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Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom

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NOTE

ECONOMICALLY NECESSITATED FACULTY DISMISSALS AS A LIMITATION ON ACADEMIC FREEDOM

INTRODUCTION

Academic freedom enables members of the academic community to research, investigate, and teach without having unnecessary restrictions or officious supervision placed on their activities.[1] The value of this freedom has long been recognized by courts that realize that if teachers do not have this freedom, the effectiveness of the schools in which they teach is appreciably diminished.[2] Academic freedom, therefore, requires protecting teachers

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[1] This protection is necessitated by the special responsibilities of members of the academic community:

> The unique responsibilities of colleges and universities in the United States are to extend the frontiers of knowledge, to make available to students the wisdom and knowledge of the past, and to help them to develop their capacities for critical, independent thought. If these vital tasks are to be performed with any degree of success, teachers in institutions of higher learning in this country must be as free as possible from restraints and pressures which inhibit independent thought and action. They must . . . be free to pursue truth wherever it may lead.

Byse, *Academic Freedom, Tenure, and the Law: A Comment on* Worzella v. Board of Regents, 73 HARV. L. REV. 304 (1959). For a discussion of the scope of academic freedom, see the *1940 Statement of Principles on Academic Freedom and Tenure*, 60 A.A.U.P. BULL. 269, 270 (1974) [hereinafter cited as *A.A.U.P. Statement of Principles*]. *See also* Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROB. 431 (1963); Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753 (1955); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 446 (1963); Pettigrew, *"Constitutional Tenure:" Toward a Realization of Academic Freedom*, 22 CASE W. RES. L. REV. 475 (1971); van den Haag, *Academic Freedom in the United States*, 28 LAW & CONTEMP. PROB. 515 (1963); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973); Comment, *Academic Freedom in the United States*, 40 U. COLO. L. REV. 589 (1967).

[2] In Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Supreme Court said:

> 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.

385 U.S. at 603. *See also* Healy v. James, 408 U.S. 169, 180-81 (1972); Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968); Shelton v. Tucker, 364 U.S. 479, 486-87 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250, 261-64 (1957) (Frankfurter, J., concurring); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); Adler v. Board of Educ., 342 U.S. 485, 497 (1954) (Black, J., dissenting).

from outside influences and pressures that could compromise their ability to study and transmit knowledge to students.[3]

Because members of the academic community are dependent upon teaching as a means of livelihood, a threat to their job security is one method by which academic freedom can be curtailed.[4] Dismissal or threat of dismissal has often been used by school administrators to curtail the freedom of teachers who are outspoken on controversial issues,[5] who are sympathetic to causes

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[3] Tenure is the most common method by which academic freedom is protected and it is designed to ensure

> [f]reedom of teaching and research and of extramural activities and . . . a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

A.A.U.P. Statement of Principles, at 270. While tenure does not guarantee lifetime employment, its "essential characteristic . . . is continuity of service, in that the institution in which the teacher serves has in some manner relinquished the freedom or power it otherwise would possess to terminate the teacher's services." Byse, *supra* note 1, at 306. Tenure, however, is dependent upon the teacher's continued efficient and good conduct. *See generally Academic Tenure at Harvard University*, 58 A.A.U.P. BULL. 621 (1973); Brewster, *On Tenure*, 58 A.A.U.P. BULL. 381 (1972); Davis, *Enforcing Academic Tenure: Reflections and Suggestions*, 1961 WIS. L. REV. 200; Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 A.A.U.P. BULL. 1 (1971); VAN ALSTYNE, *Constitutional Rights of Professors and Teachers*, 1970 DUKE L.J. 841; Note, *Academic Tenure: The Search for Standards*, 39 S. CAL. L. REV. 593 (1966).

[4] "Undoubtedly, most of the publicized issues of academic freedom have had to do with attempted dismissals of professors [and] . . . . [C]ontinuous or permanent tenure is a most important means of protecting the principles of academic freedom" from such dismissals. Machlup, *supra* note 1, at 760.

[5] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (testimony before a legislative committee); Ancanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974) (member of activist homosexual organization); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (involvement in political activities); Stolberg v. Board of Trustees, 474 F.2d 485 (2d Cir. 1973) (anti-Viet Nam war activity); Russo v. Center School Dist. No. 1, 469 F.2d 623 (2d Cir.), *cert. denied*, 411 U.S. 932 (1972) (symbolic protest of the quality of American life); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973) (participation in anti-Viet Nam war rallies); Cook County College Teachers v. Byrd, 456 F.2d 882 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972) (criticism of racism in educational institutions); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971) (circulation of petitions); Whiteel v. Southeast Local School Dist. No. 1, 365 F. Supp. 312 (N.D. Ohio 1972), *aff'd*, 484 F.2d 1222 (6th Cir. 1973) (controversial religious beliefs); Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972) (attended demonstration protesting arrest of students); Miller v. Jefferson County Bd. of Educ., 54 F.R.D. 393 (W.D. Ky. 1971) (political involvements); Rackley v. School Dist. No. 5, 258 F. Supp. 676 (D.S.C. 1966) (attended demonstration); Kersey v. Maine Consol. School Dist. No. 10, 96 Ariz. 266, 394 P.2d 201 (1964) (involvement in community dispute); Ray v. Minneapolis Bd. of Educ., 295 Minn. 13, 202 N.W.2d 375 (1972) (refusal to cooperate in course evaluation).

antipathetic to positions espoused by the administration,[6] and whose pedagogic style is incompatible with that considered proper by the administration.[7]

As a result of the economic exigencies facing many school systems, the job security of teachers has recently been threatened by staff reductions necessitated by financial considerations.[8] School administrations faced with dwindling enrollment and decreasing resources have viewed the dismissal of teachers as an acceptable means of meeting monetary difficulties.[9] Such dismissals, however, can constitute a serious threat to academic freedom if staff reductions are used as a means of either weeding out dissidents[10] or dispensing with procedures designed to protect

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[6] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (public criticism of school administration's policies); Pickering v. Board of Educ., 391 U.S. 563 (1968) (letter written to newspaper critical of school board policies); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 827 (1975) (irreconcilable conflicts with superiors); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 24, 1974) (No. 74-558) (stands on controversial campus issues contrary to administration's stated position); Gieringer v. Center School Dist. No. 58, 477 F.2d 1164 (8th Cir.), *cert. denied*, 414 U.S. 832 (1973) (impromptu criticisms of school administration); Duke v. North Tex. State Univ., 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973) (public criticisms of school administration); Federation of Teachers, Local 1954 v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972) (contractual dispute); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) (remarks critical of school administration).

[7] *See, e.g.*, Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974); Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 95 S. Ct. 135 (1974); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1974); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); Ewing v. Camacho, 411 F.2d 1142 (9th Cir. 1971); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

[8] Noting the effect of this economic distress on the ability of teachers to find another job, the court in Ducorbier v. Board of Supervisors, 386 F. Supp. 202 (E.D. La. 1974), said:

> Plaintiff admits that when she was initially employed by [the university], persons qualified to teach . . . on the college level were in great demand. When plaintiff [resumed teaching after several years absence] there was an oversupply of such persons when compared with demand for their services. Plaintiff's inability to find employment may well be attributable to [this] change in the job market . . . .

Id. at 205 (footnotes omitted). *See also* notes 132-33 *infra*.

[9] *See, e.g.*, American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974). The college decided to dismiss teachers and abolish its tenure system over such less extreme alternatives as lowering wages, reducing faculty size by not filling vacancies, and not renewing the contracts of nontenured instructors. *Id.* at 272, 322 A.2d at 858; *see* text accompanying notes 102-08 *infra*.

[10] *See, e.g.*, Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974). *See also* text accompanying notes 23-51 *infra*.

faculty members from arbitrary dismissals.[11]

A dismissal justified by economic necessity may be improper for a variety of reasons. The financial exigency, for example, may be a fiction designed to aid a school administration in eliminating the employment of a dissident faculty member[12] or replacing a tenure system with one less onerous to the school.[13] Even if the crisis is genuine, the method of selecting which members must be dismissed may violate the constitutional safeguards contained in the due process clause.[14] Courts, when faced with a challenge to a dismissal justified by financial exigency, must examine the needs of the administration and the rights of the teachers in order to determine whether the termination of employment infringes the individual's academic freedom.[15]

The purpose of this note is to analyze the response of courts to terminations resulting from a financial crisis threatening the school. The response of the courts depends, in part, on whether the teacher is asserting the infringement of a constitutional right, such as freedom of expression,[16] or the deprivation without due process of the law of a property interest, such as a statutory[17] or contractual[18] right to employment. Therefore, this note will ana-

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[11] *See, e.g.*, American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974). *See also* text accompanying notes 93-114 *infra*.

[12] *See, e.g.*, State *ex rel.* Karnes v. Board of Regents, 222 Wis. 542, 269 N.W. 284 (1936), where the court refused to allow the board of regents to abolish the teaching post of the plaintiff.

[13] *See, e.g.*, American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974).

[14] *Compare* Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974) *with* Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974).

[15] The courts do not use a strict balancing test to determine whether the interest of the school in reducing its faculty should prevail over the individual's interest in continued employment; the courts are, however, cognizant of these conflicting interests. *See, e.g.*, American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974).

[16] *E.g.*, Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974), where the plaintiffs alleged an infringement of their freedom of expression and a denial of due process of law guaranteed by the fourteenth amendment. *See* text accompanying notes 23-51 *infra*.

[17] *E.g.*, Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), where the plaintiffs alleged that they were deprived of a statutorily created tenure right to reemployment without due process of law. *See* text accompanying notes 59-92 *infra*.

[18] *E.g.*, American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974), where the plaintiffs were deprived of a contractually created tenure right to reemployment by the abolition of the tenure system at Bloomfield College. *See* text accompanying notes 93-108 *infra*.

lyze each area separately and then examine the adequacy of court protection of academic freedom threatened by financially required staff reductions.

I. Challenge to Dismissal Based on Infringement of Constitutional Right

A teacher's employment cannot be terminated for reasons which infringe upon his exercise of a constitutionally protected right.[19] Thus, if a teacher can establish a nexus between his exercise of expression, for example, and his dismissal, the termination is an unconstitutional infringement of his first amendment rights.[20] In determining whether there is such a nexus,

> [w]ith rights of liberty, such as the right of a faculty member to be free from disability for engaging in speech protected by the first amendment, the analysis starts with an inquiry into the substantive reasons for whatever action is taken. If it is found that either termination or nonrenewal was [based on] the exercise of protected speech . . . [then] the substantive decision is illegal as a matter of constitutional law.[21]

This analysis, however, may fail if the school alleges that the dismissal was in fact based upon financial considerations. This allegation places a heavier burden of proof on the teacher to show that the substantive reason for the dismissal was his exercise of constitutional rights.[22]

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[19] The government cannot condition a privilege upon a waiver of a constitutionally protected right. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 827 (1975); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974); Simard v. Board of Educ., 473 F.2d 988 (2d Cir. 1973).

[20] Generally, the nexus must be established between a specific exercise of a constitutionally protected right and the dismissal. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Gierenger v. Center School Dist. No. 58, 477 F.2d 1164 (8th Cir.), *cert. denied*, 414 U.S. 832 (1973); Clark v. Holmes, 474 F.2d 928 (7th Cir.), *cert. denied*, 411 U.S. 972 (1973); Hostrop v. Board of Junior Colleges Dist. No. 515, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); Russo v. Center School Dist. No. 1, 469 F.2d 623 (2d Cir.), *cert. denied*, 412 U.S. 932 (1973); Duke v. North Tex. State Univ., 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). For a discussion of how Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 827 (1975), might not require such a nexus, see Comment, *Constitutional Law—Freedom of Expression*, 52 Denver L.J. 82, 84-86 (1975).

[21] Skehan v. Board of Trustees, 501 F.2d 31, 38 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 24, 1974) (No. 74-558), *citing* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

[22] *See* text accompanying notes 40-42 *infra*. The allegation places a heavier burden on the plaintiff because he must show not only that financial exigency was not the basis

In *Collins v. Wolfson*[23] the Miami-Dade Community College, in order to implement a reduction in faculty size, decided not to renew the contracts of four faculty members.[24] The dismissed employees then brought a section 1983[25] action alleging that the "nonrenewals were effected pursuant to an arbitrary and subjective set of criteria employed by the Board of Trustees in ascertaining which teachers would not be rehired . . . ."[26] In addition to this claim, two of the plaintiffs—Collins and Rivas—alleged that the nonrenewal of their contracts infringed their constitutionally protected right of expression.[27]

Collins, a nontenured instructor, claimed that "his nonrenewal was retaliatory in nature to punish him for participation in a well-publicized political demonstration at the Democratic National Convention . . . ."[28] The court, however, held that the appeal should be dismissed as moot because Collins was subse-

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for the termination, but also that there was a nexus between the exercise of a constitutional right and the dismissal.

[23] 498 F.2d 1100 (5th Cir. 1974).

[24] Of the four faculty members whose contracts were not renewed, three—Collins, Riley, and Rivas—were nontenured while the fourth—Hernhuter—was tenured. Because Hernhuter was tenured and, therefore, had a property interest protectible under the fourteenth amendment, he was entitled to a "hearing, the purpose of which would be to assure that his position was in fact 'discontinued' within the meaning of the contract . . . ." *Id.* at 1104. The other three were not entitled to a hearing before dismissal because they were nontenured and were thus accorded a lesser degree of protection by the court of appeals.

[25] 42 U.S.C. § 1983 (1970) provides, in part, the following:

> Every person who, under color of any statute, ordinance, regulation . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law . . . .

[26] 498 F.2d at 1101.

[27] *Id.* The first amendment claim of Rivas was quickly disposed of by the court, which held it could "find no conceivable claim embodied in Rivas' complaint, for he leaves to mere conjecture the possibility that subjective standards *could* mask an improperly grounded failure to renew." *Id.* at 1103. Thus, a mere allegation, without more, that a reduction in staff is being used as a subterfuge to remove dissident faculty members is inadequate to carry the plaintiff's burden of proof. However, a factual basis for such an assertion may be sufficient to successfully challenge such a dismissal. In American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974), for example, the plaintiffs successfully demonstrated that the abolition of tenure and the dismissals of certain faculty members were not demonstrably bona fide and the court refused to sustain the administration's actions. In *Bloomfield*, however, a contractual right was violated by the administration's actions and the burden of proof in a situation like *Collins* would be on the plaintiffs to show the constitutional inadequacy of the decision.

[28] 498 F.2d at 1101.

quently rehired by the college pursuant to a rehiring policy that gave priority to faculty members dismissed as the result of a staff reduction.[29] The court, therefore, did not find it necessary to determine whether the reason given by the administration or the reason alleged by Collins was the true basis for the nonrenewal of the contract.

In so holding, the Fifth Circuit in effect deprived Collins of his cause of action under section 1983, which provides liability for the "deprivation of *any* rights, privileges, or immunities secured by the Constitution."[30] The dismissal of the suit by the trial court and the decision by the court of appeals took away from Collins the opportunity to show whether constitutional rights had been infringed and, if they were, whether damages should properly have been awarded. While reinstatement is often viewed as the proper remedy for a constitutionally impermissible termination of employment,[31] it is not an exclusive remedy, and other remedies—such as the award of back pay or punitive damages—are often found appropriate to compensate the plaintiff for the deprivation of his constitutional rights.[32] The Fifth Circuit's holding, in part, results from the fact that the administration justified its actions by using the financial condition of the college as the basis for the termination, and a different conclusion might have been reached if this had not been the basis.[33]

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[29] *Id.* at 1102. The court said that, "as a result of [his] restoration, [Collins no longer had] a live controversy with the trustees." *Id.* The claim of the third appellant, Riley, was also held to be moot because he was rehired under the same policy.

The court did not, however, indicate why it thought that there was no section 1983 claim remaining after the rehiring of the plaintiffs. One obvious argument is, because the plaintiffs were rehired, the administration's claim of financial exigency as the basis must be valid, for the school would not wish to rehire someone it fired in order to get him off the faculty. This conclusion does not necessarily follow, because Collins alleged that he was fired as a *punishment* and it is this *punishment* he claimed violated his constitutional rights and, therefore, gave rise to the school's section 1983 liability. *See* text accompanying note 28 *supra*.

[30] 42 U.S.C. § 1983 (1970) (emphasis added).

[31] *See, e.g.*, Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 24, 1974) (No. 74-558); McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973); Stolberg v. Board of Trustees, 474 F.2d 485 (2d Cir. 1973); Cooley v. Board of Educ., 453 F.2d 282 (8th Cir. 1972); Rauls v. Board of Educ., 445 F.2d 825 (5th Cir. 1971); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969); Olson v. Regents of Univ. of Minn., 301 F. Supp. 1356 (D. Minn. 1969).

[32] *Compare Collins with* Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 24, 1974) (No. 74-558) *and* Smith v. Losee, 485 F.2d 334 (10th Cir.), *cert. denied*, 417 U.S. 908 (1973).

[33] One reason a different result might have been reached is that Collins would prob-

The remaining appellant, Rivas, claimed that the criteria used in selecting which faculty members would not be rehired was arbitrary and subjective and, therefore, a deprivation of due process under the fourteenth amendment.[34] In disposing of this claim, the court held:

> [O]nce the need arose to reduce the staff, the Board could employ any device or standard to implement the reduction, such as arbitrarily drawing lots or otherwise leaving the decision to chance, so long as the actual reason for the particular separation was not retribution against the instructor's constitutionally protected conduct.[35]

The only restriction imposed by the court upon the administrative decision is that the college is "confined to determining who among qualified instructors is more or less expendable, rather than deciding who on the faculty has so misbehaved as to warrant dismissal for cause."[36]

The difficulty with the court's analysis is that the administration could easily couch the dismissals in the language of a permissible standard while in reality using constitutionally impermissible standards.[37] In *Johnson v. Branch*,[38] for example, the

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ably not have been rehired, because there would have been no policy to rehire those persons whose contracts were not renewed because of a staff reduction. Another is that Collins would have had a lighter burden of proof, because he would not have to show both the invalidity of the financial exigency *and* the nexus between his termination and an exercise of a constitutional right.

[34] 498 F.2d at 1103

[35] *Id.* at 1103-04.

[36] *Id.* at 1103.

[37] For examples of cases in which a school administration has used permissible grounds for dismissal as a subterfuge in order to implement impermissible terminations of employment, see Cook County College Teachers v. Byrd, 456 F.2d 882 (7th Cir. 1972) (plaintiff alleged dismissals were retaliation for union activities and public positions taken on racism in the university; court held that the dismissal was constitutional as it proceeded through the school's normal selection process); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971) (plaintiffs alleged dismissal based on circulation of petitions and other antiadministration actions; court held dismissal proper in that it resulted from a desire to strengthen the school's art and history departments); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) (court sustained the plaintiff's allegation that the dismissal was based on her civil rights activities over the school administration's claim that the dismissal was based on her insubordination and refusal to cooperate with her superiors); Whitsel v. Southeast Local School Dist. No. 1, 365 F. Supp. 312 (N.D. Ohio 1972), *aff'd* 484 F.2d 1222 (6th Cir. 1973) (plaintiff alleged that the dismissal was based on his criticism of the school board, his teaching of controversial subjects, and his personal religious beliefs; the court held the dismissal was based on his participation in a student demonstration and was constitutionally permissible); Williams v. Sumter School Dist., 255 F. Supp. 397 (D.S.C. 1966) (court sustained plaintiff's contention that his dismissal

reasons given for the nonrenewal of the teacher's contract were "insubordination" and an "inability to perform those extracurricular duties required of her promptly and in a cooperative manner."[39] The court, however, found that these grounds were not the true basis for the dismissal and, instead, held that the plaintiff was dismissed, in part, because of her involvement in civil rights activities.

In *Johnson,* which did not involve a reduction in faculty size, the Fourth Circuit was able to question the school's credibility and find that there was no factual basis for the reasons given for the nonrenewal of the contract.[40] In a fact situation involving a reduction in staff, however, the reduction in itself provides factual support for the dismissal. Because "someone on the faculty [has] to go because of [the] reduction," a faculty member attempting to show that he was chosen for an improper reason has a stronger presumption to rebut.[41] The Fifth Circuit in *Collins,* moreover, sanctioned the use "of any device or standard to implement the reduction" as long as the standard was not unconstitutional; however, this latitude in what constitutes a permissible standard gives the administration greater resources in fabricating constitutional excuses for what may be an unconstitutional termination of employment.[42]

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was based on his civil rights activities over the school's claim that the dismissal was caused by the plaintiff's insubordination and lack of cooperation). *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 16.09 at 331 (1972), where Professor Davis says that persons responsible for writing administrative decisions sometimes feel compelled to "dress up [a decision] in verbiage that will make it look better than it is underneath."

[38] 364 F.2d 177 (4th Cir. 1966).

[39] *Id.* The basis for the allegations of insubordination and refusal to cooperate, the court found, stemmed from the following matters:

> [B]eing 15 minutes late to supervise an evening athletic contest; arriving at the school building a few minutes after the prescribed sign-in time but before any class was due to commence; failure to furnish a written explanation for not attending a P.T.A. meeting; failure to stand in the door of her classroom to supervise pupils as the classes changed; and the failure to see that the cabinets in her home room were clean and free of fire hazard.

Id. at 178. In his dissent, Judge Bryan said that the reasons given by the school administration were sufficient for not renewing the contract of the plaintiff. *Id.* at 182 (Bryan, J., dissenting).

[40] *Id.*

[41] Collins v. Wolfson, 498 F.2d 1100, 1103 (5th Cir. 1974). *See generally* DAVIS, *supra* note 37, §§ 29.01, .06; S. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965).

[42] 498 F.2d at 1103. Standards for differentiating faculty members might include seniority, experience, publications, participation in school affairs, community involve-

Rivas also claimed that the termination of his employment deprived him of liberty without due process of law. In rejecting this claim, the court said that under *Board of Regents v. Roth*[43] only a termination that carries with it the implication of incompetence[44] or impropriety[45] infringes a person's liberty if there is no hearing before the termination. A dismissal necessitated by a staff reduction carries with it no negative implications, the court held; it merely implies that "someone on the faculty had to go" and "someone who otherwise would likely be invited to stay must be relieved."[46] While it is unclear what constitutes a stigma sufficient to justify a deprivation of liberty under *Roth*,[47] the court ignores the possibility that a termination justified by economic necessity may be interpreted by future employers as a termination in reality based upon incompetence or impropriety.[48]

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ment, classroom achievement, interest in the future of the school, and family considerations. *See* Johnson v. Board of Regents, 377 F. Supp. 227, 259 (W.D. Wis. 1974).

[43] 408 U.S. 564 (1972).

[44] For examples of cases in which the dismissals carried implications of incompetence, see Scheelhause v. Woodbury Central School Dist., 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 95 S. Ct. 255 (1974); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973); Knarr v. Board of School Trustees, 317 F. Supp. 832 (N.D. Ind. 1970), *aff'd* 452 F.2d 649 (7th Cir. 1971); Tsakiris v. Phoenix Union High School Sys., 18 Ariz. App. 416, 502 P.2d 1093 (1972); Conley v. Board of Educ., 143 Conn. 488, 123 A.2d 747 (1956); Stroman v. Board of School Directors, 7 Pa. Commw. 418, 300 A.2d 286 (1973). In Weathers v. West Yuma County School Dist. R-J-1, 387 F. Supp. 552, 559 (D. Colo. 1974), the allegations of incompetence included the fact that the plaintiff's teaching methods "were ineffective in that students did little more than 'take notes' and do 'busy work.' "

[45] For examples of cases in which the dismissals carried implications of impropriety, see Ancanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974) (homosexual conduct); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973) (told students "I am an unwed mother"); Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973) (unsubstantiated allegations of sexual conduct with younger man); Bradford v. School Dist. No. 20, 364 F.2d 185 (4th Cir. 1966) (public drunkenness and disorderly conduct); Jerry v. Board of Educ., 35 N.Y.2d 534, 324 N.E.2d 106 (1974) (allegations of sexual misconduct with student).

[46] 498 F.2d at 1103.

[47] In Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court held that if a termination infringes a person's interest in "liberty," then he is entitled to a hearing before that deprivation.

[48] For a discussion of the repercussions of a dismissal from employment as a teacher, see Schulman, *Employment of Nontenured Faculty: Some Implications of* Roth *and* Sinderman, 51 DENVER L.J. 215, 220-24 (1974). In Russo v. Center School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), for example, the plaintiff was unable to find work after her contract was not renewed despite "a highly satisfactory teacher observation report . . . and further academic achievement." Schulman, *supra*, at 222. Ducorbier v. Board of Supervisors, 386 F. Supp. 202 (E.D. La. 1974), suggests that a university is "under no duty to determine whether the job market [can] absorb [a teacher] before" terminating his employment. *Id.* at 205, *citing* Perkins v. Regents of

A teacher challenging a dismissal that is justified by his employers as required by economic necessity has a heavy burden of proof. The mere allegation that the termination was in reality based upon his exercise of a constitutional right is inadequate, because the school's claim of financial exigency in itself provides a substantive basis for the decision that is not unconstitutional.[49] Moreover, courts may be unwilling to interfere with the discretion of the school's administration as to either the necessity of dismissals or the choice of whom should be dismissed.[50] Thus, in the absence of a property right based on a contractual or statutory provision, the constitutional protection afforded a faculty member dismissed as the result of a reduction in staff is often inadequate.[51]

II. Challenge to Dismissal Based on Property Right

A person has a protectible interest, similar to a property right, in his employment if he has

> more than an abstract need or desire for [the continued employment]. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it.[52]

This claim of entitlement to continued employment is more than a mere belief that one will be rehired[53] or a subjective, unilateral expectation of reemployment.[54] This legitimate claim of entitlement may arise either through the creation of such an interest by the state[55] or by the creation of a contractual relationship.[56]

Univ. of Calif., 353 F. Supp. 618, 623-24 (C.D. Cal. 1973). *See also* text accompanying notes 131-32 *infra*.

[49] *See* text accompanying notes 37-42 *supra*.

[50] *See, e.g.*, Johnson v. Board of Regents, 377 F. Supp. 227, 236-38 (W.D. Wis. 1974); American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 267-68, 322 A.2d 846, 855-56 (Chan. Div. 1974).

[51] If, for some reason, the protection afforded by a contract or statute does not apply, then the underlying constitutional protection still remains. *Compare* Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3366 (U.S. Dec. 24, 1974) (No. 74-558), *with* Cusumano v. Ratchford, 507 F.2d 980 (8th Cir. 1974), *and* Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974). *But cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[52] Board of Regents v. Roth, 408 U.S. 564, 577 (1972). For a recent Supreme Court interpretation of *Roth* and the property interest it creates, see Arnett v. Kennedy, 416 U.S. 134 (1974).

[53] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 134 (1974).

[54] *See, e.g.*, Ducorbier v. Board of Supervisors, 386 F. Supp. 202, 208 (E.D. La. 1974).

[55] In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court held:

> Property interests, of course, are not created by the Constitution.

If a teacher has a recognized property interest in continued employment, he cannot be deprived of this interest without the due process of law guaranteed by the Constitution.[57] When confronted by a challenge to a dismissal that is alleged to infringe the plaintiff's property interest in continued employment, a court must determine,

> under the applicable state law, the nature and extent of the . . . right and, if the . . . right has been terminated other than by the expiration of its term, to consider whether the method of termination comported with the fourteenth amendment procedural due process.[58]

Thus, in situations in which a dismissal was necessitated by financial exigencies, the court must determine whether the termination infringed the rights of a teacher who had a property interest in his continued employment.

A. *Statutorily Created Interest in Continued Employment*

In *Johnson v. Board of Regents*[59] the Wisconsin Legislature reduced by 5 percent the base budget for the University of Wisconsin System and required a decrease in enrollment in the system's campuses.[60] This reduction led administrative officials to the conclusion that "there would be insufficient funds available to continue to pay the salaries of all tenured members of the faculty and staff in all departments of all campuses."[61] Faced with this forced reduction of the budget, university officials decided to discontinue the employment of some tenured faculty

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> Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

[56] Justice Powell recently said that a "person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent 'sufficient cause' for discharge." Arnett v. Kennedy, 416 U.S. 134, 165 (1974) (Powell, J., concurring), *citing* Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

[57] *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Schulman, *supra* note 48.

[58] Skehan v. Board of Trustees, 501 F.2d 31, 38 (3d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3366 (U.S. Dec. 24, 1974) (No. 74-558).

[59] 377 F. Supp. 227 (W.D. Wis. 1974).

[60] *Id.* at 230.

[61] *Id.* As in American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974), the administration apparently did not consider other, less extreme alternatives. *See* note 9 *supra*.

members and created a procedure for determining which faculty members they would "lay-off"[62] and a means by which this decision could be appealed.[63]

After following this procedure, the university laid off 38 tenured faculty members who then brought an action seeking declaratory relief.[64] The plaintiffs, claiming that the university's method of determining which faculty members would be terminated violated the procedural due process guaranteed them by the fourteenth amendment, relied on a Wisconsin statute as the basis for their claim. This statute, in part, provides that a teacher's "employment shall be permanent, during efficiency and good behavior" and that such employment "may not be terminated involuntarily, except for cause upon written charges."[65] Because there were neither written charges nor allegations of inefficiency or bad behavior, the teachers complained that having their employment terminated deprived them of a property right without due process of law.[66]

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[62] The regents decided to use the term "lay-off" rather than "terminate" or "dismiss" because

> the applicable state statutes did not specify fiscal exigency as a basis for termination of tenured faculty; that the persons affected would continue as tenured faculty members (but without pay and without duties); that the persons affected would be entitled to "first refusal" for reinstatement to their positions if funds again became available within two years; that efforts to find other employment for them within the System were being made and would continue to be made; and that the term "lay-off" avoids an implication that any act or omission of the person caused the University's action.

377 F. Supp. at 231.

[63] *Id.* at 232-33.

[64] The plaintiffs brought an action under 42 U.S.C. § 1983 (1970) alleging a deprivation of due process and 28 U.S.C. § 1343(3) (1970) seeking a "preliminary injunction to require defendants to continue the plaintiffs in their present employment unless and until minimal procedural due process is afforded them." 377 F. Supp. at 230.

[65] WIS. STAT. ANN. § 37.31 (1974-75 Supp.) provides, in part, as follows:

> (1)(a) All teachers in any state university shall be employed on probation. The employment shall be permanent, during efficiency and good behavior, after appointment and acceptance thereof for a sixth consecutive year in the state university system as a teacher. An official leave of absence, part-time or fulltime, or a teacher improvement assignment, shall not constitute a break in continuous service, nor shall it count toward the time required to attain tenure.
>
> (b) The employment of a teacher who has become permanently employed under this section may not be terminated involuntarily, except for cause upon written charges . . . .

[66] The procedures that the plaintiffs claimed they were entitled to as a matter of due process of law are those contained in *id.* § 37.31(1)(b), which provides, in part, that

The court first determined that the statutory right of tenure created by the legislature is not limited by financial considerations. In listing the applicable grounds for involuntarily terminating a tenured faculty member's employment, the statute nowhere provides that a teacher can be terminated "because of reduced student enrollment or because of considerations of economy, or both."[67] To reach a contrary conclusion would result in the anomalous interpretation that the statute afforded more protection to an incompetent teacher, who could be dismissed only according to the statutory procedures, than to a teacher in good standing, whose property interest in continued employment did not require procedural protection if the reasons for the dismissal were economic considerations.[68]

The court in *Johnson,* however, did not require that the full procedures contained in the statute[69] had to be followed before the 38 plaintiffs were dismissed.[70] In deciding how much procedure

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> [w]ithin 20 days of receiving the written notice that his employment has been terminated, such permanently employed teacher may appeal the termination to the board of regents by a written notice to the president of the board of regents. The board of regents shall hear the case and provides such teacher with a written statement as to its decision. The action and decision of the board of regents in the matter shall be final, subject to judicial review . . . .

[67] 377 F. Supp. at 234. In reaching such a conclusion, the court in *Johnson* is apparently in conformity with Wisconsin case law. In State *ex rel.* Ball v. McPhee, 6 Wis. 2d 190, 203-04, 269 N.W. 711, 718 (1959), *overruled in part on other grounds,* 39 Wis. 2d 595, 159 N.W.2d 630 (1968), the Wisconsin Supreme Court interpreted section 37.31 and said:

> We wish to take sharp issue with . . . the contention . . . . [t]hat the statute vests sole discretion in the board to determine for itself what . . . constitutes good cause for discharge. Such an interpretation of the statute would tend to completely destroy its obvious objective of assuring security of tenure to a teacher.

[68] *See* text accompanying notes 84-92 *infra.*

[69] *Compare* WIS. STAT. ANN. §§ 37.31(1)(a)-(b) (Supp. 1974-75) *with* 377 F. Supp. 232-33.

[70] Due process can, of course, vary with the substantive rights that are sought to be protected. In Boddie v. Connecticut, 401 U.S. 371, 378 (1970), the Court said, "The formality and procedural requisites [necessary to satisfy due process] can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Thus, the statutory procedures are not necessarily the only ones that will satisfy the procedural due process requirements of the fourteenth amendment. In *Johnson* the court stated that due process required only that the dismissed teacher have the right to show

> that the true reason for his or her lay-off was a constitutionally impermissible reason; or . . . that, given the chain of decisions which preceded the ultimate decision designating him or her by name for lay-off, that ultimate decision

was required by this statutory right to employment, the court applied the Supreme Court's decision in *Arnett v. Kennedy*.[71] In *Arnett*, the appellant was discharged under procedures he alleged "denied [him] due process of law because they failed to provide for a trial-type hearing before an impartial agency official prior to removal . . . ."[72] In affirming the dismissal, Justice Rehnquist, in an opinion joined by the Chief Justice and Justice Stewart, held that the entity which created the substantive right to employment could also define "the procedure provided for its enforcement."[73] Therefore, the Court held, the procedure to enforce a statutory right is not constitutional in origin, but rather

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was nevertheless wholly arbitrary and unreasonable.

377 F. Supp. at 240. In criticism of the due process protection given by the court in *Johnson*, it has been said that

> the plaintiffs' had a constitutional claim to "some minimal procedural protection." But that protection was minimal indeed, in that the court declined to prescribe any faculty participation in the separation decisions, once "reasonably adequate" statements of reasons were provided by the administration, with some opportunity for the faculty member to respond.

The Bloomfield College Case, 60 A.A.U.P. BULL. 320 (1974), *quoting* Johnson v. Board of Regents, 377 F. Supp. 227, 240 (W.D. Wis. 1974).

[71] 416 U.S. 134 (1974).

[72] *Id.* at 139. The plaintiff, an employee at the Chicago Regional Office of the Office of Economic Opportunity, was dismissed after publicly stating that his superior had "attempted to bribe a representative of a community action organization." *Id.* at 137. The superior then notified the plaintiff that he would be removed from his position as the result of making the unsubstantiated statement. *Id.* at 138.

[73] *Id.* at 152. The Court, as justification for this conclusion, said that

> that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. . . . Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice.

Id. Thus, Justice Rehnquist's opinion implies that the owner of a property right, which Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), accorded constitutional protection, may be denied that full protection if the creator of the property interest does not include the procedural protections *Roth* and *Sindermann* held the owner was entitled to have. In his dissent, Justice Marshall notes that this in effect makes the property interest similar to the privilege of governmental employment that was found to exist in Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951). 416 U.S. 211 n.7 (Marshall, J., dissenting).

only such as "Congress has designated" without any additional due process procedural protection.[74]

It could be agued under *Arnett,* then, that the authority creating the property interest in employment could, in situations not clearly delineated by the statute, define how much, if any, procedural protection is to be given in those situations.[75] As applied to *Johnson,* the authority of the University of Wisconsin System to determine the procedural due process to be accorded faculty members dismissed as the result of economic exigency would be based upon the statute creating the property interest in teaching rather than the Federal Constitution. Thus, the statute, rather than the fourteenth amendment, would determine the protection to be given a tenured teacher; this view, however, was rejected in *Johnson.*[76]

Instead, the court noted that the majority of the Supreme Court did not agree with Justice Rehnquist's opinion that the statute, rather than the Constitution, dictates the procedural due process an employee is entitled to receive.[77] The district court concluded that

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[74] 416 U.S. at 152. The Court said that reading in additional constitutional procedural protections could be done "[o]nly by bifurcating the very sentence of the Act of Congress which conferred . . . the right not to be removed save for cause . . . ." *Id.*

[75] As in the plurality's opinion in *Arnett,* it could equally well be argued that the State of Wisconsin, had it so chosen, could have included the procedural guarantees of the Federal Constitution. How this should be done, however, is something the plurality does not state. *See id.* at 151-52. Given the wide variety of cases in which requisite due process involved in a hearing might be an issue, the legislature in drafting such a statute would have to possess an unusual degree of prescience to know what the Constitution requires as a matter of due process because due process varies so considerably from situation to situation. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (repossession of consumer goods); Board of Regents v. Roth, 408 U.S. 564 (1972) (nonrenewal of teaching contract); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Fuentes v. Shevin, 407 U.S. 67 (1972) (repossession of consumer goods); Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1967) (garnishment of wages); Greene v. McElroy, 360 U.S. 474 (1959) (discharge of employment from government contractor). *See generally* Comment, *Constitutional Law—Due Process—Prejudgment Seizure of Property,* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), 52 DENVER L.J. 619, 621-25, 632 (1975), where the author describes "the inconsistent standards of due process." This problem could be avoided if, rather than accepting the plurality's approach of selective incorporation by legislatures of the due process clause, the procedural due process required for termination of employment was independent of statutes. *See* Arnett v. Kennedy, 416 U.S. 134, 207, 211 (1974) (Marshall, J., dissenting).

[76] 377 F. Supp. at 235.

[77] In his dissent, which was joined by Justices Douglas and Brennan, Justice Marshall noted that

> once the entity creating the position has afforded it the attribute of permanence or "tenure," then the due process clause of the Fifth or Fourteenth Amendment determines the minimal procedural protection which must attend termination or lay-off.[78]

Because the statute was inapplicable to these particular terminations, the court did not require the board of regents to follow the statutory procedures for termination.[79] Instead, the court applied the minimal due process requirements that underlie the statute's procedures and held that the fourteenth amendment required only protection from "termination or lay-off for a constitutionally impermissible reason . . . and from termination or lay-off which is wholly arbitrary and unreasonable."[80]

In so concluding, the court ignored the plaintiff's claim that the dismissal was in itself a violation of the fourteenth amendment. Arguably, what violates the plaintiff's fourteenth amendment rights is not the actual procedures the administration followed in *Johnson,* but rather the fact that the terminations were allowed to take place for reasons and under procedures that were

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> a majority of the Court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it could be conditioned on a statutory limitation of procedural due process, an approach which would render such protection inapplicable to the deprivation of any statutory benefit.

416 U.S. at 211 (Marshall, J., dissenting). In a concurring opinion in which he was joined by Justice Blackmun, Justice Powell found the constitutional protections of the fifth and fourteenth amendments applicable. *Id.* at 164 (Powell, J., concurring). In a separate opinion, Justice White found the "principles of due process" applicable when "a person is finally deprived of his property" interest in employment. *Id.* 178 (White, J., dissenting in part and concurring in part).

[78] 377 F. Supp. at 235.

[79] The court concluded that

> the Wisconsin legislature has invested plaintiffs' employment with a sufficient degree of permanence to prevent termination or lay-off, for whatever reason, without some minimal procedural protection afforded by the Fourteenth Amendment, whatever the elements of that protection may be.

Id. at 235. *See* criticism of this conclusion in note 70 *supra.*

[80] 377 F. Supp. at 239. In the court's view, the "minimal procedures" required at least

> furnishing each plaintiff with a reasonably adequate written statement of the basis for initial decision to lay-off;
> furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
> making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
> providing each plaintiff the opportunity to respond.

Id. at 240. *See* criticisms of this "minimal" procedure in *The Bloomfield College Case, supra* note 70.

not contained in the statute creating the property interest in continued employment.[81] The property interest of the Wisconsin teachers was, by administrative fiat, limited by the addition of a new cause for dismissal—declining student enrollment and legislative paring of the budget.[82] The court purported to reject just such a view,[83] but by allowing the dismissals to stand it sanctioned the limitation of the property interest.

The court's rationale, moreover, reaches the same result it would have reached had it followed Justice Rehnquist's plurality opinion.[84] Under the plurality's approach in *Arnett,* the university system acting for the legislative creator of the property interest may dictate "the procedural limitations which [accompany] the grant of the interest."[85] In *Johnson* this was done when the university system was allowed to decide that tenure would have to be limited by economic considerations and different procedures were followed than those specified by the statute.[86] The court then sanctioned these procedures as satisfying the requirements of the due process clause.[87] Although the court's approach in *Johnson* resulted in a judicial sanction of procedures not required under the plurality's opinion in *Arnett,*[88] the protection that *Roth* and *Sindermann* accorded an existing property interest in continued employment has been circumvented by a lower procedural requirement for dismissals justified by economic reasons. The adequacy of the statutory protection of the Wisconsin tenure act is limited because the creator of the interest and the university administration can redefine its extent and procedural protections.[89]

The weakness of statutory protection of academic freedom is revealed by the court's response in *Johnson* to a staff reduction necessitated by economic considerations. Given the bona fide

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[81] 377 F. Supp. at 230-31. For the procedures and reasons for dismissals, see notes 65-66 *supra.*

[82] *See* text accompanying notes 59-64 *supra. See also* 377 F. Supp. at 234-35.

[83] 377 F. Supp. at 235.

[84] *See* text accompanying notes 72-76 *supra.*

[85] 416 U.S. at 155.

[86] *See* text accompanying notes 62-66 *supra.*

[87] 377 F. Supp. at 240-42.

[88] *See* 416 U.S. at 163, where the Court concluded that there was no necessity for "procedural protection beyond that afforded here by the statute and related agency regulations."

[89] *See* text accompanying notes 69-76 *supra.*

nature of the necessity of the dismissals and the ambiguous tenure statute, the court was compelled to abandon the statutory procedures designed to protect academic freedom.[90] Because all of the faculty members in *Johnson* were qualified and because the employment of some had to be terminated, the opportunity to prove that the dismissal was actually based on an impermissible ground was greatly reduced.[91] The plaintiffs in *Johnson* had to show that the decision was *"wholly* arbitrary and unreasonable" in order to prevail and this, in reality, was impossible because the underlying basis for the decision—the economic reduction in staff—meant that the decision could not possibly be *wholly* arbitrary.[92]

B. *Contractually Created Interest in Continued Employment*

In *American Association of University Professors v. Bloomfield College*[93] the Board of Trustees of Bloomfield College, faced with decreasing enrollment and an increasing cash deficit,[94] decided to reduce the staff by eliminating 13 teaching positions. At the same time the board found it necessary to place the remaining professors on a 1-year terminal contract and thereby eliminate the college's existing tenure system.[95] The plaintiff

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[90] The court accepted as bona fide the administration's decision to reduce the faculty without requiring the administration to show that less extreme alternatives, such as not replacing retiring faculty, were not available. *See* note 61 *supra*. The court felt that the decision to terminate was the result of a series of decisions that the due process clause did not require the court to inquire into. *See* 377 F. Supp. 236-39.

[91] *See* 377 F. Supp. at 240.

[92] *Id.* at 239 (emphasis added). If the decision has *any* legally admissible evidence sustaining it, such as a showing of economic necessity, it is not wholly arbitrary and will be sustained by a court reviewing the administrative action. *See generally* K. DAVIS, *supra* note 37, §§ 14.07-.09, .13.

[93] 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974).

[94] Enrollment in 1973-74 was 867 students, down from 1,069 in 1972. *Id.* at 255, 322 A.2d at 849. The cash deficit "for 1972 was $123,000 and for 1973 $191,000, with estimates that it will probably rise to $231,000 for the year." *Id.* at 257, 322 A.2d at 850. The court said that

> enrollment will continue to drop for the following three reasons: (1) the pool from which the college has historically drawn in terms of age and economic background is itself being diminished; (2) inability to develop a sufficiently attractive academic program; and (3) costs. In addition . . . the area is . . . overburdened with educational facilities in terms of existing need.

Id. at 258-59, 322 A.2d at 851. For a thorough discussion of the economic problems facing Bloomfield College, see *Academic Freedom and Tenure: Bloomfield College (New Jersey)*, 60 A.A.U.P. BULL. 50 (1974).

[95] 129 N.J. Super. at 255, 322 A.2d at 849.

brought this action seeking reappointment of those faculty members whose employment had been terminated and a "declaratory judgment that [the professors'] tenured status is unaffected by the action of board of trustees."[96]

The basis for the plaintiff's action was that the contract provided that

> a teacher will have tenure and his services may be terminated only for adequate cause, except in cases of *extraordinary* circumstances because of financial *exigency*.[97]

The contract further stated that "[t]ermination of continuous employment because of financial exigency of the institution must be *demonstrably bona fide*."[98] Thus, the contract limited the situations in which a tenured faculty member could be terminated to those in which the trustees' actions were 1) justified by extraordinary circumstances and 2) demonstrably bona fide.[99]

The court first determined whether the current financial difficulties of Bloomfield College constituted the "extraordinary circumstances" which, under the contract, would allow the administration to dismiss tenured faculty. Extraordinary circumstances, the court held, arise from situations so extreme that the college is forced to take measures "reasonably calculated to preserve its existence as an academic institution" and not from those situations in which the college is merely "under financial distress and . . . 'something [has] to be done.' "[100] In determining whether

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[96] *Id.*

[97] *Id.* at 253, 322 A.2d at 849.

[98] *Id.* (emphasis added). In the *A.A.U.P. Statement of Principles*, at 270, subsection 5 of the Academic Tenure section provides that "[t]ermination of a continuous appointment because of a financial exigency should be demonstrably bona fide." In 1974, the American Association of University Professors proposed the following regulation for termination of employment on the basis of financial exigency:

> Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency which cannot be alleviated by less drastic means.

Discontinuance of a Program, Employment, Department, or Medical Reasons, 60 A.A.U.P. BULL. 411 (1974) [hereinafter cited as Proposed Revision of Regulation 4].

[99] The court said:

> That the parties intended that this evaluation [of the tenure] policy not be left to the college free of restraint is shown by their choice of conditions (1) that the Board's actions be demonstrably bona fide, (2) extraordinary circumstances . . . .

129 N.J. Super. at 266, 322 A.2d at 855.

[100] *Id.* at 264, 322 A.2d at 855.

the former or latter situation faced the college, the court considered the following factors: the duty of the board of trustees to "manage the business of the college . . . in light of its own best business judgment free from outside interference" and the "nature and extent of academic tenure."[101]

The court examined the financial difficulties facing the college[102] and concluded that these problems, while severe, did not justify a conclusion that a "financial exigency" or "extraordinary circumstances" existed. Because the school's "financial problem [was] one of liquidity, which . . . had plagued the college for many years," the school's current distress could be characterized as neither exigent nor extraordinary within the meaning of the contract.[103] The financial difficulties of the college were not sufficient to justify the abolition of tenure; this conclusion led the court to examine the good faith of the college in deciding to abolish tenure.[104]

The administration "failed to demonstrate by a preponderance of the evidence that their . . . action was in good faith."[105] Because there was no *immediate* financial benefit that could have

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[101] *Id.* at 267-68, 322 A.2d at 855-56; *see* Thomas v. Board of Educ., 89 N.J. Super. 327, 215 A.2d 35 (App. Div. 1965), *aff'd* 46 N.J. 851, 218 A.2d 630 (1966); Quinlan v. Board of Educ., 73 N.J. Super. 40, 179 A.2d 161 (App. Div. 1962). The court in *Bloomfield* described the considerations as follows:

> [T]he obligation incumbent upon the board of trustees to manage the business of the college, to appraise and project existing and future needs and resources and to act in light of its own best judgment free of outside interferences; its duty to honor solemnly undertaken tenure commitments, the objective data relating to the college's financial circumstances, its financial history, the authenticity of the financial threat; evaluations expressed by the board of trustees, the existence of real alternatives to the action taken, and the nature and extent of academic tenure itself.

129 N.J. Super. at 267-68, 322 A.2d at 855-56.

[102] *See* note 95 *supra*. The court also considered the fact that the college had lost it status as a prime lending risk, which caused its borrowing costs to increase, and that its college endownment fund had decreased by 21 percent. 129 N.J. Super. at 258, 322 A.2d at 850.

[103] 129 N.J. Super. at 270, 322 A.2d at 857. The court also considered the fact that 12 new, nontenured faculty were hired in the "period during which the action complained of took place" and that the university owned property, the value of which was "conservatively estimated at between 1½ and 4 million dollars." *Id.* at 269, 270, 322 A.2d at 856, 857.

[104] The court said that the college "cannot reasonably support its claim of demonstrably bona fide exigency." *Id.* at 271, 322 A.2d at 857.

[105] *Id.* at 268, 322 A.2d at 856.

been derived from abolishing the existing tenure system, the court concluded that the abolition "could not have been inspired by financial exigency."[106] The true concern of the administration in abolishing tenure was not in resolving a financial emergency, but rather in implementing a long-standing desire that "the present tenure system be abolished and that a new term-contract system be established."[107] Thus, both the dismissal of the tenured faculty members and the abolition of tenure were improper in that the reason given for the action—the financial exigency threatening the institution—was a subterfuge to avoid the college's contractual obligations with its faculty.[108] The court, therefore, refused to sanction the abolition of tenure and reinstated the dismissed faculty members.

The adequacy of contractual protection of academic freedom depends upon the adequacy of the contract creating the protection. In *Bloomfield College* the contract provided a means by which the court could gauge the propriety of the college administration's actions. Through the use of precisely defined terms, such as "financial exigency" and "extraordinary circumstances," the court was able to determine whether the teachers' rights were infringed by the abolition of tenure.[109] The contract, therefore, provided the court with an adequate framework within which to ascertain and protect the rights of the teachers.

If, however, the contract does not precisely define the rights of the parties, then the adequacy of the contractual protection is effectively diminished. In *Cusumano v. Ratchford,*[110] the applicable language, which was incorporated by reference into the contract,[111] provided that notice

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[106] *Id.*

[107] *Id.* at 272, 322 A.2d at 858, *quoting* a report to the board of trustees from the college's Commission to Review Tenure and Retirement Policy, dated June 21, 1973. The court noted that the report "clearly focuses upon the issue of the 'tenure system,' not with a bona fide attempt to reconcile the fact of tenure with the reality of a true financial exigency . . . ." *Id.*

[108] The court said that "[c]ourts have not hesitated to invalidate the dismissal of tenured personnel where the reasons of economy given were shown to have been used as a subterfuge." *Id., citing, inter alia,* Wall v. Board of Educ., 378 F.2d 275 (4th Cir. 1967); Chambers v. Board of Educ., 364 F.2d 189 (4th Cir. 1966).

[109] *See* 129 N.J. Super. at 263-64, 322 A.2d at 854.

[110] 507 F.2d 980 (8th Cir. 1974).

[111] *Id.* at 982.

> *should be given* at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.[112]

The court held that this language, clearly "precatory on its face," was not intended to be "a legal binding document."[113] A failure to give notice of intended termination of employment was, as a result, not violative of the teaching contract. Furthermore, because the mode of termination did not violate the underlying due process protection of the fourteenth amendment, the court sustained the dismissals.[114]

CONCLUSION

The protection of academic freedom has always involved a conflict between the interests of the institution and the individual. School administrators need discretion in day-to-day as well as long-range decisions as to the composition, size, and quality of their faculty;[115] individual scholars need job security in order to teach, research, and study effectively.[116] The conflict between these interests increases appreciably when the school administration determines that the deteriorating financial condition of the institution has become so severe that faculty size must be decreased if the school is to survive.

To resolve this conflict, it must first be determined whether the financial exigency is, indeed, a financial exigency. It should not be enough that the school is facing financial difficulties that a reduced faculty size might alleviate; instead, the financial exigency must be of such severity that members of the faculty must be dismissed if the school is to weather the crisis.[117] If evidence exists that the school is not acting in good faith[118] or if a financial crisis does not in fact exist,[119] the terminations of employment should not be sustained because it is quite possible that economic

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[112] *Id.* at 985.

[113] *Id.*

[114] *See* text accompanying notes 19-22 *supra*.

[115] *See* text accompanying note 101 *supra*.

[116] *See* text accompanying notes 1-4 *supra*.

[117] *See, e.g.*, American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974).

[118] By rehiring, for example, the exact number of nontenured faculty as it dismissed of tenured faculty, the school might not be exercising good faith. *See id.*

[119] *Id.*

necessity is being used as a subterfuge to mask unconstitutional reasons for the dismissals.[120]

If a financial crisis does exist and there is no alternative to a reduction in faculty size, the dismissals should be upheld only if there is adequate protection of the rights of the individual. Dismissals, even though necessitated by financial considerations, should not be used as a means of eliminating dissident teachers or faculty members distasteful to an administration. One way of insuring that this does not happen is to utilize faculty participation in the termination decisions.[121] The American Association of University Professors has proposed, in cases involving terminations necessitated by financial considerations, that

> [t]he faculty or an appropriate faculty body should . . . exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated.
>
> The responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or a group designated or approved by the faculty.[122]

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[120] *See* notes and text accompanying notes 5-7 and 19-21 *supra*.

[121] Proposed Revision of Regulation 4. The Association also recommends faculty participation in determining the school's budget. *See The Role of the Faculty in Budgetary and Salary Matters*, 58 A.A.U.P. BULL. 170 (1972).

[122] Proposed Revision of Regulation 4. The regulation reads in part as follows:

> (1) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably *bona fide* financial exigency which cannot be alleviated by less dramatic means.
>
> [NOTE: Each institution . . . will need to decide how to share and allocate the hard judgments and decisions that are necessary in such a crisis.
>
> As a first step, there should be a faculty body which participates in the decision that a condition of financial exigency exists or is imminent.
>
> . . . .
>
> . . . The case of a faculty member given notice of proposed termination of appointment will be governed by the following procedure.]
>
> (2) If the administration issues notice to a particular faculty member of an intention to terminate the appointment because of financial exigency, the faculty member will have the right to a full hearing before a faculty committee. . . . The issues in this hearing may include:
>
> (i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. . . .
>
> (ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered *prima facie* valid.
>
> (iii) Whether the criteria are being properly applied in the individual case.

The teacher whose employment has been terminated should, in addition, be afforded the right to challenge the decision, regardless of who made it. This challenge should include an opportunity to question (1) the validity of the financial justification for the decision, (2) the validity of the criteria for deciding who was to be terminated, and (3) whether the criteria were properly exercised.[123]

While these proposed procedures may protect academic freedom from economically necessitated staff reductions, the problem of implementing them still remains. The due process clause of the Constitution currently does not require procedures of this thoroughness to be followed before a school system can terminate the employment of a nontenured faculty member.[124] While teachers who have acquired tenure under a state statute are afforded a greater degree of protection than their nontenured colleagues, this protection may be less than that suggested above[125] and, in some cases, may be varied by school administrators.[126] Contractually created tenure probably affords the greatest possibility of protection because the procedures can be delineated in the em-

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> (3) If an institution because of financial exigency terminates appointments, it will not at the same time renew fixed-term appointments or make new appointments except in extraordinary circumstances . . . . [A] faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure.
>
> . . . .
>
> (6) In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline it.

[123] *Id.*

[124] *Compare* Proposed Revision of Regulation 4 *with* Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974), *and* Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974).

[125] *Compare* the procedural requirements of Proposed Revision of Regulation 4 *with* that required by the court in Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974).

[126] *E.g.*, State *ex rel.* Piper v. East Baton Rouge Parish School Bd., 213 La. 885, 35 So. 2d 804 (1948), where the court allowed the school board a reasonable time after the expiration of a teacher's probationary period to grant tenure under LA. REV. STAT. ANN. §§ 17:441-64 (Supp. 1975), and Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), where the court varied the provisions of WIS. STAT. ANN. § 37.31 (Supp. 1974-75) to allow the dismissals for reasons not contained in the statute. *Contra,* State *ex rel.* Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959), *overruled in part on other grounds,* 39 Wis. 2d 595, 159 N.W.2d 630 (1968), discussed in note 67 *supra.*

ployment contract and a court can then order that they be followed by requiring specific performance of the contract.[127]

Obtaining such contractual protection, however, may become increasingly difficult. One means of doing so is through the process of collective bargaining, but there is uncertainty as to with whom the teachers should bargain,[128] the proper scope of the bargaining,[129] and even whether collective bargaining is feasible in the academic environment.[130] The situation is further exacerbated by the declining base population of students and the financial hardships facing many institutions—particularly private universities.[131] These economic problems are likely to result in fewer job opportunities and a weakened bargaining position for teachers who might be unable to effectively negotiate for procedural protection of academic freedom.[132] Even if a contract containing such protection is negotiated, its provisions could still be avoided by an administration that refuses to give tenure either by requiring

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[127] *See* American Ass'n of Univ. Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Chan. Div. 1974); *cf.* Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *rev'd on other grounds*, 412 F.2d 1128 (D.C. Cir. 1969); Sarokhan v. Fair Lawn Memorial Hosp., Inc., 83 N.J. Super. 127, 199 A.2d 52 (App. Div. 1962), *cert. denied*, 42 N.J. 501, 201 A.2d 580 (1964).

[128] *See, e.g.*, Wollett, *The Status and Trends of Collective Negotiations For Faculty in Higher Education*, 1971 WIS. L. REV. 2, 23-24, where the author suggests that as many as nine possible levels exist where negotiation may occur. *See also* Johnson v. Board of Regents, 377 F. Supp. 227, 236-38 (W.D. Wis. 1974).

[129] *See, e.g.*, Moskow, *The Scope of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 33; Sands, *The Role of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 150.

[130] *See generally* Brown, *Collective Bargaining on the Campus: Professors, Associations, and Unions*, 21 LABOR L.J. 167 (1970); Ferguson, *Collective Bargaining in Universities and Colleges*, 19 LABOR L.J. 778 (1968).

[131] *See* Sibler, *Paying the Bill for College: The "Private" Sector and the Public Interest*, ATLANTIC, May 1975, at 33.

[132] Job opportunities are likely to decrease because many institutions will be forced to close due to a decline in enrollment and a lack of funds:

> Some schools, through imaginative management and good fortune, may be able to survive the coming situation while complaining of nothing more serious than "underutilization of facilities." But a great many independent colleges and universities will be forced to close their doors. Small colleges are doing so—forty-eight since 1970. . . .
>
> The higher-educational resources of the United States have been lessened by such closures, and these are but the start. . . .

Id. at 39. The situation is so serious that Mr. Sibler projects that by 1995 the decrease in students means that the equivalent of "200 universities of 5000 students each or 500 colleges of 2000 students each" will be forced to close. *Id.* at 38. *See* note 48 *supra*.

longer and longer probationary periods[133] or by dismissing teachers a few months before they complete the requisite probationary period to attain tenure.[134]

If teachers cannot obtain effective protection of their academic freedom through either contractual or statutory tenure, they will increasingly be forced to rely on the due process clause of the Constitution. The "minimal" procedural protections of the due process clause, however, will have to be expanded if the commitment made in *Keyishian v. Board of Regents*[135] to safeguard academic freedom is to remain meaningful. What the due process clause should prevent is not dismissals per se, for in some cases staff reduction may be necessary for the survival of the school; rather, the due process clause must prevent a school administration from having unbridled discretion in decisions to dismiss under the guise of financial exigency. Such discretion will serve only to threaten the job security of those who teach and think in an unconventional manner and will "cast a pall of orthodoxy over the classroom."[136] To limit this discretion, the faculty must have a voice in deciding whether a financial crisis truly faces the university and, if it does, which faculty members should be dismissed and upon what basis the decision should be made. This limitation upon the discretion of school administrators should be required as a matter of due process of the law.

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[133] *See Excessive Probation: Academic Freedom and Tenure: The Polytechnic Institute of New York, A Report on a Case of Excessive Probation*, 60 A.A.U.P. BULL. 416 (1974).

[134] *See* LaBorde v. Franklin Parish School Bd., 510 F.2d 590 (5th Cir. 1975). In *LaBorde* the plaintiff had completed the 3-year probation period required under LA. REV. STAT. ANN. § 17:442 (Supp. 1975) and was told by her principal that she would probably be granted tenure, but she eventually did not acquire tenure. She alleged that the denial of tenure deprived her of a liberty interest under *Roth* and *Sindermann* and a de facto tenure under *Sindermann*, but the court disagreed. Instead, it held that she acquired no expectancy of employment despite the completion of the parole period and the advice of her principal.

[135] 385 U.S. 589 (1967). *See* cases cited note 2 *supra*.

[136] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). *See generally* R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE 214 (1974) where the author suggests that one of the greatest threats to academic freedom is a stifling conformity that more conventional minds seek to impose upon their colleagues.