The Journal of Law and Education

Volume 3 | Issue 2 Article 4

4-1974

Due Process for the Nontenured in Private Schools

Francis William O'Brien

Due Process for the Nontenured in Private Schools

FRANCIS WILLIAM O'BRIEN*

Most writers who have treated the subject of academic due process have had as their major consideration cases dealing with public institutions which have dismissed tenured teachers for activities somehow involving the constitutional guarantee of freedom of speech.[1] The present article will not neglect such cases, but it will put the primary accent on the situation of nontenured teachers in private colleges who, without relying necessarily on any free speech issue, allege that for some other reason their non-reappointment involves a denial of due process. Actually there are two kinds of due process, procedural and substantive. The first concerns the methods, the steps, the processes involved in reaching a decision. The second looks to the actual decision itself. The present article deals largely with procedural due process.

Justice Felix Frankfurter once wrote that "the history of liberty has largely been the history of observance of procedural safeguards." [2] This is true indeed for civil as well as for criminal cases that involve any kind of government action. But even in areas that lie outside the law and concern private conduct only, the universal sentiment of mankind has been that justice is denied when actions adversely affecting a man's interests are taken without offering him at least certain elementary processes, namely, prior notice of the charges, a hearing on these charges, and an appeal from an adverse decision. The second of these is first in importance while prior notice seems a prerequisite lest the second be no more than a tissue guaran-

* The author, Francis William O'Brien, has taught constitutional law and political science at Georgetown University, Seattle University, Emory University, Rockford College, and in Europe at Fribourg, Lausanne, and Aix-en-Provence. He currently is engaged in research and writing and in conducting seminars at the Hoover Presidential Library, West Branch, Iowa.

[1] *See e.g., Academic Freedom and Tenure: Gonzaga University,* 51 AAUP BULL. 8 (1965); *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045 (1968); W. Gelhorn, *Summary of Colloquy on Administrative Law,* 6 J. OF THE SOC. OF PUB. TEACHERS 73 (1961); L. JOUGHIN, ed., ACADEMIC FREEDOM AND TENURE (1969 ed.); Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 DUKE L. J. 841; H. BAADE, ed., ACADEMIC FREEDOM, THE SCHOLAR'S PLACE IN MODERN SOCIETY (1964).

[2] McNabb v. United States, 318 U.S. 332, 347 (1943).

tee. The third might possibly be expendable, but is generally provided as an extra measure of protection against injustice.

Distinguished Lineage

According to St. John's gospel, Nicodemus thus rebuked the Pharisees who had demanded the arrest of Jesus: "Does our Law judge any man, before it hear him." [3] Tertullian, the great churchman of the second century, challenged the pagan ruler with these words: "The truth asks but one thing, that it be not condemned unheard." [4] When members of the Jewish Sanhedrin demanded that Paul be condemned, they received a sharp retort from Festus, the Roman Governor at Jerusalem: "It is not the custom among the Romans to deliver a man up without confronting him with his accusers and giving him the means for his defense." [5] And eons earlier, God himself withheld judgment till Adam had been afforded a hearing on the charge: "Hast thou not eaten of the tree, whereof I commanded thee that thou shouldest not eat?" [6] Thus, in 1863 the Supreme Court of the United States was following a long and venerable tradition when it asserted: "Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." [7]

This enduring insistence upon a hearing following adequate notice does not arise out of any love for pomp and circumstance, but is grounded solidly in natural law—that is, in the universal feeling for fairness rooted deeply in man's nature. In a 1965 case of a worker's expulsion from a union, a British judge thus outlined the bare essentials of this natural law:

> [I]f . . . natural justice applies at all, then it at least requires (1) notice of the charges or complaints to the person charged or complained about, and (2) the opportunity for him to be heard in answer to those charges.[8]

Over two and a half centuries ago, in a case involving Dr. Bentley and the University of Cambridge, another judge wrote that "The laws of God and man both give the party an opportunity to make his defense . . ." [9] In 1889, Lord Justice Bowen ruled that an education council was entitled to take adverse action against people under its authority only after a "due

[3] *St. John* 7: 19.

[4] *Apologeticus* 1: 1–2.

[5] *Acts of the Apostles* 25: 16.

[6] *Genesis* 3: 11.

[7] Baldwin v. Hale, 1 Wall 223 (1863). The Court has on countless occasions written the same sentiments into its opinions. *See e.g.*, Ray v. Norseworthy, 23 Wall 128 (1875); Ochard v. Alexander, 157 U.S. 372 (1895); Simon v. Craft, 182 U.S. 427 (1901); Powell v. Alabama, 287 U.S. 45 (1932); Jacob v. Roberts, 223 U.S. 261 (1912); Smith v. McCann, 27 How 398 (1861). *See also*-Daniel Webster's classic definition in Dartmouth v. Woodward, 4 Wheat 518 (1819).

[8] Lawlor v. Union of Post Office Workers [1965] 2 W.L.R. 579 at 590.

[9] The King v. University of Cambridge (Dr. Bentley's Case), 1 Str. 557, 93 Eng. Repl. 698, 704 (K.B. 1723).

inquiry" *i.e.*, one which imports "the substantial elements of natural justice." [10] This, he wrote, required that the decision be "honestly arrived at" following "notice" to the accused and "a full opportunity of being heard." [11] In an 1885 case, Lord Selborne singled out the essential elements of due process when he observed that the administrator "must give the parties an opportunity of being heard before him and stating their case and their view." [12] In 1890, Lord Esher asserted that a denial of prior notice and a hearing "would be contrary to fundamental justice." [13]

In the leading case of *Board of Education v. Rice*, another English judge admonished school administrators that they "must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything." [14] In 1934, an English court ordered an administrator to act "in accordance with the rules of natural justice, that is to say, he must not hear one side in the absence of the other." [15] In 1965, a British judge forbade the removal of a person from his position and prohibited any other action adverse to his interests if based on "information which that party has not seen and has had no opportunity of challenging and contesting." [16]

American courts have always manifested a similar respect for these basic notions that are "ingrained in our national traditions and . . . designed to maintain them," [17]—notions that constitute the "deep-seated demands of fair play enshrined in the Constitution." [18] In 1878, a judge in New York State chose these words to describe the honorable and ancient lineage of due process:

> It is a rule founded on the first principles of natural justice older than written constitutions that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights. . . .[19]

The same judge then went on to make the apposite observation that "the constitutional provision that no person shall be deprived of these without due process of law has its foundation in this rule." [20]

In 1971, the Supreme Court applied these ancient principles when it voided as unconstitutional state laws in two civil cases because the laws provided for no adequate hearing.[21] In *Goldberg v. Kelly*[22] the Court for-

[10] Lesson v. General Council of Medical Education, 43 Ch.D. 366, 383 (C.A. 1889).

[11] *Id.*

[12] Spackman v. Plumstead Dist. Bd. of Public Works, 10 A.C. 229, 240 (1885).

[13] Hopkins v. Smethwick Local Bd. of Health, 24 Q.B.D., 712, 716, (C.A. (1890)).

[14] Board of Education, [1911] A.C. 179, 182.

[15] Errington v. Minister of Health [1935] 1 K.B. 249, 268 (C.A. 1934).

[16] Re K 1965 A.C. 201 [H.L. United Kingdom] 1965.

[17] Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

[18] *Id.*

[19] Stewart v. Palmer, 74 N.Y. 183, 190, 30 Am. Rep. 289 (1878).

[20] *Id.*

[21] Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

bade New York City from removing the name of a person from the list of welfare beneficiaries unless the affected individual had "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." [23]

This confrontation often involves questions of great delicacy, but in criminal cases the Constitution is absolute, for the sixth amendment guarantees confrontation "in all criminal prosecutions." For other situations, these words from the majority opinion in *Goldberg* are pertinent: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." [24] In *Greene v. McElroy*[25] in 1958, the Court underscored the value of confrontation in protecting individuals against witnesses "whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." [26]

State and Public Schools

Courts generally show a commendable reluctance to substitute their judgment for that of administrators of the academe. But when constitutional rights are at stake, especially those flowing from the first amendment's freedom-of-speech guarantee, judicial authority has been vigorously employed.[27] Moreover, it would not seem reasonable to limit the enjoyment of a constitutional right to those teachers who have tenure and deny it to all others. Indeed, in 1970 two decisions by two different federal courts upheld this right in cases involving nontenured teachers who had sought judicial vindication of due process guarantees in cases of nonrenewal of contracts.[28] Furthermore, the opinions in these cases seem to reveal a disposition on the part of some judges at least to throw the protective mantle of the judiciary even over those teachers whose grievances are not founded on first amendment freedoms.

Just four days after the above-mentioned *Roth* decision, the same district court applied the reasoning employed therein to the benefit of nonretained teachers on one-year contracts in elementary and secondary public schools

[22] 397 U.S. 266 (1970).

[23] *Id.* at 270.

[24] *Id.*

[25] 360 U.S. 474 (1958).

[26] *Id.* at 496.

[27] Adler v. Board of Educ., 342 U.S. 485 (1952); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

[28] Perry v. Sindermann, 430 F.2d 934 (5th Cir. 1970); Roth v. Board of Regents, 310 F.Supp. 972 (W.D. Wis. 1970) *aff'd.* 446 F.2d 806 (7th Cir. 1971).

when it ruled that

> [T]he Board's ultimate decision may not rest on a basis of which the teacher was not notified, nor may it rest on a basis to which the teacher had no fair opportunity to respond.[29]

It is true that the Supreme Court of the United States in its most recent decisions on these matters appears to have denied this right.[30] However, a careful reading of the Court's opinions discloses that the ruling is really quite limited and that the Justices are actually disposed to show considerable largesse in defending nontenured teachers in public institutions. At this juncture, therefore, these cases merit some extended treatment.

On June 29, 1972 the Supreme Court in *Board of Regents v. Roth*[31] ruled that an assistant professor at Wisconsin State University in Oshkosh, on a one year contract, had no *constitutional* right to a hearing from the University authorities before they declined to renew his contract of employment. In so ruling, however, the majority offered this observation.

> Our analysis of the respondent's rights in this case in no way indicates that an opportunity for a hearing or a statement for non-retention would, or would not, be appropriate or wise in public colleges and universities.[32]

The Court also made this important concession, the significance of which will become apparent later on in this article:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community.... Had it done so, this would be a different case. [W]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. *Wisconsin v. Constantineau,* 400 U.S. 433, 437.... In such a case, due process would afford an opportunity to refute the charge before University officials. In the present case, however, there is no suggesting whatever that the respondent's interest in his 'good name, integrity, honor, or integrity' is at stake. Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.[33]

The Court concluded that "the respondent had not shown that *he* was

---

[29] Lafferty v. Carter, 310 F.Supp. 465 (W.D. Wis. 1970).
[30] Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).
[31] 408 U.S. 564 (1972).
[32] *Id.* at 578.
[33] *Id.* at 573.

deprived of liberty or property protected by the fourteenth amendment." [34] (Emphasis added)

The activities of Assistant Professor Roth that apparently prompted the adverse ruling of the university authorities were in the area of civil rights:[35] he had publicly criticized the administration for suspending an entire group of 94 black students, allegedly without determining individual guilt; he had stated that the university was autocratic and authoritarian; he had used his classroom to discuss what was being done about the suspension episode; on one occasion he attended a meeting of the Board of Regents instead of conducting his class.

The Court distinguished Roth's case from that of a teacher "with a clearly implied promise of continued employment" even though "hired without tenure or formal contract." [36] Roth, however, had no contract at all; he worked, rather, on "a formal notice of appointment" which specified that his employment would begin on September 1, 1968, and would end on June 30, 1969." [37] The majority deemed this to be a capital point:

> The important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.
> Thus the terms of the respondent's appointment secured absolutely no possible claim of entitlement to reemployment.[38]

Actually the Court appeared to interpret the agreement under which Roth worked as one carrying an expectance of nonrenewal. The position of Roth, then, was far different from that of a teacher who comes to a university after several years of experience elsewhere, and plants his roots in new soil after signing a three-year contract with the clear understanding from the university that the contract is but a prelude to permanency. The significance of this point will be heavily underscored in its proper place below in this article.

The Justices did assert that Roth would have had a right to a hearing if his nonrenewal had been based on charges of dishonesty, or immorality,[39] partly, so one would conclude, because of the basic right that a person has to a good reputation, and partly, presumably, because such charges would seriously interfere with his future employment elsewhere. But the Court

[34] *Id.* at 579. (Justices Brennan, Douglas, and Marshall dissented.)

[35] *Id.*

[36] *Id.* at 577.

[37] *Id.*

[38] *Id.* At least one lower court has ruled that the right of a non-tenured government employee to notice and a hearing depends upon his degree of "expectancy of continued employment". Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

[39] 408 U.S. at 573.

judged that since such charges had not been made, it was incorrect to assume that Roth's career interests would be adversely affected merely by the nonretention decision of the university.[40]

The companion case to *Roth*, *Perry v. Sindermann*,[41] involved a nontenured teacher at a state school who also had been dropped at the termination of a one-year contract. The Regents had issued a statement to the press which set forth insubordination as one of the causes for nonretention, but they gave him no official statement of their reasons for nonrenewal and provided him with no opportunity for a hearing to challenge the insubordination issue.[42] The affected teacher maintained that the decision was really based on his public criticism of the policies of the college administration and that it thus infringed his right to freedom of speech.[43] He also alleged that failure to provide a hearing violated the fourteenth amendment's guarantee of procedural due process.[44] The Regents and the college president denied that their decision was made in retaliation for his public criticism and contended that they had no obligation to provide a hearing on that point nor on any other.[45] The district court agreed that the teacher had no right to a hearing since by the terms of his contract his employment was to terminate on May 31, 1969, and moreover, the college had no tenure system.[46]

The court of appeals reversed the judgment of the district court,[47] whereupon the Supreme Court granted certiorari, and considered the case along with that of *Board of Regents v. Roth*.[48]

The Court first addressed itself to a central question in every case of nonrenewal of contract of a nontenured teacher: Is such a person bereft of all rights—constitutional or otherwise—vis-à-vis his employee?

> The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.[49]

The Court's answer would seem to lay to rest the much heard assertion that school authorities have *no* obligation to give *any* explanation for nonrenewing a contract of a nontenured teacher. The majority was emphatic

[40] *Id.*
[41] 408 U.S. 564 (1972).
[42] *Id.* at 595.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 596.

in insisting that if the reason for nonrenewal was that the teacher had exercised a constitutional right—especially the right of free speech—then the action of authorities in a state school would be unconstitutional.[50]

Since there was at least some plausibility to Sinderman's free-speech claim, the Supreme Court ruled that he was entitled to a full hearing on this contested issue.[51] Although the Justices did not entirely agree with Sinderman's second contention that his mere "expectancy" to reappointment was sufficient to give him *all* the protection of due process, the fact that he had taught for ten years—though currently on a year to year contract—was enough to suggest that he may have had de facto tenure. Therefore the Court decided that Sinderman was also entitled to a hearing on this issue.[52]

The opinion of the majority in the *Sindermann* case makes it abundantly clear that a teacher who takes his stand on the first amendment's free-speech guarantee places himself in a coign of vantage for challenging any adverse decision by school administrators. Moreover, the Court's ruling here does not seem to be conditioned by the existence of tenure—or the lively possibility that de facto tenure existed. This reading of the decision is re-enforced by the Court's insinuation in the *Roth* case that if the Wisconsin teacher had had a plausible free-speech complaint, he too might have been entitled to a hearing.[53]

A Critique of Roth and Sinderman

In summary, in *Roth* and *Sindermann* the Supreme Court has stated directly or strongly implied that the due process clause of the Constitution would entitle a nontenured public school teacher facing a nonrenewal decision the right to notice and hearing in a number of situations, *i.e.*, where freedom of speech is involved, where the charge is one of immorality or dishonesty, where the nonrenewal imposes "a stigma or other disability" for future employment, or where the charges "seriously damage his standing and associations in the community." [54] These concessions, therefore, are sufficient to cover a substantial number of nonrenewal cases. Moreover, if hearings are required in such cases, it can be strongly argued that to make them meaningful, all the additional due process guarantees must be granted also, *i.e.*, written notice, confrontation, appeal, etc. Thus the rulings of the

[50] *Id.*

[51] *Id.* at 603. On Roth's speech claim, *see* note 56 *Infra.* The Court does not seem completely successful in distinguishing.

[52] *Id.*

[53] *Id.* at 574, note 14.

[54] Nothing would damage a teacher's future more seriously than a statement that he was a complete failure as a teacher, but the Court does suggest a way to challenge such a charge.

Supreme Court in the *Roth* and *Sindermann* cases can justly be read as vindicating much of the argument in this article.

It is evident that the Justices appear disposed to extend the greatest measure of solicitude for teachers who raise the free-speech issue, and this, for some people, may be a source of concern, for actually, the teacher who is dropped by a college because of his robust and disputatious speech does not by any means necessarily suffer a disability for future employment. Indeed, he may immeasurably enhance his prospects with those administrators in other schools who might completely agree with the views he expressed, with those who prize vigorous leadership at their institutions, and with those who simply recognize that the qualities which made the teacher an effective campus protester probably demonstrate that he is also a superior classroom lecturer.

But the instructor who is without a free-speech issue and whose contract is not renewed because of allegations that he had failed as an effective lecturer and that he was a shoddy scholar would find in a nonreappointment decision an imposition of a disability completely foreclosing the possibility of his future employment as a teacher anywhere. His career is ended, his profession terminated. If the charges of incompetence are false—fabricated by jealous and vindictive colleagues—and if the nonreappointment decision is based on them and arrived at without a hearing, then there has been a most unconscionable taking of "property without due process of law." It is a taking that is perpetual and irremediable and one for which there is no commensurate compensation. On the other hand, the free-speech claimant may suffer a short temporal impairment of his liberty only to have it fully restored under the aegis of his next dean.

But if *Roth* and *Sindermann* might be criticized for failing to meet this possible inequity, the Court deserves praise for making it clear that it would be unconstitutional for school administrators to refuse a nonrenewal of contract to nontenured teachers for *any* reason they might choose. What does this mean for such rules and regulations as the following one governing the state universities in Wisconsin?

Rule II. During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.[55]

The Court did not say that school administrators *must* give a reason. It simply ruled that *if* they allege dishonesty, immorality, or some free-speech activity as their reason, or *if* they make some other charge that seriously damages his standing in the community or with other potential employees, then the affected instructor must be granted a hearing on such allegations. Might not this encourage an astute school official to maintain a resolute

[55] *Id.* at 567 n. 4.

and absolute silence about his reasons for denying a teacher renewal? The instructor thus could become a hapless victim of unscrupulous calumina-tors who report false stories of dishonesty, etc. If the president accepts these falsehoods as valid reasons for nonreappointment without revealing this fact to the victim, the latter might well be completely at a loss to explain the president's action; and if Wisconsin's Rule II is allowed to stand, he has no recourse.

On the other hand, what measure of suspicion must the innocent teacher have before he can successfully confront authorities and register an effective demand for a hearing? Would a vigorous denial from the president as to the suspected reason for nonrenewal suffice to immunize him from further questioning or would he be compelled to fortify his disavowal by granting a hearing on the *real* causes for his nonretention decision? These queries also suggest how a resourceful teacher might win himself a full hearing simply by affirming that the reason for his dismissal was a malign-er's false charge of dishonesty or immorality.[56]

It will be instructive to observe how these problems would be forestalled by the procedures employed at some schools in reappointment cases. In Iowa, a statute forbids the school board from dropping a public school teacher—even a first year teacher on a one year contract—unless it follows these steps:

[It] shall inform the teacher in writing that:

(1) the board is considering termination of said contract, and that
(2) the teacher shall have the right to a private conference with the board.[57]

If the teacher then so requests, the board is to present him with "a written statement of specific reasons for considering termination, and shall hold a private conference between the board and the teacher and his representative. . . ." [58] If the board still decides to terminate, "the teacher shall have the right to protest the action of the board, and to have a hearing thereon." [59] The law further stipulates that "the board shall hold a public hearing on such protest." [60] Even a discharge may take place only after a fair and full investigation made at a meeting . . . at which the teacher shall be permitted to be present and make defense. . . ." [61]

[56] In footnote 5 to his opinion for the Court in *Sindermann,* Justice Stewart states that a hearing would not be owed a person merely because he "asserts" that the school has denied him reappointment as a result of his use of free speech. However, he does not explain what open sesame the teacher would have to incant to remove the barriers provided by Rule II for bolting the door that leads to the hearing chamber. 408 U.S. 593 at 599 n. 5.

[57] Iowa Code, Vol. I, 279.13 (1973).

[58] *Id.* at § 279.25.

[59] *Id.*

[60] *Id.*

[61] *Id.*

In Illinois, public school teachers enter upon "contractual continued service" [62] after two consecutive terms, unless "given written notice of dismissal stating the specific reason therefore.... at least 60 days before the end of such period." [63] After this one year of probation, teachers are given a host of due process guarantees to protect them from being deprived of their posts for any cause except the dropping of a subject or a decision to decrease the size of the faculty.[64] Some of these rights are the following:

1. Right to written notice of charges.
2. Right to written bill of particulars.
3. Right to a hearing 10 days later, public if requested.
4. Right to be accompanied by an attorney.
5. Right to cross-question opposing witnesses.
6. Right to present evidence and witnesses.
7. Right to a recorder's copy of the proceedings.
8. Right to appeal an adverse decision of the board.[65]

In addition, before the original notice of charges is issued, the teacher must have been given warning "specifically" and "in writing" of any "remediable" faults, which, if not corrected, could result in charges leading up to dismissal.[66] Thus, the board could not charge the teacher with things like habitual tardiness, crude language in class, failure to attend faculty meetings, unless previously it had warned him in writing to correct these derelictions.

Natural Law and Private Schools

An objection may arise in some quarters that regardless of what legislators and courts have decreed for public institutions, none of it is applicable to private colleges. The best response is a quiet demurrer, for the primary purpose of this article is to underscore the *natural law* obligations of school administrators, not their duties under positive law. Indeed, it engenders most chilling skepticism and produces disillusionment of seismic proportions when presidents of private colleges piously avow their commitment to basic American and Christian principles, yet use their freedom from government control to deny their employees what these principles command. Rather should their ideal be to grant *freely* to their teachers—with the biblical "good measure, pressed down and overflowing"—all those venerable rights that public institutions sometimes grant niggardly and with ill grace, and often only because of the compelling hand of public authority.

[62] ILL. STAT. ANN. § 24-11 (1962).
[63] *Id.* at § 24-12.
[64] *Id.*
[65] *Id.*
[66] *Id.*

But perhaps the natural law argument merits a few words of further illumination at this juncture. First, it is assumed that the private colleges referred to in this article are in no way tied to any American government, federal or local, not even by the most gossamer threads. They receive no grants, have accepted no loans. Therefore, the administrators of such institutions can not be said to perform any "state action" which would put them under the restraints of the fourteenth amendment as explicated by the Court in *Roth* and *Sindermann* and earlier cases. Thus, regardless of the limitations these rulings put upon public schools or state universities and functionaries therein, these decisions in no way bind private colleges and their administrators.

This, however, does not absolve them from the obligation to follow certain fair procedures in dealings with their teachers. Early in this article, several British judges were quoted to the effect that such procedures were required by "natural justice" [67]—a term that appears redolent of the phrase "natural law", and which may be conveniently defined as

> [T]hat law which, grounded in the innermost nature of man or of society, is independent of convention, legislation or other institutional devices[68]

The correlative of natural law or higher law is natural rights. It is not necessary for the purposes of this article to set forth here what is the ultimate source of either.[69] Suffice it to say that man by reason of his intrinsic dignity should have freedom to perform certain actions and should also have immunity from compulsion to posit certain other actions that derogate from his dignity. This implies that other persons have a reciprocal inhibition forbidding them from interference with this freedom and with this immunity that cloaks all human beings. This inhibition does not arise from any constitution or positive legal action. It is higher than either and therefore has been called the higher law. It comes not from conventions but from the nature of things and thus may be called natural law. For some people its source is God; for others it is simply man's inner light which perceives the proper order in human relations. Whatever position one takes, there is fairly universal agreement that all men deeply feel certain "can't helps" compelling them to judge that they "should" do certain things and refrain from doing other things. Collectively, these "can't helps" might conveniently be called the essentials of natural law. Followers of this doctrine, of course, will readily admit that men can honestly disagree about the derivatives of natural law, that they can conscientiously arrive at different con-

[67] Notes 8–16 *supra*.

[68] GURVITCH, *Natural Law,* XI–XII ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 284 (14th ed., 1962).

[69] Those interested in this question as well as the general subject of natural law, might consult ROMMEN, NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY, (1947).

clusions when applying the basic principles of the doctrine to particular situations. This, however, does not shake their belief that there is an objective norm of action that is most consonant with human nature.

The Founding Fathers were strongly influenced by natural law thinking in writing the Constitution and the Bill of Rights.[70] Such influence also left its indelible imprint upon many early court decisions.[71] More pertinent is the natural law gloss that the post 1870 Court has put upon basic constitutional rights in applying them to the states via the due process clause of the fourteenth amendment.[72] In 1943 the Court said:

> The due process clause of the fourteenth amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of justice and liberty.[73]

In 1952, Justice Frankfurter, writing for a unanimous Court, observed that

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of the nation as to be ranked as implicit in the concept of ordered liberty.[74]

In 1947, Frankfurter wrote that due process of law demanded "canons of decency and fairness . . . which express the notions of justice of English-speaking people." [75] Commenting on these and other opinions of the late Justice, a Georgetown University professor of law has observed that "from where I stand, in the natural law tradition, I must say that I find Mr. Justice Frankfurter's theory almost indistinguishable from my own." [76]

Of course, those who are professedly within the natural law tradition admit with Frankfurter that "these standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopaeia." [77] Indeed, there is often considerable debate over what rights actually merit a place in the hierachy of essential freedoms and liber-

---

[70] CORWIN, THE HIGHER LAW BACKGROUND OF THE CONSTITUTION (1956); WILSON, THE AMERICAN POLITICAL MIND 358 (1949); HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS, 50–58, 75–91, 104–111, (1930); PRITCHETT, THE AMERICAN CONSTITUTION 8, 160 (2nd ed., 1968).

[71] *See, e.g.,* Chase in Calder v. Bull, 3 Dall. 386–89 (1798); Paterson in Van Horne's Lessee v. Dorance, 2 Dall. 304, 310 (1795).

[72] Corwin, *The Debt of American Constitutional Law to Natural Law Concepts,* 25 NOTRE DAME LAWYER 281 *et passim* (1950); GREEN, THE FRAMING OF THE FOURTEENTH AMENDMENT 182–83, 198–199; HAINES, *op cit, supra,* note 70, 144–195. *See also* Swartz, *infra,* note 130, *op. cit.*

[73] Buchatter v. New York, 310 U.S. 427, 429 (1943).

[74] Rochin v. California 342 U.S. 165 (1952).

[75] Adamson v. California, 332 U.S. 46 at 67 (1947) (Frankfurter, J., concurring).

[76] Professor Joseph M. Snee whose remarks are found in SUTHERLAND, ed., GOVERNMENT UNDER LAW 132–33 (1956).

[77] Adamson v. California, 332 U.S. 46 at 68 (1947) (Frankfurter, J., concurring).

ties. However, few would disagree that in proceedings involving a person's rights, "if natural justice applies at all, then it at least requires (1) notice . . . and (2) the opportunity . . . to be heard." [78] Therefore, private school administrators cannot escape being touched by the thrust of this article, for "the laws of God and man both give the party an opportunity to make his defense." [79]

The Nontenured Teacher

As a matter of fact, most private and public schools do provide notice and hearing to tenured teachers in cases involving their dismissal. Moreover, this article has already treated those strictures which the Court in *Roth* and *Sinderman* recently placed upon public educational institutions in situations that concern the reappointment of their nontenured instructors.[80] The remainder of this article will probe into this question more deeply and attempt to prove that from the very nature of things, natural justice (higher law or natural law) commands *all* school authorities in *all* schools to grant at least notice and hearing even to nontenured teachers. Certain legal decisions and court opinions touching public schools—even some non-school cases—will be referred to, but only because of their particular intrinsic merit, not because they themselves are deemed to have any binding effect on private schools.

In the case of *Greene V. McElroy*,[81] the Supreme Court underscored the fact that when the government revoked Greene's security clearance, it for all practical purposes deprived a highly trained aeronautical engineer of the opportunity to continue his long-established career.[82] This was true not only with ERCO, the particular company that discharged him, but with all similar companies whose work required employees of Greene's skill to have government clearance for the use of classified material. Greene was thus forced to take work at a much lower level at one fourth his former pay. The Court ruled that no federal statue authorized a clearance revocation based on statements of unidentified informants,[83] without a full-hearing, including the traditional procedural safeguards of cross-examination and confrontation of witnesses.[84] These had not been granted to Greene.

---

[78] Note 8 *supra*.

[79] Note 9 *supra*. One may, if he wishes, substitute "the Laws of nature" for "the laws of God", and still not deroute the argument as it makes its passage through the pages of this article.

[80] Note 54 *supra*, summary in the text.

[81] 360 U.S. 474 (1959).

[82] ERCO gave no other cause for discharging the engineer than that the government had denied him access to classified information, which access was essential to the performance of his job. Thus the court saw the government's action as *the* cause for the dismissal. Note the relevancy of this judgment of the Court to the ethical principle discussed at note 88.

[83] 360 U.S. at 493.

[84] *Id.* at 508.

It is true that the Court, by a 5-4 decision in *Cafeteria Workers v. McElroy*,[85] sustained the summary dismissal of a cook by a private concessionaire on the premises of the Naval Gun Factory in Washington, D.C. without notice or hearing. But the Court wrote that the cook "could not constitutionally have been excluded from the Gun Factory if the announced grounds of her exclusion had been arbitrary." [86] More significantly the Court underscored the fact that the cook's dismissal for lack of security clearance implied little stigma and would in no way impair her "employment opportunities elsewhere." [87] That is, her culinary skills had suffered no disparagement because of dismissal for the stated reasons.

But such impairment is precisely what generally follows upon failure to renew the contract of a teacher on probationary status, and it is for this precise reason that the right to a hearing and prior notice would have to be extended to the affected teacher in *public* schools. Even assuming that *private* schools may not be subject to *court* control in this matter, administrators are still responsible to the mandates of natural law in cases where their actions cause the same impairment. Nor is it possible to escape this responsibility in such cases by disavowing any *intention* or desire to cause the impairment. The basic principles of morality demand that no human action be posited without weighing its probable consequences *in concreto, omnibus circumstantibus totaliter consideratis*.[88] The Court had in mind just such principles—besides constitutional mandates—when it forbade the Attorney General from listing organizations or individuals as "subversive" without notice and hearing on the charges, even though neither the Attorney General nor the government penalized them in any manner.[89] Justice Douglas spoke pertinently to this point.

> This is . . . a proceeding to ascertain whether the organization is or is not "subversive." This determination has consequences that are serious . . . Those consequences flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination . . .[90]

Some of the consequences were: cancellation by the Bureau of Internal Revenue of the organizations' tax status; discharge from New York's public schools of teachers belonging to groups so classified; curtailment of opportunities for employment by most private employees.[91] Of course the Attorney General did not himself decree such penalties; indeed, he might possibly have decried these disqualifications imposed by other agents. This

[85] 367 U.S. 886 (1961).

[86] *Id.* at 898.

[87] *Id.*

[88] "In the concrete, with all the circumstances in their totality considered." *See* note 82 *supra* for a good application of this principle of morality.

[89] Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951).

[90] *Id.* at 175 (Douglas, J., concurring).

[91] *Id.*

notwithstanding, his indirect involvement placed upon his shoulders the constitutional and *moral* obligation of providing notice and hearing to these organizations before reaching his determination to classify them as subversive.

More recently, in *Jenkins v. McKeithen*[92] the Court held that adverse public reaction to a person under investigation by a state criminal investigatory commission—even though itself lacked prosecuting power—was virtually sufficient to demand the extension of fair procedural rights to the affected individuals.

Protection of Person's Interests

These cases all demonstrate the realistic approach that the courts have taken in measuring the degree of procedural due process to which a person is entitled. Quite justly, they have considered not only the immediate loss that ensues upon action of the employer or agency, but also the very probable impact on one's future opportunities elsewhere and the larger repercussions to one's reputation as well. Of course, these cases did not involve schools nor private institutions. Nonetheless, the reasoning in the Court's opinions recommends itself for the light it sheds upon a premise of cardinal importance in sustaining the argument of this study. That premise is that employers—public or private—assume a serious obligation vis-à-vis the well-being of persons they engage to work for them. Articulate testimony to the general acceptance of this statement is had in the multitudinous "hours," "wage," and "safety" legislation spelling out in considerable detail what governments require of employers. Most such laws rest on the premise that they have some obligation vis-à-vis the physical welfare of their employees. As for goods less measurable, like scholastic reputation and good standing in the academic community, it suffices at this juncture of the present study simply to observe that "life is more than meat and the body more than raiment." [93]

It is also significant for the theme of this article that in the cases just reviewed the Court's quality of justice was not heightened by considerations of age, seniority, distinction, or tenure of the parties involved. Yet not a few people profess to believe that in the scholastic world a different theory should prevail, that teachers have no rightful claim upon the college if non-tenured and that it may thus decide against reappointment without any obligation to the due process procedures granted tenured teachers —unless, of course, provisions for such had been previously stipulated.[94] But nontenure contracts should not be given this restrictive reading. Surely

[92] 395 U.S. 411 (1969).

[93] *Gospel of St. Luke* 12: 23.

[94] This clearly was the view of those who enacted the relevant Wisconsin regulation. Note 55 *supra* in the text.

there is a well-recognized difference between the short contract of the visiting professor and the short contract of the teacher on so-called probationary status. The former is generally invited because of an established record of scholastic distinction; he does not come to be tested or to be proved. Nor does his coming imply any expectancy to be hired beyond the life of the limited agreement. Thus, upon its termination, when he takes his leave, he takes also with him his professional reputation intact, its splendor unsullied by his brief sojourn as guest in his host's academic household.

Far different are the auspices attending the departure of a teacher on probationary status whose contract is not renewed. His investment of time and talents at the institution denying him renewal has failed, and he now carries away from the school greatly depreciated credentials for use in future negotiations with other prospective employers. For older teachers—especially in a depressed market—the nonrenewal may be catastrophic in its consequences. They leave not only *this* college, but probably college life as such, passing over an academic bridge of sighs to dim dungeons of silence whence they never return. Their plight is briefly but accurately sketched by Harvard Professors Clark Byse and Louis Joughin:

> A teacher who takes his doctor's degree at thirty, serves six or seven years in full harness, and then finds himself denied tenure—and probably not retained—confronts a grave crisis in his career. He is too old to compete on salary terms with new, less expensive Ph.D.'s, and his failure to achieve tenure is difficult to explain when he seeks a job elsewhere.[95]

The position of such a teacher is really not different from that of a person discharged from his college post. And if discharge has been rightly viewed as the "capital punishment" in the scholastic world, failure to receive tenure surely is a punishment of almost equal gravity. For it often signals—generally so in these days—the end of an academic life. Thus, if a person facing dismissal is entitled to notice, hearing, and other due process protections, surely similar guarantees should be granted the teacher who is denied tenure, at least where such denial is accompanied by nonretention. In 1952, the Court demanded a hearing for a nontenured teacher fired from a public school during the term of his contract.[96] In 1971 it gave a similar ruling in the case of a teacher who had neither tenure nor contract.[97] Both cases admittedly involved loyalty oaths and therefore first amendment freedoms in the protection of which the Supreme Court generally rises with special alacrity and determination. But a similar response might be reasonably expected from the Justices even in cases where, although the first amendment is not an issue, a summary dismissal without notice or

[95] Byse & Joughin, Tenure in American Education 40–41 (1959).

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

[97] Connell v. Higgenbotham, 403 U.S. 207, 208 (1971).

hearing might be based on an undisclosed calumny whence there ensues consequences having the most disastrous effect upon the discharged teacher. In a 1915 case the Court appositely observed that merely because a person has no contract guaranteeing him work for a specified time does not mean that he may be "discharged at any time for any reason or for no reason." [98]

Rights and Privileges

Frequently one hears the argument that a particular job is a privilege not a right, and that therefore the job-holder can be dismissed at the discretion of his superiors. Fortunately the Court has abandoned the right-privilege distinction in the public sector,[99] and the majority opinion in the *Roth* case underscored this abandonment with evident approval.[100] Perhaps the best epigrammatic argument against the distinction was Justice Jackson's pithy sentence written in 1950:

> The fact that one does not have a legal right to get or keep a job does not mean that he can be adjudged ineligible illegally.[101]

For the benefit of administrators of private schools where the "privilege" argument is most bandied about, this bit of Jacksoniana might be paraphrased to read "the fact that one does not have a natural right to get or keep a job does not mean that he can be judged ineligible by methods offensive to natural law principles. Indeed, when a teacher commits himself to a private college on a three-year contract, he understands that the school administrators have employed him only after a responsible investigation has satisfied them that he was a good investment. He thus has every right to think that the contract will be allowed to come to its natural fruition, *i.e.* tenure, unless some serious cause dictates otherwise. Never would he have signed the original agreement had he thought that he might be cast overboard into uncharted waters because of the whim of a capricious helmsman. But should superiors consider dropping him at the conclusion of his three-year contract, natural justice would demand that they give him a bona fide hearing to show that they have serious cause for their change of heart.

---

[98] Truax v. Raich, 239 U.S. 33 at 41 (1915).

[99] Graham v. Richardson, 403 U.S. 365 at 374 (1970).

[100] 408 U.S. 564 at 577.

[101] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J., concurring). For recent lower court decisions in keeping with Justice Jackson's views, *see* Meredith v. Allen County War Memorial Hospital Com'n, 397 F.2d 33 (6th Cir. 1968) physician on staff of county hospital; Birnbaum v. Trussell, 371 F.2d 672 (2nd Cir. 1966), physician employed at a municipal hospital; Orr v. Trinter, 318 F.Supp. 1041 (S.D. Ohio, 1970), public school teacher; Lucia v. Duggan, 303 F.Supp. 112 (D. Mass., 1969), public school teacher. *See also,* the dissenting opinion of Judge Lay in Freeman v. Gould Spec. Dist. of Lincoln Cty, 405 F.2d 1153, at 1161, 1164 (8th Cir. 1969).

In the *Roth* case, the Court said quite appositively that "when protected interests are implicated the right of some kind of prior hearing is paramount." [102] Roth himself was not deemed to have a sufficient interest—property or other kind—to qualify for such a hearing, but surely the person just described has interests of the first order that should entitle him to a prior hearing and whatever else might be necessary to make it meaningful. As for the exact procedural formalities in other cases, they, of course, may well vary, according to the importance of the interests involved.

At this juncture it will be helpful to review briefly three recent cases, which although treating non-school matters, reveal the court's concern lest government action infringe on important rights of individuals. For reasons soon to be made obvious, the Court's opinions should also recommend themselves to those with a particular interest in the natural law aspect of this article.

In 1970 in the case of *Goldberg v. Kelly* the Court lent a sympathetic ear to certain individuals who had been summarily dropped from the list of people receiving benefits under New York's welfare laws, and it ruled that they were entitled to timely and adequate notice, detailing the reasons for termination, and providing for effective opportunity to defend by confronting adverse witnesses and by presenting their own arguments orally before the decision-maker.[103]

In the 1971 case of *Bell v. Burson,* the Court considered the situation of a non-insured driver whose license had been suspended (following his involvement in an accident) because the other party asserted that the man was liable for an estimated $5000 in damages.[104] Underscoring the fact that transportation in a self-driven automobile was essential for the man's work, the Court demanded that his license be returned until a hearing had established some reasonable grounds for charging fault and responsibility on his part.[105]

In 1972 in *Stanley v. Illinois,* the Court ruled that due process entitled an unwed father to a hearing on his fitness as a father before his children—upon their mother's death—could be taken from him and placed in a foster home.[106]

Natural Law and Natural Consequences

It should be observed here that proponents of the natural law doctrine would in all probability reach the same conclusion in *Goldberg, Bell,* and

[102] *See* note 38 *supra.* For the formalities required in any case, *see* Bodie v. Connecticut, 401 U.S. 371 at 378 (1971).

[103] 397 U.S. 254 (1970).

[104] 402 U.S. 535 (1971).

[105] *Id.* at 537.

[106] 405 U.S. 645 (1972).

Stanley as did the Court when relying principally on the due process clause. For in reasoning from natural law principles, they always keep within their ken the *natural* consequences that flow from any action. Quite astutely has a French novelist observed that "les conséquences seules détérminent la gravité de l'acte." [107]

It is unfortunate that the *Roth* case was such a frail vessel for carrying to the high Court issues so freighted with significance. As stated above, the Wisconsin teacher really had no contract at all but had been hired only on a one year "formal announcement" which clearly seemed to imply that ultimate permanent employment was never envisaged.[108] Moreover, Roth, a young person, was at the university only five months before learning that his contract would not be renewed for the next academic year. A much better case for the far-reaching issues involved would have been that of an older teacher who is not retained after he has left one college and signed a three-year contract at another on the uncontroverted understanding that permanency was ultimately to result unless he should conduct himself in such manner as to justify a skuttling of the original agreement. When such a person is not reappointed, the academic world draws a conclusion that mortally damages his future life. This conclusion has as its basic premise the fact that the contract is *not* considered terminal in the sense that this adjective qualifies the contract of a visiting professor. Permanent tenure is the goal at which it aims and expectancy of such is its very soul and spirit. This is stamped upon the document as clearly as though written in *ipsissima verba.* It pervades the parchment upon which the agreement is penned, "is intermixed with the materials which compose it, is interwoven with its web and blended with its texture." As though written in bold characters is the firm commitment that the college will retain this teacher unless a serious reason dictates another course of action. The teacher thus should be able to plan his life around this expectancy and on the good faith of his employers.

Relative to this question of expectancy, a word should be offered here about the basic reason for tenure. Although most people generally speak of tenure as a corollary flowing from academic freedom, another solid justification for it is the teacher's need for economic and personal security. Other comparable professions like law or medicine have a certain built-in security arising from the fact that a good lawyer or a good doctor can accumulate considerable wealth in a relatively short period of time. In comparison, the material rewards for teaching at any level are not highly tempting, and thus

[107] MAUPASSANT, *Mon Oncle Jules,* in BARTON, ed., SIX CONTES CHOISIS 15 (1936). "The consequences alone determine the seriousness of the act." Proponents of natural law would not agree with the comprehensiveness of this statement, but they do hold that the results which flow from a person's action are of the greatest import in judging its morality.

[108] *See* notes 36–38 *supra* and corresponding text.

most people who enter upon an academic career do so in quest of a recompense measured by a quite different standard. But if teachers can not anchor their life security to a solid bank account, they should be able to tie it firmly to a reasonable certitude that in mid-career, some buccaneering dean or perfidious committee will not cut them loose to drift unprovisioned in strange and inhospitable waters. If the profession can not guarantee immunity against such immoral adventurers, then the profession itself will suffer as gifted students turn deaf ears to academic callings and employ their talents in other careers more profitable and less precarious.

The dangers sketched above may be especially imminent today in those schools suffering acutely from an economic pinch. In such stress, some administrators experience deep regret that tenure rules require them to keep high-salaried teachers on their faculty. They thus often yield to the temptation to deny a further granting of tenure to deserving teachers. This frequently means that the teacher, regardless of his age, experience, and credentials, must be automatically dropped. The school now has the opportunity to replace the affected person with a young Ph.D. or an M.A. at a greatly reduced salary. The process can be repeated when the new employee reaches a level which makes him also expendable in the name of economy.

Such a policy is highly questionable when measured by academic and ethical standards. But it deserves unqualified condemnation as completely immoral when economy-minded deans and presidents *contrive* a case against a teacher of high merit and use it to lend a measure of respectability to a shoddy decision completely unsupportable by the facts. That such things do come to pass even in the hallowed halls of ivy-covered buildings at the academe underscores the practical need of due process protections for teachers facing non-reappointment action.

The teacher's position is much like that of a person who builds his small business enterprise around his automobile and grounds it on the firmly reasoned conviction that the state will in good faith renew again and again his three-year permit to drive the vehicle. This renewal is not a mere gratuity but a right that can be withheld for serious cause alone, and then only if the case for denial is proven in an investigation having all of the due process attributes. Withholding the driver's license would destroy not only his present business, but would seriously jeopardize his hopes for continuing his enterprise in any other state where all would view him with deep suspicion. The teacher's situation is no different. His present life can be shattered by a non-renewal of contract and his hope for future employment almost completely blasted. Like the businessman there is no such thing as returning him to the status ante quo for all people engaged in education understand quite clearly what was expected and what was promised on the

day of the affixing of signatures. Thus, when the college decides not to renew a three-year contract, by that very act it flashes a message to the entire academic world that the teacher has, in its eyes, failed. Try though it might, the college cannot maintain a sphinx-like inscrutable silence, for its tongue wags in its act of nonretention. Indeed, its very refusal to state reasons supporting nonrenewal excites the greater speculation, for silence now becomes an open invitation for people to run the full gamut of possible reasons—from innocent failings and misadventures to foul deeds and mischievous conduct of darkest character.

Natural Law and Resolving Doubts

Human psychology assures us, of course, that administrators must have *some* reason for every nonrenewal decision, and natural law demands that there be a *recta ratio* behind *every* human action. Moreover, the implicit terms of the contract would never justify a nonrenewal because of mere whim. If, for instance, college administrators should hear secret reports that a teacher is a racial bigot, physically brutal and academically unfair to black students, they might decide against any investigation for a number of reasons: distaste for unwanted publicity; fear that the teacher might ask to confront those who testified against him and might prove their accusations mere lies or part of a vile plot to destroy him for their own personal gains. A host of people might thus be highly embarrassed. And so the squeamish administrators escape from the explosive problem by a craven retreat: they do nothing save announce that the teacher's three-year contract will not be renewed. In this way the threatening plaintiffs are placated, and yet the teacher, according to the stunted reasoning of the administrators, suffers no wrong from the college, for he has no more of a vested right to his teaching position, so they argue, than he had to that position before he was hired.

A little reflection will reveal how transparent is the fallacy in such reasoning. A college has no attachment to mere *candidates* for teaching positions who have invested nothing of themselves in the institution at which they seek employment. But he who has taught at a college for some years has already given to that school part of himself, and if his dedication was complete, that part of himself is irretrievable, remaining with the institution in a manner that precludes reclaim. In a real sense he can say that this is *his* college.

Thus the probationary contract does give him some right to continuous association with the college *unless there be* evidence which proves him unfit. Moreover, even if the administrators, in a magnanimous spirit of "fairness", vow absolute silence about the complaint—rumored brutality, for instance—they cause by that very silence irreparable damage to the teach-

er's professional and moral reputation. Thus, the course that the college is morally and contractually obligated to follow would seem clear: if the charges appear utterly unfounded, they must simply dismiss them as having no relevancy to the question of renewal. If, however, the accusations produce some plausible doubt in a prudent observer, then a full investigation must be mounted and conducted in accordance with the fundamental demands of due process. It would be outrageously immoral for the college to summarily drop the teacher on the trite but false assertion that doubts must be decided in favor of the institution. On the contrary, administrators have a moral duty to see that the doubt is removed by an honest hearing which either clears the teacher or fortifies their original suspicions, thus allowing them to act with good conscience. This line of reasoning found expression in an opinion written by Chief Justice Weintraub of the Supreme Court of New Jersey in *Zimmerman v. Board of Education of New Jersey:*

> [I]f we may inquire into "unreasonableness," it would seem to follow that there must be a "reason" *i.e.*, "cause" for refusal to continue the teacher into a tenure status. It would not mean the court would not recognize a wide range of "reasons" or would lightly disagree with the employer's finding that the "reason" in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to a review as to whether the grounds are arbitrary in nature or devoid of factual support. . . .[109]

Now all history teaches that a fastidious attention to due process is the best guarantee that doubts will be dissipated and the truth emerge. The prime motive for such attention should of course be concern for the sacred rights of the teacher. But there is a pragmatic consideration as well, for as Justice Jackson once wrote

> [D]ue process of law as not for the sole benefit of an accused. It is the best assurance for the Government itself against those blunders which leave lasting stains in a system of justice which are bound to occur on ex parte consideration.[110]

In a paragraph pregnant with wise observations the late Justice Frankfurter concluded with the same thought:

> That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it is reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in

[109] 183 A.2d 26, 30 (N.J. 1962).

[110] Shaughnessy v. United States, 345 U.S. 206, 224 (1953).

> jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important in popular government, that justice has been done.[111]

Specifics of Academic Due Process

But what *specific* rights do nontenured college teachers have? Harvard Professors, Clark Byse and Louis Joughin have answered this question by presenting the following list of procedures for the adjudication of cases involving nonrenewal of contracts on nontenured teachers:[112]

1. Timely notice in writing of the charges.
2. Right of teacher to be heard personally on these charges before the decision-making body.
3. Right to select from colleagues his own academic advisor.
4. Right of teacher to present his own witnesses.
5. Right to confront and question witnesses against him.
6. Full written record to be taken at all hearings.
7. Availability of written record to teacher.
8. The hearing committee's conclusions to be in writing and presented to teacher.
9. Right of appeal by teacher eventually to the ultimate authority responsible for the college.

More recently suggestions quite similar to these nine proposals have been put forward by Duke University Law Professor, William V. Van Alstyne.[113]

It would, of course, not be desirable for the courts to meddle too much in school affairs nor to formulate a detailed procedure to be followed rigidly in every case, for as the late Justice Frankfurter cautioned, " 'due process' cannot be imprisoned within the treacherous limits of any formula." [114] But the extent to which an individual will receive due process guarantees should depend on what is at stake. One reputable writer puts it thus:

> The character of the hearing . . . may depend on what he stands to lose, of course, but his constitutional right to due process entitles him to a quality

[111] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 171 (1951) (Frankfurter, J., concurring). For an identical thought by a British judge, *see* Rex v. Bodmin JJ., [1947] 1 K.B. 321, 325.

[112] TENURE IN AMERICAN EDUCATION, 193–197 (1959).

[113] *The Constitutional Rights of Teachers and Professors,* DUKE L.J. 841, 865 (1970). Professor Van Alstyne presents these steps with the realistic observation that only a few would actually be necessary except in a rare case.

[114] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (Frankfurter, J., concurring). In 1971 the American Association of University Professors endorsed a statement on the nontenured teacher, recommending, *inter alia,* that in cases of nonrenewal, the affected teacher be given written reasons and an opportunity for a review by a body other than the one making the original decision. 64 AAUP BULLETIN 206–210 (1971). *See also, Academic Freedom and Tenure: Gonzaga University,* 51 AAUP BULLETIN 8–14 (1965).

> of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat.[115]

In every civil suit, even one involving an insignificant sum of a few dollars, the plaintiff must present the defendant with a "plain statement of the claim showing that the pleader is entitled to relief." [116] Only thus would he be able to defend himself. But denial of reappointment is infinitely more serious than the loss of a few dollars. Thus, howsoever school administrators might scale down a particular procedure for a particular teacher's case, there should never be any doubt that notice and hearing are absolutely the minimal prerequisite to due process. In any criminal case, the procedural guarantees for the accused are even more numerous and more rigorously enforced.[117] Of course, a proceeding which results in the discharge of a teacher or a refusal to renew his contract is not a criminal trial. However, the result is much the same to the individual, for his loss of academic reputation and the serious impairment of opportunities for his future employment constitute a very real punishment, certainly as real as the imposition of a substantial fine. And of course there is the accompanying loss of reputation.

> Good name in man or woman, lord, is the immediate jewel of their eye.
> Who steals my purse, steals trash. 'Tis something, nothing,
> 'Twas mine, 'tis his and has been slave to millions.
> But he who filches from me my good name
> Takes that which not enriches him
> But leaves me poor indeed.[118]

Actually the litmus test of any type of a proceeding is the simple word "fairness", and "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." [119] Natural justice has as its very core fundamental fairness. This was the central message conveyed in a 1936 report of the Committee on Ministers' Powers in England which stated that while "in an administrative determination a Minister may "depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against 'natural justice.' " [120] Three principles of "natural justice" were stated to be that (1) "a man may not be a judge in his own cause," that (2) "no party ought to be condemned unheard," and that (3) "a party is entitled to know the reason for the decision." [121]

---

[115] Van Alstyne, *The Demise of the Right—Privilege in Constitutional Law,* 81 HARV. L. R. 1439, 1452 (1968).

[116] Rule 8 (a) Fed. Rules of Civ. Proc. 61 AM. JUR. 2d § 71–73.

[117] AM. JUR. 2d § 66.

[118] SHAKESPEARE, OTHELLO, Act III, Sc. 3, line 155–160.

[119] *See* note 114 *supra,* 341 U.S. 123 at 170.

[120] REPORT OF COMMITTEE ON MINISTERS' POWERS, Cmd. 4060, pp. 75–80.

[121] *Id.* at 80.

But can "natural justice" be realized without allowing for a confrontation with witnesses?[122] In the academic world confrontation is a painful experience. Hopefully most cases of discharge or nonreappointment could be equitably disposed of without it. One objection urged against confrontation is that the teacher-administrator relationship might be damaged by the resulting embarrassment and friction. But this consideration is moot if the hearings and reviews vindicate the administrator's original decision not to reappoint. On the other hand, if they reveal that this decision was wrong —based, for instance, on misunderstandings or dishonest testimony—then the embarrassment or inconvenience that follows upon the rehiring of the teacher is a small price to pay for the prevention of a serious miscarriage of justice. As one federal judge wrote in a 1969 school-teacher case, "the avoidance of an unjustified nonretention must outweigh the danger of disharmony." [123]

The "embarrassment" argument has a particularly strong thrust when it is directed at demands for confrontation and cross-examination of witnesses who are colleagues—or even for demands for names of the witnesses or for specifics on the charges they have made. But the general answer must be that given above—if confrontation is the only way to uncover the falsehoods supporting a decision hostile to a teacher's rights and calculated to cause irreparable danger to his reputation and his whole career, then confrontation must be permitted regardless of the embarrassment which might ensue. *Justitia fiat, ruat coelum.*

Conclusion

"Supreme Court decisions are harbingers of what is to come, a promise of protection yet to be redeemed." [124] Although Professor William P. Murphy of the University of Missouri Law School wrote these words over ten years ago, they might well express the hope and expectation of a substantial number of today's commentators on the rights of teachers to due process guarantees when threatened with discharge or nonreappointment. As this article has shown, the Court with fairly consistent predictability has been demanding hearings stamped with genuine due process attributes

[122] "[N]o safeguard for testing the validity of human statements is comparable to that furnished by cross-examination." 5 WIGMORE ON EVIDENCE, § 1367 (3d ed. 1940).

[123] Drown v. Portsmouth Sch. Dist., 435 F.2d 1182 (1st Cir. 1969). The embarrassment, disharmony, and tension in the school could actually be much greater if he is never told who his accusers are nor given the true reasons for his non-renewal, for he then might suspect any number of fellow teachers who had nothing to do with his case. School administrators have some obligation to prevent this, and the natural law would have a most critical eye for their part in creating a situation where innocent people become targets for the recriminatory shafts of the disaffected teacher. *See* notes 88 and 107 *supra* and corresponding text.

[124] Murphy, *Academic Freedom—An Emerging Constitutional Right* in BAEDE 56, *supra* note 1.

for individuals facing substantial losses that might come from an arbitrary fiat of public officials—loss of welfare benefits, loss of children, loss of driver's license, etc. A number of lower courts have borrowed from the reasoning of the high tribunal in these and similar cases to supply the underpinnings for their own rulings that nontenured public school teachers must be accorded due process hearings in situations involving nonreappointment. It is true that the Supreme Court in *Roth* and *Sinderman* did not fully acquiesce in the arguments, nor accept in toto the decisions of these lower court judges. Indeed, to many people, the Court's ruling in *Roth* was probably highly disappointing. However, for reasons given above,[125] a careful reading of the Court's opinions should dispell any inordinate dejection. Actually, the Court trumpeted a highly encouraging note when it asserted that public schools may not decide against the reappointment of nontenured teachers for *no* reason whatsoever or for *any* reason they might choose, and that such teachers do have rights which in certain instances would include notice and hearing. By this ruling the Court laid to rest the widely held assumption that nontenured teachers have no rights whatsoever, vis-à-vis a nonrenewal decision. Thus, it can rightly be said that these two decisions—especially when fortified by the Court's reasoning in several non-school cases[126]—are "harbingers of what is to come, a promise of protection yet to be redeemed."

But even if the high tribunal should ultimately extend to nontenured public school teachers the most comprehensive due process coverage, this would not necessarily throw the protecting judicial mantle over personnel in private schools. This concession, however, in no way weakens the thrust of the present article, the main purpose of which is to demonstrate that faculty members in private academic institutions—nontenured as well as tenured—should and do have rights to due process treatment from their employers nearly identical to the legal and constitutional rights of their counterparts in state schools, but anchored in natural law and natural justice rather than in any kind of positive legal enactment. It is beside the point that the Courts might not vindicate rights so grounded. A person may have no right, constitutional or otherwise, to teach in a private college —or in a public school for that matter—but once he gets there he does have the basic right, grounded in natural law, not to be cast out in a fashion that violates fundamental principles of justice.[127] And the best guarantee against such violations must ultimately rely not in the courts but on the consciences of school officials.

In establishing the basic premise for this argument, it was necessary to prove that when administrators hire a teacher on probationary status, they

[125] *See*, notes 48–54 *supra*, especially the text corresponding to note 54.

[126] *See*, notes 81–93 *supra*, 100 and corresponding text.

[127] *See*, note 101 *supra* and the relevant discussion in the text.

obligate themselves by principles of natural justice to do nothing, without sufficient reason, to endanger the professional reputation of that teacher. But this they do—especially in today's market—by a nonrenewal of contract for reasons not justified by the facts. Ergo, they deny him substantive due process.

Even if the reasons for nonrenewal seem objectively sufficient for such action, the academic officials have a natural law obligation[128] to reveal these reasons to the affected teacher, partly because failure to do so is an open invitation to all future potential employers to conclude that the teacher is guilty of the most reprehensible of actions.

It should also be evident that additional procedures should be permitted the affected person to test the validity of these reasons, for history as well as experience of an individual nature should caution school administrators against any claims to personal infallibility. In the first place, it is indispensable that he receive *written* notice stating the precise reasons for the contemplated adverse decision. Such is the requirement for every civil action, where the plaintiff must furnish his adversary with a written, clear, and specific declaration in order to inform "the defendant of the charge so as to enable him to prepare his defense." [129] In criminal cases, requirements for the indictment are even more demanding. Since a refusal to renew a teacher's contract is a grave penalty, frequently a life-term penalty, it is hardly asking too much that school administrators should present the affected teacher with a like notice stating the causes for their action.

In addition, the teacher should be given an opportunity to state his case before the decision-making board, to confront and cross-examine those who have testified against him, and to appeal the judgment against nonrenewal to another board, possibly to the trustees themselves. These are the minimum rights, according to natural justice that every school should extend to all its faculty members in reappointment cases for their protection as human beings—and likewise for the protection of the institution and its administrators as well, lest the school escutheon be tarnished and their own consciences sullied by those sad and far-reaching consequences that so often ensue upon the errors so frequently made in ex parte proceedings.[130]

---

[128] In certain situations there would also be a constitutional obligation in the case of public schools. Text at note 54 *supra.*

[129] Note 116 *supra.*

[130] Highly recommended for additional study of problems presented in this article are Swartz, *Administrative Procedure and Natural Law,* 28 NOTRE DAME L. 169 (1953); Tobias, *The Plea for the Wrongfully Discharged Employee Abandoned by His Union,* 41 U. CINN. L. R. 55 (1972).