duria Suncar, an 18 year old Oriental student at the college asked [Cockburn] about employment as a lab assistant.... [She] was interviewed by [Cockburn who] met her and put her to work immediately washing beakers. He then asked her to come with him to the basement to do some work. In the basement he held her hand, asking how her hands felt washing all those dishes. He then grabbed her, holding her tightly. He kissed her on the cheek then on the mouth, saying afterwards, 'o.k., go to work.' Five or ten minutes later he tried to embrace her again. [Suncar] said 'no, I don't want to.'[14]

Cockburn was confronted with the incident and was eventually told that he would need to have an evaluation by a psychologist independent of the college before the president of the college decided on Cockburn's employment. The psychologist, as a condition of his employment, insisted that Cockburn tell his wife. Cockburn rejected that condition, and submitted a request for retirement which was granted. Even so, the college retained the psychologist for 12 therapy sessions with a now amenable Cockburn. In the psychologist's opinion, "the possibility of a recurrence of the above behavior appears to be very minimal given ongoing therapy and monitoring."[15] Cockburn unsuccessfully attempted to withdraw his resignation request and brought this case on grounds of a lack of procedural due process, an issue outside the scope of this paper. No mention was made of Cockburn's tenure status. The court noted the "grave responsibility" both it and the Santa Monica Community College District Personnel Commission have "to the [Santa Monica Community College] and their personnel, the professors, instructors and students they embrace and to the general public."[16]

Joseph William Stubblefield, a teacher at Compton Junior College in Los Angeles County, after teaching a night class on 28 January 1969, drove a female student to a secluded location. A patrolling police officer flashed a light on the couple who were in a state of undress: he with his pants unzipped and penis exposed, she nude above the waist and unzipped below. The court observed that, "[i]t would seem that, as a minimum, responsible conduct upon the part of a teacher, even at the college level, excludes meretricious[17]

relationships with his students ...."[18]

Manuel Loera's discharge by the Oregon State Board of Higher Edication was upheld, based, in part, on his entry into women's dormitories against orders allegedly for room checks, conversations with sexual overtones with female students, and sexual advances toward a female resident assistant.[19]

On 26 February 1992 the Supreme Court ruled 9-0 that students may sue for monetary damages for sexual harassment based on Title IX of a 1972 federal education act.[20] The law banned sex discrimination in any "education program or activity receiving Federal financial assistance", that is, all public and many private schools and colleges. Justice Byron R. White, who wrote the opinion of the Court joined by five other justices, "presumed the availability of all appropriate remedies" when none are specified by Congress, as in this law. Clarence Thomas and Chief Justice William H. Rehnquist concurred with Antonin Scalia's opinion that a 1979 decision that private individuals have a right to sue under the act was incorrect, but that because Congress had endorsed that decision (and apparently on principles of stare decisis), "it is too late in the day" to deny damages. The case was brought in 1988 by Christine Franklin's who claimed that one of her high school teachers in Gwinnett County, Georgia forced sexual relations on her School officials were informed and investigated but took no action other than to discourage her from pressing criminal charges against the teacher. The teacher resigned and the investigation was ended.[21]

A recent case is that of Dr. Margaret Bean-Bayog, a Harvard Medical School psychiatrist. She has been accused of seducing Paul Lozano, a student at the school whom she counseled from July 1986 to June 1990. In April 1991 Mr. Lozano committed suicide. Court papers filed in a medical malpractice and wrongful death action allege that Dr. Bean-Bayog led Mr. Lozano "into a dangerous cycle of regression and transference wherein the patient was caused to become completely dependent, as a 3-year-old child, on Dr. Bean-Bayog as his mother." Also, that she caused him to "participate in vivid sadomasochistic sexual fantasies" resulting in sexual intercourse. Harvard placed Dr. Bean-Bayog on leave as of May 1991.[22]

2. With a former student

A 1966 California case deals with a relationship between a male teacher and a female student from the previous school year. Eugene Clarence Hartman was a permanent teacher dismissed by the Board of Trustees of Mount San Antonio Junior College District of Los Angeles County[23] for immoral conduct and evident unfitness for service.[24] The principal grounds for dismissal was Hartman's relationship with a woman (designated by the court as Patricia).



> Beginning about 12 December 1961 and for much of 1962, Hartman cohabited with Patricia who was married to a[nother] man ..., that such relationship commenced on the day that Patricia left her husband, that the defendant's wife had died less than 30 days prior thereto, and that Patricia had been a student of [Hartman] at Mount San Antonio Junior College [in 1960-61 school year][25]. [N]either Patricia nor defendant "believed in good faith that their activities in Tijuana, Mexico, on December 19, 1961, had resulted in that day or at any later time in a valid diforce [sic] between Patricia ... and her husband, or in a valid marriage between [Hartman] and Patricia...."[26]

The California appellate court considered this to be adequate grounds for dismissal as a result of immoral conduct. Cohabitation raises the presumption of sexual relations, but even had there been none, "the evil [target of the statute] ... is the harmful impression on others, particularly students, arising from the fact of a teacher and a woman to whom he is not married living together openly as man and wife."[27] The appeal was largely based on procedural issues and failed by a 3-0 vote.

3. With a non-student

The trial court in the Hartman case also determined that, in the fall of 1960, while married to Barbara Jean Hartman, Mr. Hartman lived in an apartment with a woman designated as Frances under the name of Mr. and Mrs. Hartman. This was considered sufficient grounds for dismissal on the grounds of immoral conduct.[28] The appellate court apparently agreed. This case is probably even more dated now. I have found no more recent cases of discharge based extramarital relations with a non-student.[29]

Homosexuality has also been considered a matter of immorality.[30] However, one of the few cases won by a teacher, evidence of a single "undescribed but noncriminal private act "of a homosexual nature" with a consenting adult three years earlier was not considered sufficient cause for discharge as a result of moral turpitude.[31]

*B. Language*

One case deals with a teacher who used graphic language sometimes combined with descriptive actions. William Hensey, a permanent junior college philosophy teacher in Palo Verde, California was dismissed for "evident unfitness for service and immoral conduct."[32] The trial findings included the following:

> [That Hensey]
> (2) ... stated the bell system of the college "sounded like a worn out phonograph in a whorehouse" and made numerous references during the semester to "whore" and "whorehouses" and, following a reprimand for this conduct, submitted to the president of the college a thesis on the justification of his of these terms in his class.
> (3) ... directed himself to several Mexican-American students seated in the rear of the classroom and stated, "I understand you have been to San Luis; I understand they have super-syphilis there, and you know that they don't have drugs to cure that. Be careful when you're there." This statement was made in a tone loud enough to be heard by all of the students in the class, both male and female.
> (4) ... advised his philosophy class that the district superintendent ... "... spends too much time ... (at this point in the statement he stepped over to the wall and simulated licking the wall with his tongue in an up and down manner and then continued speaking) ... licking up the Board."
> (5) ... derogatorily referred to the walls of the high school and on one occasion he referred to them as looking as though "someone had peed on them and then smeared them with baby crap."

As to the bell characterization (incident 2), the court opined that teaching fitness standards applied to elementary and high schools may well be different than those applied to college and university faculty.[33] "[W]hile the use of the words may have shown bad taste and vulgarity (footnote: On one occasion he referred to the public address system as sounding like a constipated elephant.) we cannot find that these charges constitute or are evidence of immorality."[34]

For the safe sex warning (incident 3), "[a]gain, while we find this incident to be in bad taste, we can find in it no evidence of immorality."[35] Venereal diseases was apparently not a subject in the course and I believe that a current court, more sensitive to issues of demographic diversity, would respond more strenuously.

Concerning wall licking (incident 4) the court states,

> [h]ere, we have passed the limits of bad taste and vulgarity. The defendant's contention that he was imitating a deaf mute ordering an ice cream cone was an insult to the intelligence of the trial judge. Rather, it is obviously a gesture which was intended to describe a person who would rather curry favor with his superiors than to do his duty and was specifically directed to the County Superintendent of Schools. The defendant's explanation that, in this context, he meant "face licking" was obviously not accepted by the trial court nor do we so accept it. Quite to the contrary, this expression means in common parlance licking in an entirely different portion of the anatomy. It was obviously so intended by the defendant and so understood by his college-age students. This obscene incident indicates both "immorality" and "evident unfitness."[36]

Hensey's speech is considered "far outside the protection of the First Amendment ...."[37]

The court's response to the wall description (incident 5) implies that language acceptable to males is unacceptable to females. The courts notes that "this was a class made up of both males and females. We assume that each of them at that age was familiar with the words used.... Nevertheless a teacher has a responsibility to respect the feelings and sensitivities of the members of his class and to conduct himself with a certain degree of rectitude. His behavior in this incident is inexcusable in the presence of his students."[38] The characterization of the depiction as "barrack's language" may be another observation relating to gender specific language reflecting a time before females were in the barracks. The court does "not consider the language used to be immoral, [however] its obvious vulgarity was evidence of "evident unfitness."[39]

Of the six points considered by the court, only the wall licking was deemed immoral, but "[a]ll of the incidents taken in the aggregate serve as substantial basis for the trial court's determination that the charges of "immoral conduct" and "evident unfitness for service" were true and constituted cause for dismissal."[40]

### *C. Course Content*

Despite the Bertrand Russell case, the best argument against dismissal for cause based on moral turpitude is probably a claim of academic freedom to determine course content. One of the rare faculty winners was Deena Metzger, a permanent teacher at Los Angeles Valley College.[41] The approved textbook in her first-year junior college English class was Girvetz's "Contemporary Moral Issues". In conjunction with a unit on obscenity, Metzger distributed her poem "Jehovah's Child", "liberally sprinkled with Anglo-Saxon obscenities, slang references to male and female sexual organs and to sexual activity, and profane references to Jehovah and Christ."[42] Supplementing a propaganda section, a brochure

"You Can Become a Sexual Superman" and advertisement for "The Picture Book of Sexual Love" were used. Even so, widespread support from her peers and students was apparently quite helpful to Metzger and the court warned the they were not granted a carte blanche to obscenity and pornography.[43]

It remains to be seen if Professors Jeffries and Levin of City College will withstand attacks against them based on the alleged immorality of their teachings.

*D. Teachings*

A particularly noteworthy case is that of Kay v. Board of Higher Education of City of New York.[44] This is the case against the appointment of Bertrand Russell to chair of philosophy at City College by the New York City Board of Higher Education. Despite the defense of the Corporation Counsel of New York City and the filing of three amici curiae briefs on his behalf, Russell's appointment was revoked. This case again reflects the judicial understanding of the potential impact of a teacher on college students. Even if Mr. Russell were to teach mathematics,

> his very presence as a teacher will cause the students to look up to him, seek to know more about him, and the more he is able to charm them and impress them with his personal presence, the more potent will grow his influence in all spheres of their lives, causing the students in many instances to emulate him in every respect.[45]

The argument the court found "most compelling" was that "the appointment of Bertrand Russell has violated the public policy of the state and of the nation because of the notorious immoral and salacious teachings of Bertrand Russell and because [Jean Kay] contends he is a man not of good moral character."[46] "The contention ... that Mr. Russell has taught in his books immoral and salacious doctrines, is amply sustained by the books conceded to be the writings of Bertrand Russell ...."[47] The writings quoted recommend "childless marriages"[48] and pre-marital sex[49] and do not condemn infantile masturbation[50] and homosexuality.[51] The court sees Russell's hiring as an "expenditure that seeks to encourage the violation of the provisions of the Penal Law."[52]

The scathing denunciation of Bertrand Russell by Justice McGeehan of the New York County Supreme Court deserves lengthy quotation.

> The appointment of Dr. Russell is an insult to the people of the City of New York and to the thousands of teachers who were obligated upon their appointment to establish good moral character and to maintain it in order to keep their positions. Considering the instances in which immorality alone has been held sufficient basis for removal of a teacher and mindful of the aphorism "As a man thinking in his heart, so he is," the court holds that the acts of the Board of Higher Education of the City of New York in appointing Dr. Russell to the Department of Philosophy of the City College of the City of New York, to be paid by public funds, is in effect establishing a chair of indecency and in doing so has acted arbitrarily, capriciously and in direct violation to the public health, safety and morals of the people .....[53]



## CONCLUSIONS

Conventional legal research is particularly difficult in this area of law. From my discussions with college and university faculty and administration it is clear that in most cases of moral turpitude neither teachers nor schools want the publicity litigation brings. Teachers want to avoid the stain even a charge of moral turpitude brings. Schools do not want it known that such teachers taught at their institutions.

The future of moral turpitude cases is hard to predict. On the one hand, cases upholding dismissal of tenured college and university faculty for moral turpitude often require a sense of violated community values. Therefore, as our society seems to have become one of permissiveness based on concepts of relative ethics, the number of cases has decreased.

On the other hand, a new player may appear on the scene, students, the purported victims of moral turpitude. Especially after Anita Hill's testimony, and the William Kennedy Smith and Mike Tyson rape cases, victims of sexual offenses may be somewhat less reluctant to bring cases. The case provides a monetary incentive to bring cases against schools. At the same time, we appear to be more sensitive to such women's rights issues as sexual harassment. Therefore, the number of litigated moral turpitude cases will probably rise, at least for sexual misconduct cases brought by students against colleges and universities that do not take adequate preventive and corrective measures against sexual misconduct.

## ENDNOTES

1. AAUP Statement on Procedural Standards in Faculty Dismissal Proceedings, Introductory Comments (1958).

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

3. California Education Code Section 13403.

4. Goldsmith v. Board of Education, 66 Cal. App. 157, 178, 225 P. 783 (1924).

5. Morrison v. State Board of Education, 1 Cal. 3d 214, 235, 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

6. "The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 Statement and standards which have developed in the experience of academic institutions." AAUP Statement on Procedurals in Faculty Dismissal Proceedings, Introductory Comments (1958).

7. 1970 Interpretive Comment 9.

8. Miller v. California, 413 U.S. 15, 22 (1973).

9. AAUP Statement on Professional Ethics, The Statement (1966).

10. Lovan, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J. of Coll. and U.Law 419, 422 (1983-84).

11. Kay v. Board of Higher Education of City of New York, 18 N.Y.S. 2d 821, 826, 173 Misc. 943 (New York County 1940).

12. Board of Trustees of Mount San Antonio Junior College Dist. of Los Angeles County v. Hartman, 246 Cal. App. 756, 763, 55 Cal. Rptr. 144 (1966).

13. 161 Cal. App. 3d 734, 207 Cal. Rptr. 589 (1984).

14. Id. at 737.

15. Id. at 744.

16. Id. at 748.

17. It is unclear what the judge means by use of this word. Perhaps he intends "having the nature of prostitution (meretricious relationship)" (Webster's Ninth New Collegiate Dictionary, 1989), but there is no evidence of a quid pro quo in the case.

18. Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 825, 94 Cal. Rptr. 318 (1971).



19. Loera v. State Bd. of Higher Educ., 45 Or. App. 715, 609 P.2d 826, 828 (1980).

20. Franklin v. Gwinnett County Public Schools, No. 90-918 (U.S. Feb. 26, 1992).

21. The New York Times, Feb. 27, 1992.

22. The New York Times, March 31, 1992.

23. Board of Trustees of Mount San Antonio Junior College Dist. of Los Angeles County v. Hartman, 246 Cal. App. 756, Cal. Rptr. 144 (1966).

24. Education Code, Section 13403.

25. Id. at 767.

26. Id. at 759-760.

27. Id. at 763.

28. Id. at 760.

29. See Kay, *supra* note 11.

30. Id.

31. Morrison, *supra note 5,* at 217.

32. Palo Verde Unified School Dist. of Riverside County v. Hensey 9 Cal. App. 3d 967, 970, 88 Cal. Rptr. 570 (1970).

33. "Were this an elementary school, these charges might bear more careful scrutiny. However, the defendant was teaching at a junior college level ...." Id. at 973.

34. Id.

35. Id.

36. Id. at 974.

37. Id.

38. Id. at 975.

39. Id.

40. Id. at 976.

41. Board of Trustees of Los Angeles Junior College v. Metzger, 104 Cal. Rptr. 452, 501 P.2d 1172 (1972).

42. Id. at 1173.

43. "[O]ur ruling should not be viewed as insulating permanent teachers from discipline on account of their classroom use of indecent or profane works or writings. Id. at 1176.

44. *Supra* note 11.

45. Id. at 830.

46. Id. at 826. It seems that had he been teaching only mathematics, his private life and writings would have been considered less relevant to his fitness. "It has also been argued that he is going to teach mathematics. His appointment, however, is to the department of philosophy ...."

47. Id. at 827.

48. Id. "It is not necessary to detail here the filth which is contained in the books. It is sufficient to record the following: from "Education and the Modern World," pages 119 and 120: "I am sure that university life would be better, both intellectually and morally, if most university students had temporary childless marriages. This would afford a solution of the sexual urge neither restless nor surreptitious neither mercenary nor casual, and of such a nature that it need not take up time which ought to be given to work."

49. Id. "From "Marriage and Morals," pages 165 and 166: "For my part, while I am quite convinced that companionate marriage would be a step in the right direction, and would do a great deal of good, I do not think that it goes far enough. I think that all sex relations which do not involve children should be regarded as a purely private affair, and that if a man and a woman choose to live together without having children, that should be no one's business but their own. I should not hold it desirable that either a man or a woman should enter upon the serious business of a marriage intended to lead to children without having had previous sexual experience." ("The peculiar importance attached, at the present, to adultery, is quite irrational." From "What I Believe," page 50.)

50. Id. at 830.

51. Id. at 831. "[W]e are confronted with Dr. Russell's utterances as to the damnable felony of homosexualism, which warrants imprisonment for not more than twenty years in New York State, and concerning which degenerate practice Dr. Russell has this to say in his book entitled "Education and the Modern World," at page 119, "It is possible that homosexual relations with other boys would not be very harmful if they were tolerated, but even then there is danger lest they should interfere with the growth of normal sexual life later on."



52. Id. at 828-29.

53. Id. at 831.