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University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection, (with R. Ladenson)

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University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection

BY
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INTRODUCTION

In recent years, increased attention has focused on the rights of university faculty members to dissent from the views of their colleagues, the university administration, or the general public. Faculty have looked to their employment contracts and the Constitution as sources of protection for their right to dissent. In this Article we examine the vitality of these sources.

We argue that faculty should have a right to freedom of expression in the college or university which parallels the rights of citizens generally under the first amendment. That is, the law should forbid school interference with faculty expression in the same way the first amendment forbids government interference with free expression by citizens.

In public colleges and universities, we argue that *Pickering v. Board of Education*[1] provides this measure of protection but that subsequent decisions have misconstrued *Pickering*. In private institutions of higher

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[1] 391 U.S. 563 (1968).

learning, we argue that courts should recognize the same protection for faculty freedom of expression as an implied term of academic employment contracts. We suggest that implementation of this proposal will require courts to be more willing to scrutinize the university decision-making process.

I. THE PHILOSOPHICAL JUSTIFICATION FOR ACADEMIC FREEDOM

At the outset, essays on academic freedom confront the difficult problem of precisely identifying their subject. Academic freedom resists a succinct characterization. One simply cannot reduce it to a concise verbal formula.[2] Fortunately, however, substantial agreement exists as to

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[2] Consider, for example, the following typical effort in this regard:

> Academic freedom is that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community. The claim that scholars are entitled to particular immunity from ideological coercion is premised on a conception of the university as a community of scholars engaged in the pursuit of knowledge, collectively and individually, both within the classroom and without, and on the pragmatic conviction that the invaluable service rendered by the university to society can be performed only in an atmosphere entirely free from administrative, political, or ecclesiastical constraints on thought and expression.

Developments in the Law — Academic Freedom, 81 HARV. L. REV. 1045, 1048 (1968).

The authors of the above quotation describe academic freedom as "a particular immunity from ideological coercion." *Id.* This seems too narrow. One can imagine violations of the principle of academic freedom in no way ideologically motivated, at least if one understands the word "ideology" in the standard way as referring to a system of beliefs. To cite just one example, consider the case of a university faculty handbook which includes a rule that faculty members must not make any public statements that tend to detract from the good name of the university. Such a rule, though clearly abridging academic freedom, need not necessarily have an ideological motivation behind it.

The above quotation is vague in other ways. Its last sentence characterizes academic freedom as freedom from "administrative, political, or ecclesiastical constraints on thought and expression." This requires much more specification before one can say confidently what the authors have in mind. What kinds of administrative regulations limiting a teacher's range of discretion in organizing his or her courses count as "administrative constraints on thought and expression"? Does a general requirement that final exams be given in all courses represent an "administrative constraint on thought and expression"? What about administratively determined degree requirements? These are not frivolous questions. Faculty and school administrators disagree about them constantly. Moreover, in the context of such disagreements, from time to time faculty seek to buttress their position by appeal to the principles of academic freedom. For other attempts to characterize academic freedom with analogous problems, see *1940 Statement of Principles on Academic Freedom and Tenure*, in ACADEMIC FREEDOM AND

the types of actions by school officials that clearly violate the principle of academic freedom.

Consider the following five hypothetical cases:

1) A faculty handbook includes as one of its rules that faculty members must not make public statements that tend to detract from the good name of the university;

2) A dean instructs the campus bookstore not to order several books on the required reading list for a forthcoming course. The dean regards them as too liberal;

3) A university rule bans the use of books by certain authors;

4) A gifted teacher and researcher, who has carried out his academic responsibilities flawlessly, is denied tenure because of his membership in the Communist Party;

5) A university rule requires that all philosophy and political science courses include certain works as required texts because the school authorities believe they provide proper moral guidance.

Each of the above five cases generally is recognized as a serious abridgment of the principle of academic freedom. When one looks for connecting threads applicable to all of them, a well-known justification of academic freedom comes to mind:

> That the open search for truth has rendered great services to mankind can scarcely be denied — although the magnitude of that service is not sufficiently appreciated by society in general. The institution distinctively dedicated to this service is the university, with such adjuncts as the special organizations of science, philosophy, and the humanities, themselves mainly composed of faculty members. From this function the claim to academic freedom derives. This freedom is not to be thought of as a privilege, not as a concession, nor as something that any authority inside or outside the institution may properly grant or deny, qualify or regulate, according to its interest or its discretion. It is something instead that is inherently bound up with the performance of the university's task, something as necessary for that performance as pen and paper, as classrooms and students, as laboratories and libraries.[3]

Colleges and universities have as their principal function the furthering of knowledge through teaching and research. Carrying out this function requires that faculty enjoy academic freedom. In each of the above cases, school authorities abridged the freedom of faculty in ways

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TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 33 (L. Joughlin ed. 1967); Thompson, *A Proposed Statement on Academic Freedom*, in THE CONCEPT OF ACADEMIC FREEDOM 263-64 (E. Pincoffs ed. 1972); Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (E. Pincoffs ed. 1972).

[3] R. MACIVER, ACADEMIC FREEDOM IN OUR TIME 11 (1955).

which conflict with the furthering of knowledge. In the first case, school authorities placed a higher value on the school's reputation than upon the pursuit of truth. In the second case, school officials imposed a prior restraint, making discussion of certain ideas impossible. The third case involved direct censorship of faculty, and the fourth was an instance in which school authorities penalized a faculty member because of the views he espoused. Finally, the fifth case constituted an attempt by school officials to use the faculty as instruments for imposing a particular orthodoxy upon students.

These divergent but related situations help identify the core applications of the principle of academic freedom. The principle is violated when school officials take actions which have the effect of undermining the goal of furthering knowledge. One may gain deeper insight into the nature of academic freedom by comparing its principal justification with the broader principle of free expression which applies to the relationship between a government and those subject to its authority.

John Stuart Mill's classic argument in chapter two of *On Liberty*[4] is the definitive statement of the theory underlying the general principle of free expression. Mill recognizes that the expression of attitudes and beliefs can precipitate substantial harm. Indeed, these harms may be of such magnitude that were comparable harms caused by other, non-expressive, activities one would unhesitatingly impose legal restrictions upon those other kinds of behavior. One might, therefore, consider control of expression as a legitimate government function. Mill, however, invites us to consider the implications of this viewpoint. Because no one is infallible, such coercive regulation would result in widespread acceptance of seriously mistaken viewpoints on important matters. Further, such a condition might persist for many generations absent the most obvious means of overcoming it, free expression. Even false views may contain a substantial element of truth or serve to stimulate creative thought. Hence, these benefits would also be eliminated by regulating free expression. Mill argues that whatever advantages might accrue from an effective method of thought control, the evils associated with it count for much more in the balance.

Moreover, according to Mill, very little leeway exists between the full control of expression and minimal regulation. Any proposed basis for controlling expression, though presumably limited, runs an unacceptable risk of developing into full control. This danger exists whether one specifies a special subject matter, mode of presentation, or motiva-

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[4] J.S. MILL, ON LIBERTY (C. Shields ed. 1956).

tion as the ground for limiting expression. None of these grounds can be stated in a way that does not open the door in principle to the evils that attend full scale thought control.[5] Once restrictions upon expression are imposed, society must rely solely upon the humanity and sound judgment of government authorities to avoid their abuse. But given the enormous interest at stake — avoiding thought control — this is patently unacceptable.

The justification for academic freedom both resembles and differs from the philosophical justification of a general right to free expression. Each justification is premised upon the vital connection between free expression and the search for truth. The various modes of repression, such as censorship and prior restraints, undermine the search for truth whether imposed on all society by government or within an institution of higher learning by school officials. The justifications of a general right to free expression and of academic freedom differ, however, in the following way. Given the powerful repressive devices at the disposal of even a moderately strong government, pervasive regulation of expression may amount to thought control. In contrast, although colleges and universities have exercised substantial coercive force to discourage teachers from freely expressing themselves, no single institution of higher learning could ever exercise the kind of centralized power to control thought that a government possesses.

Both the similarities and differences between the justifications for academic freedom and the general right of free expression figure significantly in the proposals we advance in this Article. Our proposals are designed to provide legal support for the principle of academic freedom in its core applications, such as the five cases discussed earlier. Such legal support is highly desirable because, as the next section demonstrates, current law does not accord academic freedom its proper measure of protection.

II. PROTECTION OF ACADEMIC FREEDOM BY CONTRACT: UNIVERSITY TENURE POLICIES AND THE EMPLOYMENT AGREEMENT

Contractual protection of academic freedom may exist for dissenting faculty members in both public and private institutions through judicial enforcement of tenure contracts. However, some courts have encountered difficulty in enforcing such contracts due to uncertainties about the precise terms of the contracts. Many other courts have resolved

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[5] In chapter two, Mill addresses the problems that attend subject matter restrictions, mode of presentation, and motivation. *Id.* at ch.2.

these uncertainties by deferring to the university's judgments.

A. The University-Faculty Employment Relationship

The typical employment relationship between faculty and university is embodied in the university's tenure policies.[6] The generally accepted statement of principles governing the employment relationship is the *1940 Statement of Principles on Academic Freedom and Tenure*, of the Association of American Colleges and the American Association of University Professors (AAUP).[7] A substantial number of universities[8] and professional organizations have expressly adopted the *1940 Statement*,[9] and courts and commentators have frequently cited it as the standard definition of tenure.[10] The *1940 Statement* provides that after serving an initial probationary period not to exceed seven years, a faculty member shall have tenure and shall be subject to termination only for cause, retirement, or the institution's financial exigencies.[11] Termination for cause of a tenured faculty member should be considered by both a faculty committee and the institution's governing body, and must be preceded by a hearing to resolve disputed issues of fact. Other protec-

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[6] Of course, some universities do use employment systems other than tenure. *See* Pryles v. State, 86 Misc. 2d 205, 380 N.Y.S.2d 429 (1975) (employment system based on continuing, term, and temporary appointments), *aff'd*, 51 A.D.2d 827, 380 N.Y.S.2d 628 (1976).

[7] 27 AM. A.U. PROFESSORS BULL. 40 (1941) [hereafter *1940 Statement*].

[8] Although there was considerable confusion and diversity regarding tenure policies among institutions of higher learning during the late 1950s, by the early 1970s policies modeled on the *1940 Statement* were apparently becoming standard. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1121 & n.5 (1980) [hereafter *Regulation by Agreement*].

[9] A list of such organizations appears at 60 AM. A.U. PROFESSORS BULL. 269 (1974).

[10] For a collection of cases and commentaries regarding the *1940 Statement* as a standard definition of tenure, see *Regulation by Agreement*, note 8 *supra*, at 1151 n.140.

[11] The *1940 Statement* is silent concerning whether a formal grant of tenure is required or whether tenure is acquired automatically upon reappointment for an eighth year. The acquisition of such de facto tenure or tenure by default has been the subject of litigation producing conflicting results. *Compare* Bruno v. Detroit Inst. of Tech., 51 Mich. App. 593, 215 N.W.2d 745 (1974) (faculty member who fulfilled tenure requirements was tenured without further action by school) *with* Cusumano v. Ratchford, 507 F.2d 980 (8th Cir.) (entire thrust of school's tenure regulations was to avoid de facto tenure), *cert. denied*, 423 U.S. 829 (1975) *and* Pryles v. State, 86 Misc. 2d 205, 380 N.Y.S.2d 429 (1975) (temporary appointment of doctor to teaching staff did not mature into tenured position simply through passage of time), *aff'd*, 51 A.D.2d 827, 380 N.Y.S.2d 628 (1976).

tions include prior written notice to the faculty member of the charges against him, the right to counsel, the right to have a full stenographic record of the hearing, and the right to be heard by all bodies which pass judgment on the case.

Probationary appointments are usually made for a specified term subject to renewal at the expiration of that term. The *1940 Statement* provides that probationary faculty members have the same academic freedom as tenured faculty members, similar rights to a hearing if they are to be dismissed for cause prior to the expiration of a term appointment, and a right to one year's notice of a decision not to renew an appointment.

B. Judicial Enforcement of Academic Employment Contracts

Courts that have been called upon to enforce the academic employment contract have recognized that it is inappropriate to transfer contractual principles from private industry in a wholesale manner.[12] Such a transfer would produce an absurd result. The general common law rule in private industry is that an employment relationship of indefinite duration is terminable at will by either party.[13] Applying this rule to the academic employment contract would require holding that a probationary appointee who cannot be terminated except for cause before the end of the contractual term suddenly becomes, upon the award of tenure — a status designed to enhance job security — terminable at the will of the institution.

Most courts have avoided this result by enforcing tenure provisions as part of the academic employment contract. Some courts have specifi-

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[12] Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.

Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969). This statement was quoted with approval in Krotkoff v. Goucher College, 585 F.2d 675, 680 (4th Cir. 1978), and Karlen v. New York Univ., 464 F. Supp. 704, 706 (S.D.N.Y. 1979).

[13] *See, e.g.*, Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467 (1980); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Olsen, *Wrongful Discharge Claims Raised by at Will Employees: A New Legal Concern for Employers*, 32 LAB. L.J. 265 (1981); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

cally rejected the application of the terminable at will doctrine,[14] but most have simply not discussed it.

From the application of the *1940 Statement*, practical and theoretical justifications for judicial willingness to enforce tenure contracts may be discerned. On a practical level, the requirement of a prior hearing spares the court the uncomfortable task of having to make difficult judgments of academic ability in the first instance. In contrast, comparable procedures seldom exist in private industry except when negotiated in collective bargaining. On a theoretical level, private industry limitations on the employer's ability to terminate at will provide job security for the employee as an end in itself,[15] whereas academic tenure also provides job security as a means to a greater end: protection of the professor's academic freedom.[16]

1. Determining the Terms of the Employment Contract

The judicial consensus that a contract of academic tenure is enforceable breaks down when courts attempt to discern the terms of the con-

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[14] *See, e.g.*, Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973). *But see* Bradley v. New York Univ., 124 N.Y.S.2d 238 (1953), *aff'd*, 283 A.D. 671, 127 N.Y.S.2d 845, *aff'd*, 307 N.Y. 620, 120 N.E.2d 828 (1954).

[15] *See* Summers, note 13 *supra*.

[16] *See generally* Van Alstyne, *Tenure: A Summary Explanation and "Defense"*, 57 AM. A.U. PROFESSORS BULL. 328 (1971). Judge J. Skelly Wright described the link between tenure and academic freedom:

> The real concern is with arbitrary or retaliatory dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting. If a professor had no protection against such actions, he might well be deterred from pursuing his studies or his teaching in the paths that seem to him to be best. The tenure system . . . is designed to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits.

Browzin v. Catholic Univ. of Am., 527 F.2d 843, 846 (D.C. Cir. 1975).

An additional distinction between the university and private industry that has been cited to justify not applying the employment at will doctrine is that while the grant of permanent employment is atypical in private industry, it is the norm in academia. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 289 (1977).

While the authors of this Article agree on the degree of protection that should be available to the faculty member's right to dissent, they have divergent views over whether such protections should transfer to private industry. *Compare* R. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS ch. 4 (1983), *with* Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 MICH. J.L. REF. ___ (1983).

tract. Most courts have incorporated into the contract the institution's bylaws as set forth in its faculty handbook.[17] Two issues have arisen with some frequency in this regard: the effectiveness of changes in the bylaws or handbook made after the award of tenure,[18] and termination

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[17] *See, e.g.*, Karlen v. New York Univ., 464 F. Supp. 704, 706-07 (S.D.N.Y. 1979); Abramson v. Board of Regents, 56 Hawaii 680, 687, 548 P.2d 253, 258 (1976); Rymer v. Kendall College, 64 Ill. App. 3d 355, 358, 380 N.E.2d 1089, 1090 (1978); Rose v. Elmhurst College, 62 Ill. App. 3d 824, 826, 379 N.E.2d 791, 793 (1978); Brady v. Board of Trustees, 196 Neb. 226, ___, 242 N.W.2d 616, 619 (1976); Lewis v. Salem Academy & College, 23 N.C. App. 122, 123, 208 S.E.2d 404, 406, *cert. denied*, 286 N.C. 236, 210 S.E.2d 58 (1974); Zimmerman v. Minot State College, 198 N.W.2d 108, 114 (N.D. 1972); Rehor v. Case W. Reserve Univ., 43 Ohio St. 2d 224, 230, 331 N.E.2d 416, 420, *cert. denied*, 423 U.S. 1018 (1975); Drans v. Providence College, 119 R.I. 845, 857, 383 A.2d 1033, 1039-40 (1978), *vacated and remanded on other grounds*, 410 A.2d 992 (1980); Fazekas v. University of Houston, 565 S.W.2d 299, 307 (Tex. Civ. App. 1978), *appeal dismissed*, 440 U.S. 952 (1979). *But see* Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978) (university can terminate tenured faculty for financial exigency despite absence of such a provision in university bylaws); Mustiful v. State, 347 So. 2d 516, 518 (La. Ct. App. 1977) (although faculty handbook recommended one year notice for termination, university was not contractually obligated to provide such notice). In their willingness to incorporate the faculty handbook into the faculty member's employment contract, courts have again departed from their general rules in private industry. *But see* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 612-19, 292 N.W.2d 880, 891-95 (1980) (employer's statements of personnel policy may be incorporated into employee's contract).

[18] Most, but not all, of the controversy has involved post tenure unilateral changes in a university's mandatory retirement age. *See* Rose v. Elmhurst College, 62 Ill. App. 3d 824, 379 N.E.2d 791 (1978) (post tenure change in bylaws governing dismissal for financial exigency). The cases appear to have divided into two camps. In Rehor v. Case W. Reserve Univ., 43 Ohio St. 2d 224, 331 N.E.2d 416, *cert. denied*, 423 U.S. 1018 (1975), and Fazekas v. University of Houston, 565 S.W.2d 299 (Tex. Civ. App. 1978), *appeal dismissed*, 440 U.S. 952 (1979), the courts essentially reasoned that the faculty members' contracts incorporated the universities' bylaws and that the governing bodies reserved the right to change the bylaws. The universities exercised this right by instituting a mandatory retirement age, and the faculty members acceded to this exercise of authority by accepting continued employment and salary increases. *See also* Russell v. Board of Trustees, 502 F. Supp. 916 (E.D. Ark. 1980), *aff'd*, 657 F.2d 1008 (8th Cir. 1981).

A second approach was followed by the courts in Karlen v. New York Univ., 464 F. Supp. 704 (S.D.N.Y. 1979), and Drans v. Providence College, 119 R.I. 845, 383 A.2d 1033 (1978), *vacated and remanded on other grounds*, 410 A.2d 992 (1980). Both courts looked to an AAUP-AAC 1950 Statement on Retirement as indicative of the reasonable expectations of the academic community and held that the tenured faculty members' contracts permitted the institutions unilaterally to change the mandatory retirement age provided that special provisions were made to cushion the shock for those adversely affected.

Professor Finkin has hailed the latter approach as recognizing that the construction

of tenured faculty for reasons of the institution's financial exigency.[19] In both sets of cases courts have grappled with a desire to enforce faculty contractual rights, while affording university administrations flexibility to make the academic and business judgments necessary to run their institutions. The Rhode Island Supreme Court articulated this concern in *Drans v. Providence College*:[20]

> As we review the broad range of topics encompassed in the Providence College Faculty Manual (use of audiovisual aids, purchase requests, parking privileges, traffic regulations, etc.), we cannot subscribe to this all-inclusive incorporation [in the contract]. The effective management of our academic institutions would be seriously compromised if the contractual assent of every single faculty member was required before the college could, say, rewrite the procedures for borrowing a book from the library or change the discount rate being offered the faculty at the campus bookstore.[21]

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of the faculty member-institution relationship "turns on an appreciation of academic usage and the norms and expectations of the national academic profession." *Regulation by Agreement*, note 8 *supra*, at 1145. While concepts of academic usage may help resolve some matters, they should not govern matters at the heart of academic tenure — job security. The award of tenure guarantees continued employment until the occurrence of one of three events: termination for financial exigency, termination for cause, or termination for reaching a specified mandatory retirement age. In at least one case, the retirement age was specifically incorporated in the university's tenure policy. *Fazekas*, 565 S.W.2d at 304. To change the specified age is to change the basic award. Even in private industry there is a strong line of arbitral precedent equating mandatory retirement with discharge. Although there is equally strong authority treating mandatory retirement as distinct from discharge, it is clear that when a collective bargaining agreement specifically deals with the subject, the employer may not unilaterally impose a new mandatory retirement policy which conflicts with the existing agreement. *See generally* Eglit & Malin, *Employment Discrimination: Federal Statutes and Regulations other than the Age Discrimination in Employment Act*, in 2 EGLIT, AGE DISCRIMINATION §§ 19.28, 19.30 (1982). Indeed, the AAUP itself has urged the invalidity of unilateral changes in a faculty handbook which weaken the protections of tenure. *See Academic Freedom and Tenure: Philander Smith College (Arkansas)*, 66 ACADEME 198 (1980).

[19] The problems faced by courts in dealing with dismissals for financial exigency have generated considerable discussion among commentators. *See, e.g.*, Note, *Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom*, 52 DEN. L.J. 911 (1975); Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417 (1976); Note, *Dismissing Tenured Faculty: A Proposed Standard*, 54 N.Y.U. L. REV. 827 (1979).

[20] 119 R.I. 845, 383 A.2d 1033 (1978), *vacated and remanded on other grounds*, 410 A.2d 992 (1980).

[21] *Id.* at 857, 383 A.2d at 1040.

2. Judicial Reluctance to Review Academic Judgments

Judicial reluctance to second guess the business and academic judgments of university administrators has caused courts to defer to the administrators' judgment that financial exigency exists, even when the exigency is limited to a single department,[22] or when the institution could have avoided termination of tenured faculty by selling real property,[23] or temporarily invading the corpus of its endowment.[24]

Judicial reluctance to interfere with university academic judgments is even stronger when a court is asked to determine whether a professor's discharge for cause breached the professor's employment contract. Few reported decisions deal with the issue of what constitutes just cause.[25] Most such cases are resolved by the internal procedures required prior to termination.[26] When called upon to review discharges in cases involving conduct apparently unrelated to the exercise of academic freedom, courts have had little difficulty sustaining discharges for willful insubordination, for violation of university rules relating to leaves of absence,[27] for having sexual relations with a student, and for assaulting a police officer.[28]

Courts have taken widely divergent approaches to university discharges in cases that raise issues of infringement on the discharged faculty member's academic freedom. In *Koch v. Board of Trustees*,[29] a tenured faculty member was discharged for writing a letter to the editor of the school newspaper. The letter responded to an essay published in the same newspaper which had commented negatively upon the moral

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[22] *E.g.*, Scheuer v. Creighton Univ., 199 Neb. 618, 260 N.W.2d 595 (1977).

[23] *E.g.*, Karlen v. New York Univ., 464 F. Supp. 704 (S.D.N.Y. 1979); American Ass'n of Univ. Profs. v. Bloomfield College, 136 N.J. Super. 442, 346 A.2d 615 (1975).

[24] *E.g.*, Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); *see also* N.J. State College Council v. Higher Educ. Bd., 181 N.J. Super. 179, 189-90, 436 A.2d 1152, 1156 (1981), *modified*, 91 N.J. 18, 449 A.2d 1244 (1982).

[25] The dearth of judicial precedent concerning just cause for the discharge of university faculty contrasts with the substantial number of reported decisions involving primary and secondary teachers. *See* Note, *Dismissing Tenured Faculty: A Proposed Standard*, 54 N.Y.U. L. REV. 827, 836-46 (1979).

[26] By providing for a hearing in the first instance before a professor's peers, the institution seeks a determination of the merits of the discharge from "those with whom the risk of abuse may least dangerously be placed . . . ." Van Alstyne, *Tenure: A Summary Explanation and "Defense"*, 57 AM. A.U. PROFESSORS BULL. 328, 330 (1971).

[27] Stastny v. Board of Trustees, 32 Wash. App. 239, 647 P.2d 496 (1982).

[28] Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (2d Dist. 1971).

[29] 39 Ill. App. 2d 51, 187 N.E.2d 340 (1962), *cert. denied*, 375 U.S. 989 (1964).

climate at the university. The plaintiff's letter took a liberal approach to the issues of campus morality and stated that premarital sexual intercourse among students was not *per se* improper.

The university president sought the plaintiff's discharge on the ground that the letter was "offensive, repugnant and contrary to commonly accepted standards of morality and . . . could be interpreted as an encouragement of immoral behavior . . . ."[30] The plaintiff requested and received a hearing before the University Senate Committee on Academic Freedom, which unanimously recommended that he be reprimanded. The plaintiff then received a hearing before the University Board of Trustees, which decided to discharge him. The court interpreted the plaintiff's employment contract as allowing discharge for good cause, as determined by the Senate committee and the Board of Trustees. It thus refused entirely to review the findings of those bodies that good cause existed.

The decision of the Wisconsin Supreme Court in *State ex rel. Ball v. McPhee*[31] stands in marked contrast to *Koch*. The court overturned the discharge of a tenured faculty member because of irregularities in the pretermination procedure. It specifically rejected the approach taken in *Koch*.[32] In setting guidelines for rehearing by the University Board of Trustees, the court commented that to protect the professor's academic freedom the following actions by the professor could not constitute good cause for discharge: his attempt to persuade graduates not to accept teaching jobs in northern Wisconsin;[33] his vocal opposition to graduate students taking undergraduate courses;[34] his criticism of the college ad-

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[30] *Id.* at 54, 187 N.E.2d at 342.

[31] 6 Wis. 2d 190, 94 N.W.2d 711 (1959), *overruled on other grounds*, Stacy v. Ashland County Dep't of Pub. Welfare, 39 Wis. 2d 595, 602, 159 N.W.2d 630, 634 (1968).

[32] We wish to take sharp issue with one of the contentions advanced by the attorney general. Such contention is that the statute vests the sole discretion in the board to determine for itself what conduct on the part of a teacher 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 who has completed his four year probationary period. The statute guarantees such tenure *"during efficiency and good behavior."* It necessarily follows that any discharge for a cause that does not qualify as inefficiency or bad behavior is contrary to law and reviewable by the courts in certiorari.

Id. at 203-04, 94 N.W.2d at 718 (emphasis in original). *Accord* State *ex rel.* Richardson v. Board of Regents, 70 Nev. 347, 352, 269 P.2d 265, 268 (1954).

[33] *McPhee*, 6 Wis. 2d at 204, 94 N.W.2d at 718.

[34] *Id.* at 204, 94 N.W.2d at 719.

ministration at a meeting of the Association of Wisconsin State College Faculties;[35] and his statements to colleagues criticizing a change in the university pay plan.[36]

Judicial reluctance to review academic judgments is strongest in cases challenging a probationary teacher's denial of reappointment or tenure. In numerous cases courts have brushed aside tenure denial challenges under the due process clause of the fourteenth amendment by succinctly holding that the probationary faculty member has no property or liberty interest, and thus is not entitled to a hearing or a statement of reasons.[37] In numerous other cases in which tenure denials have been attacked for being based on impermissible grounds, courts have routinely accepted at face value the university's statement of reasons for their actions.[38]

3. The Search for an Adequate Standard

This extreme reluctance to examine the university's academic judgments is understandable. Unlike the decision to terminate for cause, which will usually focus on specific incidents, the decision to grant or deny tenure is based on observation of the faculty member throughout the probationary period. Evaluation of the faculty member's teaching and scholarly ability, as well as the long term academic interests of the

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[35] *Id.* at 211-12, 94 N.W.2d at 723.

[36] *Id.*; *see also* State *ex rel.* Richardson v. Board of Regents, 70 Nev. 347, 269 P.2d 265 (1954).

[37] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Kilcoyne v. Morgan, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); McElearney v. University of Ill., 612 F.2d 285 (7th Cir. 1979); Haimowitz v. University of Nev., 579 F.2d 526 (9th Cir. 1978); Wells v. Board of Regents, 545 F.2d 15 (6th Cir. 1976); Wood v. University of S. Miss., 539 F.2d 529 (5th Cir. 1976); Hyning v. University of Alaska, 621 P.2d 1354 (Alaska), *cert. denied*, 454 U.S. 958 (1981); Laubach v. Bradley, 194 Colo. 362, 572 P.2d 824 (1977); Cornwell v. University of Fla., 307 So. 2d 203 (Fla. Dist. Ct. App. 1975); Loebeck v. Idaho State Bd. of Educ., 96 Idaho 459, 530 P.2d 1149 (1975); Akhtar v. Van de Wetering, 642 P.2d 149 (Mont. 1982); Smith v. Greene, 86 Wash. 2d 363, 545 P.2d 550 (1976).

[38] *See, e.g.*, Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981) (first amendment), *cert. denied*, 103 S. Ct. 69 (1982); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977) (title VII); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977) (title VII); *cf.* Laborde v. Regents of the Univ. of Cal., 686 F.2d 715 (9th Cir. 1982) (associate professor's title VII challenge to decision not to promote her to rank of full professor rejected because decision was based on her inadequate scholarship), *cert. denied*, 103 S. Ct. 820 (1983); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976) (title VII challenge to college's failure to offer plaintiff a third year teaching contract rejected because college's decision was legitimately based on professional qualifications); *see also* notes 111-33 and accompanying text *infra*.

university, requires in the first instance the judgment of his peers based upon their observation of his progress during the probationary period.[39]

Nevertheless, courts should not allow these factors to render the contractual rights of a probationary faculty member regarding tenure or reappointment effectively unenforceable. These rights may include adequate notice of termination,[40] and in certain instances a hearing.[41] Moreover, given that the purpose of a tenure system is to safeguard the academic freedom of all faculty members, and given the provision of the *1940 Statement* assuring probationary faculty the same academic freedom as tenured faculty, an implicit term of the probationary faculty member's employment contract is that he will not be denied tenure or reappointment because he dissents from the views of his colleagues or the university administration. It is thus incumbent upon courts to scrutinize closely a denial of tenure or reappointment when such decision is allegedly due to the faculty member's dissent. Such scrutiny is necessary to reinforce the protection provided by the limitations on discharge before the expiration of a term appointment. Absent such scrutiny, those opposed to the dissident may choose to avoid a midterm termination proceeding in favor of nonrenewal at the expiration of the appointment when the reasons for the decision would not be subject to challenge.[42]

Judicial scrutiny of a denial of tenure or reappointment to safeguard the right to dissent raises a dilemma. Can it be done without unduly intruding on the academic judgments of the university? Professor Mathew Finkin, in the broader context of a general discussion of faculty contractual rights, has suggested that courts can achieve both goals — safeguarding faculty contractual rights and minimizing intrusion into academic affairs — by relying upon academic custom and usage for their standards of contract interpretation.[43] He further suggests that a principal source of such custom and usage is the policy statements and rulings of the AAUP.

Unfortunately, there is little reason to believe that the pronouncements of the AAUP constitute generally recognized custom, as the term is understood in contract law. Rather, they constitute one conception of

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[39] An excellent discussion of these concerns in the constitutional context appears in Stebbins v. Weaver, 396 F. Supp. 104, 112-13 (W.D. Wis. 1975).

[40] *See* Zimmerman v. Minot State College, 198 N.W.2d 108 (N.D. 1972).

[41] *See* Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969).

[42] *See Academic Freedom and Tenure: Lincoln College*, 50 AM. A.U. PROFESSORS BULL. 244 (1964).

[43] *Regulation by Agreement*, note 8 *supra*; *see also* Finkin, *Toward a Law of Academic Status*, 22 BUFFALO L. REV. 575 (1973).

the standards which ought to govern the faculty-university relationship. That courts should adopt this conception is not self evident but rather requires a substantial argument. Even if the AAUP standards become the prevailing practice, they would only be useful in resolving contractual disputes that do not relate to job security.[44] Because the protection of job security is directly related to the protection of a faculty member's academic freedom, such protection should not depend merely on the prevailing practices at the time of the dispute.[45] A court called upon to

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[44] Professor Finkin's view discerning a line of cases as the beginning of a trend to resort to academic usage may be too optimistic. Professor Finkin contrasts the approach of the courts in Scheuer v. Creighton Univ., 199 Neb. 616, 260 N.W.2d 595 (1977), Baker v. The Cooper Union, N.Y.L.J. Aug. 2, 1976, at 5 (Sup. Ct. N.Y. Cty. 1976), and Rehor v. Case W. Reserve Univ., 43 Ohio St. 2d 224, 331 N.E. 2d 416, *cert. denied*, 423 U.S. 1018 (1975), which represent extreme judicial deference to institutional decisions, with the approach in Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978), Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969), and Drans v. Providence College, 119 R.I. 845, 383 A.2d 1033 (1978), *vacated and remanded on other grounds*, 410 A.2d 992 (1980), which represent judicial acceptance of academic usage. In *Krotkoff*, however, the court used the concept of academic usage to imply a right of the university to terminate tenured faculty for financial exigency even though the university's bylaws made no such provision. In *Drans*, the court relied on academic usage to allow the university to lower its mandatory retirement age from the age specified at the time of the plaintiff's award of tenure. Thus, in both cases the courts resorted to academic usage to expand the powers of the institution beyond those that it had apparently retained in the contract. Viewed in such a light, these cases are not as inconsistent with the *Baker-Scheuer-Rehor* line of authority as Professor Finkin suggests.

In the third case, *Greene*, the court relied on academic usage to avoid giving effect to an apparent disclaimer by the university that it was obligated to provide specified notice of nonreappointment to probationary faculty members. The court did so, however, upon finding the provision ambiguous because it conflicted with other provisions of the faculty handbook and upon finding that, by its actions (including assigning the faculty member to teach a course the following fall and requesting that he produce a reading list), the university had for all practical purposes reappointed the faculty member by the time it had given him notice of nonreappointment. Although the court referred several times to a general need to interpret academic employment contracts in light of academic custom, its analysis of the facts before it does not necessarily lead to such a broad holding.

[45] The *1940 Statement* itself contains an apparent restraint on the faculty member's freedom of expression:

> The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise ap-

resolve such a dispute should exercise its independent judgment.

The search for an adequate standard to guide judicial enforcement of a faculty member's right to dissent requires a return to our initial inquiry into the nature of academic freedom. The grounds for a faculty member's claim to academic freedom and a citizen's claim to freedom of expression, though not identical, have important similarities. Both are predicated upon the vital connection between freedom of expression and truth.[46]

We thus suggest that the search for a standard to safeguard a faculty member's contractual right to dissent is facilitated by an inquiry into the search for a standard to safeguard a citizen's first amendment right to dissent. The two standards merge in cases involving state universities and the first amendment. We therefore next consider the first amendment rights of faculty at state universities.

III. CONSTITUTIONAL PROTECTION OF ACADEMIC FREEDOM IN PUBLIC UNIVERSITIES

A. Protection of Public Employees Under Pickering

Despite numerous statements in dicta emphasizing the importance of academic freedom, the United States Supreme Court has never held categorically that faculty in public colleges and universities have a right to academic freedom under the first amendment.[47] They do, however, have first amendment rights of free expression by virtue of their status

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> propriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

1940 Statement, note 7 *supra*, at 41. Not surprisingly, this provision has had a tortured history of interpretation by the AAUP. Much of this history is recounted in *University of California at Los Angeles*, 57 AM. A.U. PROFESSORS BULL. 382, 395-97 (1971).

[46] A private university may, of course, contract with its faculty to restrict their academic freedom. *See, e.g.*, Curran, *Academic Freedom: The Catholic University and Catholic Theology*, 66 ACADEME Mar.-Apr. 1980, at 126. Such restrictions indicate that the institution is not a university in the truest sense of the word. However, as a matter of contract law, these restrictions should be enforced when they are clearly and unambiguously spelled out.

[47] *See* Widmar v. Vincent, 454 U.S. 263, 276-77 (1981); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Healy v. James, 408 U.S. 169, 180-81 (1972); Whitehill v. Elkins, 389 U.S. 54, 59-60 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 250-51, 261-64 (1957).

as public employees under *Pickering v. Board of Education.*[48] In that case the appellant, Marvin Pickering, was dismissed from his job as a high school teacher for writing letters to a local newspaper that criticized the school board. He charged that the board had built an athletic field with unauthorized bond funds, and further, that the board was creating a "totalitarian atmosphere" and lying to the public.

Pickering was fired. Although unsuccessful in the Illinois Courts, Pickering ultimately won in the United States Supreme Court. Holding that the first amendment applies to public employment, the Court said that "the theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[49] Hence, teachers may not be compelled to surrender all the rights they would otherwise have as citizens to comment on matters of public interest related to schools. "The problem," said the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[50]

The Court explicitly declined to enunciate a general standard of first amendment protection for public employees. Confining its attention specifically to the *Pickering* case, however, the Court indicated "some of the general lines along which an analysis of the controlling interests should run" to evaluate "the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case . . . ."[51] The Court pointed out that Pickering's letter, although sarcastic in tone and occasionally inaccurate, nonetheless attacked only the school board. It did not personally criticize anyone with whom he worked on a day to day basis. Accordingly, the Court observed, to retain Pickering would not inevitably lower morale or upset the normal operations of the school where he worked.[52] The Court noted further that Pickering's position as a teacher neither placed a strict duty of confidentiality upon him nor involved "personal and intimate" relations with his superiors which would be irretrievably damaged by his public criticism of them.[53] In addition, the Court observed that by speaking out as he did, Pickering did not place his competence

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[48] 391 U.S. 563, 568 (1968).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 569.

[52] *Id.* at 570.

[53] *Id.* at 570 & n.3.

as a teacher in question.[54] Thus, the Court held that a teacher, or any public employee, should not be subject to dismissal unless his or her words were made with knowing or reckless disregard of the truth.[55]

B. Connick v. Meyers: *Ad Hoc Balancing and the Public Interest Test*

The Supreme Court held in *Pickering* that the first amendment applies to public employees generally, and to public school teachers in particular. The Court's opinion, however, is narrowly drawn, and as a consequence does not provide much explicit guidance about *how* the first amendment applies in the context of public employment. The Court merely indicated that the words of the appellant, Marvin Pickering, were entitled to first amendment protection. But the Court said very little about *why* those words were protected.

Despite having addressed the issue of first amendment rights of public employees on several occasions, the Court did not appreciably clarify *Pickering*'s broad holding until its recent decision in *Connick v. Meyers*.[56] In *Connick* the Court adopted an approach already widely followed by lower courts which reads *Pickering* as having mandated the resolution of first amendment issues relating to public employees through a process of ad hoc balancing. Through this process, courts determine whether the words of a given public employee fall under the scope of the first amendment by taking into account a wide variety of factors, and then deciding in an intuitive fashion how they should be balanced to reach a reasonable decision about the case at hand. The degree to which a public employee's words address a matter of public importance is crucial in applying the balancing test. Under this proce-

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[54] *Id.* at 573 & n.5.

[55] *Id.* at 574. The phrase "knowing or reckless disregard of the truth" is precisely the same as the one the Court emphasized in New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (under the first amendment public officials must meet a substantially heightened burden of proof as plaintiffs in lawsuits for defamation).

[56] 103 S. Ct. 1684 (1983). Pre-*Connick* decisions dealing with public employee rights of free speech include Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), and Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977). In *Givhan* the Court held that for employee speech to have first amendment protection it need not take place in a public forum. Under the holding in that case, for example, an employee's complaint made in the office of his or her supervisor receives no less protection than the same complaint voiced through the mass media. *Mt. Healthy* raises procedural issues which, while important, do not pertain to the question of what public employees may say without fear of sanctions. *See also* notes 82-99 and accompanying text *infra*.

dure, courts take as their principal questions the extent of possible public interest in the employee's words, and the weight to accord this interest as compared with the interest of the government as employer in maintaining the efficiency of its operations.

In *Connick v. Myers*, Myers, an Assistant District Attorney in New Orleans had circulated among her colleagues a questionnaire soliciting their views on such internal office matters as office transfer policy, morale, confidence in supervision and the need for a grievance procedure. After being fired for insubordination, she sued under 42 U.S.C. § 1983. Although the lower courts held that her discharge violated the first amendment, the Supreme Court reversed.

The Court did not hold that Myers' statements were not protected by the first amendment.[57] Instead it sanctioned the ad hoc balancing approach described above, stating:

> *Pickering*, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expressions cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.[58]

Several pre-*Connick* lower court cases involving public college and university teachers have utilized a straightforward application of the above approach. For example, in *Clark v. Holmes*,[59] cited with approval in *Connick*, the Seventh Circuit concluded that the words of a

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[57] 103 S. Ct. at 1690.

[58] 103 S. Ct. at 1689-90 (footnote omitted). The Court split 5-4 in *Connick*, with Justice Brennan writing a strong dissent that was joined by Justices Marshall, Stevens, and Blackmun. Justice Brennan objected to the majority opinion for three principal reasons. First, he took issue with the position of the majority that the context of an employee's utterances determines in part whether they count as addressing a matter of public interest. Second, he maintained that, contrary to the majority viewpoint, the effect of a government agency's personnel policies on employee morale constitutes a matter of public concern. Third, Justice Brennan complained that the majority misapplied the *Pickering* balancing test by concluding that even though Myers' questionnaire addressed at least one matter of public interest, she nonetheless could be dismissed without evidence that her conduct actually caused disruption. 103 S. Ct. at 1695-96.

We agree that *Connick* was wrongly decided, but base this conclusion on an analysis that differs in important respects from Justice Brennan's. Our analysis rejects the assumption shared by both the majority and dissent in *Connick*, that *Pickering* mandates an ad hoc balancing approach for determining the first amendment rights of public employees.

[59] 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

teacher who criticized his colleagues in class were not entitled to first amendment protection. In this regard, the court characterized the teacher as having "irresponsibly made captious remarks to a captive audience." Similarly, the Fifth Circuit stressed the interest to the public of the information sought as its reason for upholding the right of the faculty members to distribute a questionnaire in *Lindsay v. Board of Regents*.[60] *Connick v. Myers* thus mandates the procedure hitherto followed by most courts for determining the first amendment rights of teachers in public colleges and universities. Their words receive protection only to the extent that they address matters of public interest.

This approach to the rights of free expression of public college and university teachers differs markedly from the way the Supreme Court generally applies the first amendment. For the most part, the Court emphatically rejects the notion that protection of a person's words under the first amendment depends upon a judicial determination of the extent to which those words address a matter of public interest.[61] Were the Court to accept such an idea it would thereby allow government officials, specifically judges, to determine what words may be said freely by personally evaluating their importance. This seems directly antithetical to the basic philosophical justification for the principle of free expression as enunciated in Part I of this Article.

In *Connick*, the Court justified this deviation from general first amendment law by noting that cases involving the government as employer involve a factor not present in ordinary first amendment cases — the governmental interest in maintaining efficient operation of public agencies. Hence, the court saw a need to balance this interest against the interest served by allowing public employees freedom of expression.[62]

Such a position, however, presupposes a deeply mistaken view of the proper approach for courts in applying the first amendment. It assumes

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[60] 607 F.2d 672, 674-75 (5th Cir. 1979); *cf.* Roseman v. Indiana Univ. of Penn., 520 F.2d 1364, 1368 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976) ("Roseman's communication was made in a forum not open to the general public and concerned an issue of less public interest than Pickering's . . . ."). A few pre-*Connick* cases sounded the first faint rumblings of judicial dissatisfaction with the ad hoc balancing approach. *See* Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 69 (1982); Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977).

[61] *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 520 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Pell v. Procunier, 417 U.S. 817, 828 (1974); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Police Dep't v. Mosely, 408 U.S. 92, 95 (1972).

[62] *Connick*, 103 S. Ct. at 1689-91.

that, at least in some cases, a court may legitimately resolve questions about free expression through an intuitive balancing of diverse interests. This outlook conflicts with a basic premise of any plausible theory of interpretation for the first amendment — namely, that the right to free expression is constitutionally fundamental. That is, the status of the right to free expression as constitutionally fundamental precludes the ad hoc balancing approach employed by the Court to determine First Amendment rights of public employees.

The following example helps to clarify the last point. In *Branzburg v. Hayes*,[63] the Supreme Court ruled that newspaper reporters have no first amendment right to decline to respond to a grand jury subpoena in a criminal investigation if the desired testimony concerns information obtained by a promise not to reveal its source. Shortly after announcement of the *Branzburg* decision, the House Judiciary Committee conducted hearings on proposed federal shield legislation which would give reporters the same first amendment privilege unsuccessfully urged before the Supreme Court.[64]

How did the relevant factors with respect to the issue before the Court in *Branzburg* differ from those pondered by the House Judiciary Committee? That is, can one point to a genuine distinction between the first amendment issue with which the Court dealt and the policy issue treated by Congress, both of which concerned whether newspaper reporters should receive a testamentary privilege? If such a distinction exists, where lies the difference? If there is no distinction, then should one therefore view the Supreme Court when it reviews questions under the first amendment as a nine-membered superlegislature engaged in the same kind of policy deliberations as Congress? If so, then how can such a conception of the Court be reconciled with a commitment to democratic government according to which the will of the majority should prevail?

These questions have no answers unless one assumes the existence of fundamental rights grounded in basic principles of morality pertaining to the structure of political institutions. One cannot accept as legitimate a small appointed body with authority to overturn duly enacted acts of a democratically elected legislature unless one also accepts the idea that such acts conceivably could violate fundamental rights whose scope and content simply are not subject to determination through the legislative

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[63] 408 U.S. 665 (1972).

[64] *To Assure the Free Flow of Information to the Public and Related Measures: Hearings on H.R. 717 Before the Subcomm. No. 3 of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973).

process. According to this idea, it makes no more sense to say that a society can decide collectively through legislative action about such matters than it does to say that an individual can decree — that is, make it the case simply by saying so — that a basic moral rule such as "do not cheat" or "keep your promises" has a special meaning in his or her case. Fundamental rights, conceived of in this way, to use Ronald Dworkin's apt phrase, "trump" all other considerations, even those that otherwise would be considered decisive.[65]

Judicial determination of the first amendment rights of public employees through a procedure of ad hoc balancing thus directly conflicts with a basic proposition of first amendment theory, namely that the right to free expression is constitutionally fundamental. One might object, however, that the balancing approach is required by *Pickering*, notwithstanding the theoretical deficiencies of the approach. Yet, such an objection rests upon an incorrect interpretation of the decision. Although no language in *Pickering* expressly forbids a balancing approach, no language in the opinion expressly mandates it.

Courts which follow a balancing approach in dealing with the first amendment rights of public employees consistently cite the following passage from *Pickering* as their authority for doing so:

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[66]

The above statement does not mandate ad hoc balancing. The Court indeed said that *Pickering* presented the problem of striking a balance between competing interests. But this remark, by itself, does not indicate a specific judicial procedure for arriving at such a balance. The ad hoc balancing of interests approach endorsed in *Connick* is just one possible approach. Another, more consistent with the constitutionally fundamental status of the right to free expression, would employ a theory of first amendment interpretation which provides a systematic basis for weighing the various interests at stake in particular cases involving public employees. A court using such an approach would not arrive at

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[65] Dworkin used this metaphor in developing his ideas on rights at a series of unpublished seminars on law and philosophy at Harvard University during the summer of 1978. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977).

[66] *Pickering*, 391 U.S. at 568.

the constitutional balance by making intuitive judgments about the comparative importance of different factors. Instead, the judgments would follow as logical consequences from the application of principles of interpretation grounded in a sound conception of the basic philosophy of free expression.[67] Thus, although *Pickering* balances the interests of free expression of public employees and efficient government operations, it does not mandate that courts do so through ad hoc balancing.

C. Pickering*'s Systematic Approach to Affording First Amendment Protection Against Penalties for Free Expression*

Despite the *Connick* Court's treatment of the ad hoc balancing approach as required by its decision in *Pickering*, the latter opinion admits of a quite different interpretation. Indeed, a systematic approach to first amendment analysis is implicit in *Pickering*, as the following passage suggests:

> The public interest in having free and unhindered debate on matters of public importance — the core value of the Free Speech Clause of the First Amendment — is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity . . . .
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> . . . .
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> While . . . damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.[68]

Here, the Court suggests that by dismissing Pickering his school board penalized him for expressing his beliefs. Viewed from this perspective, the opinion is consistent with prior first amendment decisions invalidating government actions which penalized free expression.[69] Pe-

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[67] For an example of such an approach, see R. LADENSON, note 16 *supra*.

[68] *Pickering*, 391 U.S. at 573-74 (citations omitted).

[69] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (suspension of students who wore black armbands to protest the Vietnam War violated the first amendment); United States v. Robel, 389 U.S. 258 (1967) (invalidating a federal law that made it a crime for any member of a "communist action organization" to engage in any kind of employment in a defense facility); Bond v. Floyd, 385 U.S. 116 (1966) (Georgia House of Representatives resolution excluding Julian Bond from membership because he spoke out against the Vietnam War violated the first amendment); Dombrowski v. Pfister, 380 U.S. 479 (1965) (enjoining criminal prosecutions undertaken to harass a civil rights group); Speiser v. Randall, 357 U.S. 513 (1958) (invalidating a

nalization in the relevant sense occurs when a person has imposed upon him or her a burden not normally placed on relevantly similar individuals. It also occurs when a person is denied a benefit ordinarily granted to relevantly similar individuals.

Deciding whether someone was penalized for expressing certain beliefs presents courts with two principal problems. First, they may not blindly accept government denials that the action was meant to penalize free expression. Instead, courts must determine the genuine motivating factors.[70] Second, courts must specify in each case the class of relevantly similar individuals to compare the treatment accorded to them and that accorded the person complaining of improper penalization of expression.[71]

The Supreme Court did not address this second issue explicitly in *Pickering*. Nonetheless, the Court distinguished the circumstances of Pickering's case from other circumstances which might have necessitated a different result. The court noted that Pickering's position as a teacher neither placed a strict duty of confidentiality upon him nor involved "personal and intimate relations" with his superiors which would be damaged by his public criticism.[72] Furthermore, the Court observed that Pickering's words probably did not lower the morale of his co-workers or upset the normal functions of his school. Finally, by speaking out as he did, Pickering did not place his competence as a teacher in question.[73]

From this list of specific factors, several criteria may be developed to determine when public employees have been penalized for expressing their beliefs. The first two factors, a need for confidentiality and/or personal and intimate relations with one's superiors, suggest a more general concern about whether an employee's acts of expression conflict with the satisfactory performance of his or her job related duties. These two factors thus suggest the first criterion of relevant similarity:

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provision of the California Constitution which denied tax exemptions to anyone supporting violent overthrow of the government); Grosjean v. American Press Co., 297 U.S. 233 (1936) (striking down a Louisiana state tax on newspapers with a circulation of over 20,000 on the ground that it was intended to penalize opponents of Huey Long).

[70] *See* notes 99-138 and accompanying text *infra*.

[71] To illustrate, suppose Smith says, "I should have been promoted because Jones and Brown were." The administration counters, "No, you should not have been promoted because Schwartz and O'Brien weren't." Who constitutes the class of relevantly similar individuals: Jones and Brown or Schwartz and O'Brien?

[72] *Pickering*, 391 U.S. at 570.

[73] *Id.* at 570, 573.

whether the employee was penalized because his or her acts of expression may make continued effective job performance impossible. The third factor in *Pickering*, the disruptive effect of a teacher's acts of expression upon the morale of other teachers or upon the normal operations of the school, suggests a broader concern with the impact of an employee's acts of expression upon the ability of a governmental agency to conduct its principal activities. This, in turn, implies a second criterion of relevant similarity: whether the employee satisfied a reasonable standard of nondisruptive behavior. Finally, by noting that Pickering's words did not cast doubt upon his competence as a teacher, the Court implicitly suggested a third criterion: whether the employee met a requisite standard of competence and/or ability.[74]

In sum, one may regard the following general principles for dealing with cases involving free expression of public employees as implicit in *Pickering:*

I. Public employees may not be penalized for expressing their beliefs. That is, an employee's expression of certain beliefs may neither be a basis for imposing burdens not placed upon relevantly similar co-workers, nor may it be a basis for denying benefits normally granted to relevantly similar co-workers.

II. The following factors define the class of relevantly similar co-workers for applying the above principle:

(a) Satisfactory performance of job related duties;

(b) Satisfaction of a reasonable standard of nondisruptiveness;

(c) Competence and/or ability.

To apply these principles to cases involving dismissal or discipline of teachers in public institutions of higher learning would require courts to ask two principal questions. First, was the teacher in question penalized? That is, was he or she treated differently from other relevantly similar teachers, when the criteria of relevant similarity consist of a) standards of performance with respect to job related duties; b) disruptiveness to the institution; and c) level of competence. Second, if a court decided that the teacher was penalized, then was he or she penalized for expressing certain beliefs? The court would then have to assess the

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[74] Although the Court used the word "competence," rather than "ability," it seems reasonable to suppose that its remarks reflect concern with the latter, broader idea. Some burdens, such as dismissal, may be imposed on grounds of incompetence. Others, however, such as failure to promote, are usually predicated on a judgment that the faculty member failed to meet a substantially stricter standard than mere competence. Presumably, the Court would agree that where such higher standards are appropriate, one may not think of a faculty member as having been penalized for his or her words, if those words indicated that he failed to meet the standards.

motivation of the school authorities.

The above approach may be broadened to provide even greater protection for academic freedom. Penalties for free expression contravene the first amendment precisely because they constitute one of the primary modes of governmental repression to achieve thought control.[75] Other modes of repression exist as well; for example, censorship, prior restraints, and governmental attempts to coerce the expression of belief.[76] One may thus regard the principle which forbids public colleges and universities from penalizing faculty for the expression of a belief as a special case of the following more general principle: public colleges and universities may not restrict the expression of faculty in any way which the first amendment would proscribe as impermissible when imposed upon citizens by a governmental body.[77] Under this broader principle the five paradigm violations of academic freedom described at the outset of Part I of this Article clearly contravene the first amendment.

The above principle would safeguard academic freedom by holding public colleges and universities to the same first amendment standards as any other governmental body. Under this approach, the question of whether a teacher's words concerned matters of public interest becomes irrelevant. Criticism of school administrators or colleagues would receive no less protection than a faculty member's expressions of opinion about politics or social issues. Similarly, denying tenure to faculty members simply because they belong to rival camps in some academic controversy is no more permissible than a denial of tenure motivated by political disagreement.

Conceiving of the right to free expression of public college and university teachers in this way may require courts to address certain issues which they traditionally have been reluctant to consider. For example, they occasionally may face the problem of whether a failure to award tenure stems from a good faith negative evaluation or a perverse refusal to acknowledge as legitimate any work of people who belong to a rival school of thought.[78] The problems posed by such issues, though diffi-

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[75] *See* text accompanying notes 1-5 *supra*.

[76] For a theory of first amendment interpretation which analyzes the significance of these kinds of governmental actions from the standpoint of the basic philosophical defense of free expression, see R. LADENSON, note 16 *supra*, at 39-75.

[77] To preserve consistency with *Pickering*, we retain the exception for statements uttered with knowing or reckless disregard for the truth.

[78] For example, in 1981, Colin McCabe claimed he was rejected for a tenured position at Cambridge University (England) because he favored the structuralist approach to literary criticism. *See* Walker, *Structuralism's Debate Moves to English Dept. at Oxford*, CHRONICLE OF HIGHER EDUC., December 15, 1982, at 26.

cult, are not intractable. More importantly, courts may not avoid these issues consistent with a belief in the right to free expression of college and university teachers as constitutionally fundamental. That is, courts may not avoid these issues on the ground that they do not concern matters of general public interest. The primary philosophical defense of the right to free expression provides no basis for according different levels of legal protection to speech on the basis of subject matter.

The above principle contrasts sharply with the approach mandated by *Connick* to determine the first amendment rights of teachers in public colleges and universities. The principle eschews ad hoc balancing, and focuses instead upon whether school authorities have engaged in actions which would be impermissible under the first amendment if undertaken by any other governmental bodies. That is, it directs courts to address such issues as whether the school authorities penalized faculty members for expressing their beliefs, or whether the school authorities imposed censorship, prior restraints, and so forth. Furthermore, under this principle, in cases presenting the issue of whether a faculty member was penalized for expressing his or her beliefs, courts would never ask whether those beliefs concerned a matter of general public interest. Such a question would be no more pertinent in this kind of case than in any other first amendment case.

Following our proposed principle for protecting the free expression of public college and university faculty, courts would determine the first amendment rights of such teachers in a manner consistent with the general approach of the Supreme Court in all other first amendment cases. Courts would resolve free expression issues for teachers in public institutions of higher learning consistent with a conception of the right to free expression as constitutionally fundamental.

IV. THE IMPLIED CONTRACTUAL RIGHT OF ACADEMIC FREEDOM

Under the above proposed principle, the academic freedom of teachers in public colleges and universities would receive substantial first amendment protection. Serious difficulties, however, arise in extending the scope of this protection to private colleges. Some commentators propose that the concept of state action provides the basis for such an extension.[79] Judicial reception of these proposals, however, has been chilly.[80] Moreover, the reluctance of courts to apply the first amendment to

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[79] *See Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1056-64 (1968).

[80] *See, e.g.*, Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982); Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

private schools has a sound theoretical basis. As noted in Part I of this Article, granting government the authority to regulate expression necessarily involves conceding it the authority to control thought. In contrast, no private college or university has at its disposal the repressive devices available to the government. Accordingly, a principal consideration underlying the citizen's right to freedom from governmental restrictions upon expression does not apply to abridgment of academic freedom by private schools.

Although the first amendment may not protect private college and university teachers, there may exist other legal bases for protecting them from violations of their academic freedom. We propose that courts should recognize a commitment to avoid violations of academic freedom as an implied term in the employment contract of any teacher in a private institution of higher learning. Furthermore, private school teachers should receive, as a matter of contract right, precisely the same measure of protection as that accorded public college and university faculty under our proposed constitutional standard. The argument for this is simple and straightforward. Both public and private colleges and universities carry on the task of expanding the scope of knowledge. Furthermore, given customary social expectations, one may regard this task as their primary purpose. Abridgments of academic freedom seriously hamper the search for knowledge. Accordingly, it seems reasonable to assume that unless explicitly told otherwise, a college or university teacher may assume that he or she enjoys the contractual right of academic freedom.

Implementing this proposal will require that courts be prepared to assess the motive of the university in acting to dismiss, not renew, or deny tenure or promotion to a dissenting faculty member. Assuming that the faculty member's dissent is protected, the court will have to determine whether that dissent was the cause of the negative action. Two difficult factual situations arise: first, when the evidence indicates that the university relied on both the professor's protected conduct and on legitimate factors in reaching its decision (mixed motive cases); and second, when the university offers evidence of legitimate reasons for its decision while the faculty member contends that the profferred reasons were pretextual and that the real reason was his protected activity (pretext cases).

A. Mixed Motive Cases

In *Mt. Healthy School District v. Doyle*,[81] the Supreme Court addressed the standard of causation to be applied in mixed motive cases. Doyle, an untenured teacher, was not rehired following his having advised a local radio station of a school board proposal for a faculty dress code, and following his use of obscene gestures after two students failed to obey his commands. The notice of nonrenewal cited both the protected communication to the radio station and the unprotected obscene gestures. The lower courts found that Doyle's protected activity played a substantial part in the decision not to renew his contract. The Supreme Court vacated the lower court decisions, holding that in such mixed motive cases the burden is initially on the plaintiff to prove that the protected activity was a substantial factor in the decision. Upon such proof, the burden shifts to the defendant to prove that it would have reached the same decision in the absence of the protected activity.[82]

The Court thus borrowed two standards of cause-in-fact from tort law: the plaintiff must prove "substantial factor" causation while the defendant may prove, as an affirmative defense, the absence of "but for" causation.[83] Although this standard of causation has been adopted in other types of employment cases,[84] it has been sharply criticized by commentators.[85] Criticism is not surprising because the Court's analysis

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[81] 429 U.S. 274 (1977).

[82] *Id.* at 286. The *Mt. Healthy* standard of causation was reiterated in Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979).

[83] *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: A GUIDE TO § 1983, at 86-87 (1979). The Court did not use the term "but for" in *Mt. Healthy*; however, it later characterized *Mt. Healthy* as requiring a "but for" standard. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979). The *Mt. Healthy* Court viewed the availability of the affirmative defense as necessary to avoid overcompensating the plaintiff:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Mt. Healthy, 429 U.S. at 286.

[84] *See, e.g.*, Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

[85] *See, e.g.*, Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 450 n.13 (1979); Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 384-93 (1979).

relied primarily upon compensation principles involved in tort law without considering the constitutional principles underlying the first amendment.[86] An analysis of the constitutional principles involved in the mixed motive issue, however, reveals that *Mt. Healthy* reached a correct result.

The determination of whether a dissenting faculty member's rights were violated is in essence a determination of whether that faculty member was penalized for his expression. This necessarily requires a determination of the class of relevantly similar individuals with which to compare the treatment accorded the dissenting faculty member. In *Mt. Healthy* that class consisted of individuals with qualifications similar to Doyle's who engaged in similar transgressions to his use of obscene gestures. If such individuals would not have been renewed, Doyle cannot be said to have been penalized for his constitutionally protected expression and is therefore not entitled to relief.

The purpose behind constitutional remedies is not only to compensate but also to deter future unconstitutional acts. Thus, in criminal cases, evidence which is illegally obtained is excluded in order to deter future police misconduct, even though it may result in freeing a guilty individual.[87] There is no similar need to afford relief to employees whose discharge would have occurred regardless of their protected expression. Because the employee was not penalized for his expression, there is no constitutional violation.

It may be argued, however, that such an approach will encourage defendants to proffer alternate excuses in cases in which the plaintiff's rights have been violated in hopes of defeating the plaintiff's cause of action. The risk that a truly injured plaintiff will be denied recovery is thereby arguably enhanced.[88] This argument ignores that the burden of

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[86] *See generally* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

[87] Mapp v. Ohio, 367 U.S. 643 (1961).

[88] This appears to be Van Alstyne's position:

> There is a special problem that arises in cases where plaintiff has succeeded in establishing that constitutionally impermissible considerations were taken into account in the determination of his ineligibility (or termination), and where the basic remedy is to require that the matter be reconsidered free of these impermissible considerations. The problem runs into two kinds of an administrative "Catch 22." First, in the course of the judicial proceeding during which plaintiff is able to show that such impermissible considerations were taken into account, the defendant administrator may attempt to "confess and avoid," *i.e.*, admit that this was so, but avoid the usual legal consequence by testifying that even without consideration of the improper material, the decision would have been the same.

proving the absence of but for causation rests on the defendant. The defendant must prove that the plaintiff was treated no differently than relevantly similar employees. Once the plaintiff establishes that the defendant considered the plaintiff's expression as a substantial factor in its decision, the defendant must prove that the plaintiff was not penalized for his expression. If *Mt. Healthy* is interpreted in this manner and if courts critically evaluate the evidence offered by the defendant, *Mt. Healthy* should deter future unconstitutional conduct.[89]

Two recent cases illustrate the inappropriate and appropriate application of *Mt. Healthy*. In *Ollman v. Toll*,[90] the Department of Government and Politics at the University of Maryland recommended that the plaintiff, a Marxist, be hired to chair the Department. The provost agreed with the recommendation, as did the chancellor.[91] The next step in the appointment process was for the chancellor to recommend the plaintiff to the vice president for academic affairs and the president for appointment. While the chancellor was compiling the proper files for his recommendation, the fact that a Marxist was a leading candidate to chair the department was highly publicized and criticized. When the vice president eventually received the recommendation, he made a detailed inquiry and recommended that the president not appoint the plaintiff. The president was within one month of his announced retirement. Concerned that he would become involved in lengthy litigation if he followed the vice president's recommendation, the president took no action. When the president's successor arrived on campus, he undertook a thorough review of the issue. As was his practice at his prior institution, the new president sought the advice of many scholars outside the university. Based in large part on the negative comments of his outside reviewers, the successor decided not to appoint the plaintiff.

The plaintiff offered evidence that appointments of department chairpersons were usually approved routinely and speedily by the president when recommended by the provost and chancellor. The court gave this evidence little weight because the highly publicized and controversial nature of the plaintiff's appointment rendered it unique.[92] Instead, the court found that the new president "did not base his decision

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Van Alstyne, note 85 *supra*, at 450 n.13.

[89] Van Alstyne would appear to agree, as he suggests that the decision need not be reconsidered if the use of improper material is harmless, although he demands proof of the harmlessness beyond a reasonable doubt. *Id.*

[90] 518 F. Supp. 1196 (D. Md. 1981).

[91] The chancellor initially favored another candidate but was persuaded by the provost to recommend the plaintiff. *Id.* at 1200.

[92] *Id.* at 1216.

on plaintiff's Marxist beliefs. Rather, he acted as he did because it was his considered judgment that plaintiff did not possess the qualifications" for the position.[93]

The court's analysis clearly is incorrect. Proper constitutional analysis requires that the plaintiff be compared with relevantly similar candidates for department chairpersons; that is, individuals who had been recommended by their departments, the provost and the chancellor. If the plaintiff's evidence is credited, it would establish that the president routinely approved such individuals, while the plaintiff was subjected to intense scrutiny. The reason for such scrutiny was the highly publicized, controversial nature of the plaintiff's appointment. The controversy was due to the plaintiff's Marxist views. Thus, the plaintiff was not treated in the same manner as other relevantly similar individuals. He was penalized for his Marxist views.

The university's evidence that the new president relied on negative appraisals of the plaintiff's qualifications rather than the plaintiff's views in rejecting the appointment should not change the result. Had the plaintiff been treated in the same manner as other relevantly similar individuals, the new president would not have had the opportunity to pass on the plaintiff's appointment. Thus, although the university was able to prove the existence of a legitimate alternative reason for the plaintiff's rejection, it was unable to prove that the plaintiff was not penalized for his political beliefs.[94]

The court in *Allaire v. Rogers*[95] recognized this crucial point. The plaintiff had been involved in lobbying the Texas legislature for additional funding for faculty salary increases at the University of Texas at Austin. Certain legislators criticized his lobbying efforts to the university president. The president was responsible for determining faculty pay raises. Her determinations were based on department recommendations. Those recommendations were based on the assumption that each department's budget for faculty salaries would increase by five percent.

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[93] *Id.* at 1215.

[94] One commentator has suggested that *Mt. Healthy* approved the use of alternative reasons in the defendant's affirmative defense. Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 388-90 (1979). Closer examination of the opinion, however, reveals this not to be the case. The Court's express concern was with the employee rejected on his record whose protected conduct merely served to reinforce the rejection. *Mt. Healthy*, 429 U.S. at 286. In other words, the Court's concern was that the plaintiff's treatment be compared to that given to relevantly similar individuals.

[95] 658 F.2d 1055 (5th Cir. 1981), *cert. denied sub nom.* Rogers v. White, 456 U.S. 928 (1982).

In actuality, a 6.8% increase became available. The president decided to distribute the additional 1.8% in the form of $400 merit raises to two-thirds of the faculty. Excluded from the distribution were new employees and faculty with salaries above $35,000.

The plaintiff's department had recommended that the plaintiff receive a $1900 salary increase. The president initially decided to give him a $2300 raise, the $1900 recommended by the department and the $400 merit increase given to most faculty members. She then learned that the university regents might call upon her to justify raises exceeding $2000. She considered that the plaintiff's raise was the one most likely to be questioned because his name was well known as a result of his lobbying. She then re-evaluated the plaintiff's position and decided it might be difficult to justify his raise. She therefore reduced it to $1900.

The evidence conflicted over whether the president's difficulties in justifying the plaintiff's raise were based on the plaintiff's lobbying activity or on controversy surrounding his recent promotion. The court found this issue to be irrelevant because the plaintiff would not have been re-evaluated had he not lobbied the legislature. The plaintiff was thus penalized for his constitutionally protected activity because he was treated differently from relevantly similar individuals; that is, others whom the president had initially decided to award salary increases in excess of $2000.[96] *Allaire* thus represents an appropriate application of *Mt. Healthy*.[97]

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[96] *Id.* at 1064.

[97] It has been argued that even when *Mt. Healthy* is applied in this manner it is still too pro-defendant. Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 390-91 (1979). This argument may find support from the development of the substantial factor test for cause-in-fact in tort law, which resulted from the unworkability of the but for test in cases involving multiple causation. S. NAHMOD, note 84 *supra*, at 86-87. However, this argument is misconceived. If three drivers simultaneously negligently strike a pedestrian, the use of a "but for" test will shield each driver from liability because even if that driver had not been negligent the pedestrian would have been injured by the other two. Such a result is clearly unjust for it leaves the innocent injured pedestrian without a remedy while shielding the admittedly culpable drivers. The injustice is avoided by use of a substantial factor standard.

Comparable injustice is simply not present in a mixed motive constitutional case. The plaintiff is "innocent and injured" only if he has been treated differently from relevantly similar individuals. It is precisely this issue that the but for standard is designed to resolve.

B. Pretext Cases

Although *Mt. Healthy* was a mixed motive case, it has sometimes been referred to as providing a method for organizing the proof in a pretext case.[98] Unfortunately, it offers no such guidance. In a pretext case the university denies that the faculty member's dissent entered into the employment decision and proffers what it contends to be the real basis for the decision. If the university's proof is rejected, the necessary conclusion is that but for the professor's protected expression, the employment decision would have been favorable. If the proof is accepted, the necessary conclusion is that the professor's protected expression was not even a substantial factor in the negative decision. *Mt. Healthy* offers no guidance as to how to decide whether to accept the university's proffer.[99]

Many courts have approached this issue by calling for almost complete deference to the university's judgment.[100] The Second Circuit stated this position in *Faro v. New York University*:[101] "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."[102]

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[98] *See, e.g.*, Croushorn v. Board of Trustees, 518 F. Supp. 9 (M.D. Tenn. 1980); *cf.* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); Special Counsel v. State, 82 Fed. Merit. Sys. Rptr. (MSPB) 7001 (1982).

[99] *See* Lindsey v. Board of Regents, 607 F.2d 672, 676 (5th Cir. 1979).

[100] *See, e.g.*, Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982); Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 69 (1982); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979); Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977); Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981); Cohen v. Community College, 484 F. Supp. 411 (E.D. Pa. 1980); Cherry v. Burnett, 444 F. Supp. 324 (D. Md. 1977); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977); Cussler v. University of Md., 430 F. Supp. 602 (D. Md. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264 (M.D. Pa. 1976); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976); Labat v. Board of Higher Educ., 401 F. Supp. 753 (S.D.N.Y. 1975); Van de Vate v. Boling, 379 F. Supp. 925 (E.D. Tenn. 1974). For an extreme example of deference to the university's decision, see Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969) (granting defendant's motion for summary judgment); *see also* Klein v. Board of Higher Educ., 434 F. Supp. 1113 (S.D.N.Y. 1977) and Levitt v. Board of Trustees, 376 F. Supp. 945 (D. Neb. 1974) (when financial exigency requires release of faculty members, it is particularly within the university's discretion to decide which instructors to dismiss or retain).

[101] 502 F.2d 1229 (2d Cir. 1974).

[102] *Id.* at 1231-32.

Faro has had a roller coaster history in the Second Circuit. In *Powell v. Syracuse University*,[103] the court turned away from the anti-interventionist rhetoric of *Faro*, noting that it had led to colleges and universities being "virtually immune to charges of employment bias, at least when that bias is not expressed overtly."[104] However, the court appeared to return to the *Faro* policy two years later in *Lieberman v. Gant*.[105]

A few courts have joined the Second Circuit in tempering their rhetoric of extreme deference to university decisions.[106] All such cases have arisen under title VII of the Civil Rights Act of 1964,[107] and have relied on the 1972 extension of title VII to cover educational institutions for the proposition that Congress intended that the courts not merely accept university explanations at face value.[108] Courts, however, should not limit their willingness to scrutinize university decisions to title VII cases. The protection of fundamental constitutional rights is at least as worthy of judicial concern as the protection of statutory civil rights. Moreover, the faculty member's right to academic freedom derives from his employment contract. Implicit in the contractual agreement to respect such rights is the realization that alleged breaches of the agreement will be subject to judicial scrutiny.[109] If a court is to scrutinize a university's employment decisions when restrictions are imposed on the university's discretion by statute, it should certainly be prepared to scrutinize those decisions when the restrictions were voluntarily agreed to by the university.

Regardless of the rhetoric used, in practice courts generally have accepted the university's explanation for the employment decision.[110] The

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[103] 580 F.2d 1150, 1153 (2d Cir.) (affirming judgment for university, but explicitly not relying "on any [*Faro*-type] policy of self-abnegation where colleges are concerned"), *cert. denied*, 439 U.S. 984 (1978).

[104] *Id.* at 1153.

[105] 630 F.2d 60 (2d Cir. 1980).

[106] *See, e.g.*, Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979); Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 439 U.S. 24 (1978).

[107] 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

[108] *See, e.g.*, Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); Davis v. Weidner, 596 F.2d 726, 731-32 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 439 U.S. 24 (1978).

[109] *Cf.* OFCCP v. University of Cal., Berkeley, 23 Fair Empl. Prac. Cas. (BNA) 1117, 1126 (1980) (Sec'y of Labor).

[110] *See* Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473, 482-83 (1980).

Fourth Circuit Court of Appeals quite candidly stated the reality of the situation:

> Someone from outside the university would have an almost impossible task, given the many and varied, inevitably subjective factors, going into a decision to offer tenure, in establishing that he would have been tendered tenure employment but for something he said or wrote which fell within the protection of the First Amendment. So far as the probationary employee *in his final year* is concerned, he is in a comparable status as to what he must prove . . . . His advantage lies simply in the fact that improbability will not seem quite so rampant with respect to any claim by him of First Amendment violation because of his prior intimate association with the institution and its faculty.[111]

Courts have considered themselves as lacking the appropriate expertise to assess academic qualifications.[112] They defer to the peer review process, holding that the initial determination of an academic's qualifications must rest with his or her peers.[113] They further find it proper to defer to the institution's judgments because the procedural safeguards of the peer review process insure against improper motivation in the employment decision.[114]

Such arguments do not justify the almost total deference that the courts have shown. The existence of peer review and procedural safeguards does not guarantee that the decision will be free from bias. This is particularly true with decisions involving a dissident faculty member whose peers do not share his views.[115] However, the conflict between the recommendation of the professor's peers and the ultimate employment decision, or the existence of procedural irregularities may, in appropriate cases, provide strong evidence of improper motivation in the employment decision. Nevertheless, courts have generally accepted the university's explanation despite procedural irregularities[116] or the rejec-

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[111] Mayberry v. Dees, 663 F.2d 503, 519 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 69 (1982) (emphasis in original) (citations and footnotes omitted).

[112] *See, e.g.*, Smith v. University of N.C., 632 F.2d 316, 345-46 (4th Cir. 1980); Clark v. Whiting, 607 F.2d 634, 639 (4th Cir. 1979); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353-55 (W.D. Pa. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976); Labat v. Board of Higher Educ., 401 F. Supp. 753, 757 (S.D.N.Y. 1975); Lewis v. Chicago State College, 299 F. Supp. 1357, 1359-60 (N.D. Ill. 1969).

[113] *See, e.g.*, cases cited in note 100 *supra*.

[114] *See, e.g.*, Davis v. Weidner, 596 F.2d 726, 732 (7th Cir. 1979); Laborde v. Regents of Univ. of Cal., 495 F. Supp. 1067, 1073 (C.D. Cal. 1980), *aff'd*, 686 F.2d 715 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 820 (1983).

[115] *See, e.g.*, Koch v. Board of Trustees, 39 Ill. App. 2d 51, 187 N.E.2d 340 (1963), *cert. denied*, 375 U.S. 989 (1964), *discussed in* text accompanying notes 29-30 *supra*.

[116] *See, e.g.*, Timper v. Board of Regents, 512 F. Supp. 384 (W.D. Wis. 1981); Cap

tion of a favorable recommendation by the professor's peers.[117] Indeed, in most cases in which courts have found the university's decision to be improperly motivated, the university virtually admitted its motivation,[118] or prior to or following the decision undertook action tantamount to admitting that the professor was qualified.[119]

Two federal appellate court decisions illustrate the inadequacy of this approach. In *Shaw v. Board of Trustees*,[120] the plaintiffs, one tenured and one probationary faculty member, were discharged shortly after they protested a college plan to eliminate the tenure system for all nontenured faculty. The court accepted the college's explanation that the discharges were due to the plaintiffs' absence from a workshop and their refusal to wear a cap and gown at commencement, despite uncon-

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v. Lehigh Univ., 450 F. Supp. 460 (E.D. Pa. 1978); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977); Van de Vate v. Boling, 379 F. Supp. 925 (E.D. Tenn. 1974).

[117] *See, e.g.*, Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980); Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981); Lieberman v. Gant, 474 F. Supp. 848 (D. Conn. 1979), *aff'd*, 630 F.2d 60 (2d Cir. 1980); Cap v. Lehigh Univ., 450 F. Supp. 460 (E.D. Pa. 1978); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264 (M.D. Pa. 1976); Franklin v. Atkins, 409 F. Supp. 439 (D. Colo. 1976), *aff'd*, 562 F.2d 1188 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978); Labat v. Board of Higher Educ., 401 F. Supp. 753 (S.D.N.Y. 1975); Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969); *see also* Berry v. Battey, 666 F.2d 1183 (8th Cir. 1981) (affirming district court's refusal to admit report of academic freedom and tenure committee).

[118] *See, e.g.*, Allaire v. Rogers, 658 F.2d 1055 (5th Cir. 1981), *cert. denied sub nom.* Rogers v. White, 456 U.S. 928 (1982); Hickingbottom v. Easley, 494 F. Supp. 980 (E.D. Ark. 1980); Cohen v. Community College, 484 F. Supp. 411 (E.D. Pa. 1980); Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd mem.*, 614 F.2d 1295 (5th Cir.), *cert. denied sub nom.* Dutt v. Alabama State Univ., 449 U.S. 862 (1980); Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977); EEOC v. Tufts Inst., 421 F. Supp. 152 (D. Mass. 1975).

[119] *See, e.g.*, Allaire v. Rogers, 658 F.2d 1055 (5th Cir. 1981), *cert. denied sub nom.* Rogers v. White, 456 U.S. 928 (1982); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980); Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *cf.* Trotman v. Board of Trustees, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981) (issue not primarily employment but general pattern of prior restraint on free expression). One might cynically observe an additional area in which courts have not been reluctant to overturn university employment decisions: discrimination claims by white faculty at predominantly black institutions. *See, e.g.*, Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980); Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D. La. 1980); Cohen v. Community College, 484 F. Supp. 411 (E.D. Pa. 1980); Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd mem.*, 614 F.2d 1295 (5th Cir.), *cert. denied sub nom.* Dutt v. Alabama State Univ., 449 U.S. 862 (1980).

[120] 549 F.2d 929 (4th Cir. 1976).

tradicted evidence that except for both actions, their records had been exemplary and that other faculty members who violated the same rules on other occasions received little or no punishment.[121]

In *Lieberman v. Gant*,[122] the plaintiff alleged that she was denied tenure because of her sex. The evidence indicated that the tenure committee of her department voted 5-0 in favor of tenure,[123] that the department's joint tenure and executive committee initially favored tenure 5-4,[124] that the dean's advisory council split 3-3 on the issue,[125] and that the central administration recommended against tenure, a recommendation accepted by the board of trustees.[126] The evidence also showed that the plaintiff had, during the preceding academic year, protested to the department chairman that she believed many of her colleagues were biased against her and that such bias infected their opinions of the quality of her work.[127] The court considered plaintiff's case for tenure to be close.[128] Nevertheless, it refused to admit evidence offered by the plaintiff to show that relevantly similar male faculty had been awarded tenure, and instead accepted the university's position that the plaintiff was denied tenure because of negative evaluations of her teaching and scholarship. It may well be that the plaintiff's evidence would not have shown that she was treated differently from relevantly similar males.[129] That possibility, however, should not excuse the court's decision to accept blindly the university's explanation rather than confront the factual issue.[130]

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[121] *Id.* at 935-36 (Butzner, J., dissenting).

[122] 474 F. Supp. 848 (D. Conn. 1979), *aff'd*, 630 F.2d 60 (2d Cir. 1980).

[123] *Id.* at 856. The tenure committee, and all subsequent reviewing bodies, however, opposed promotion from assistant professor to associate professor.

[124] *Id.*

[125] *Id.* at 857.

[126] *Id.*

[127] *Id.* at 855. Plaintiff's complaints may not have been without substance. Numerous studies have shown that the sex of an employee influences the view of the employer toward her. For example, the same article has been more highly rated when attributed to a male author than a female author. M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 9 (1982).

[128] *Lieberman*, 474 F. Supp. at 856.

[129] This appears to be the view of the Second Circuit in affirming the lower court. *See* Lieberman v. Gant, 630 F.2d 60, 68 (2d Cir. 1980). However, the court held that the evidence was inadmissible, rather than holding the failure to admit the evidence harmless error.

[130] Some courts have also shown a reluctance to confront the effects of institutional discrimination. For example, in Hernandez-Cruz v. Fordham Univ., 521 F. Supp. 1059 (S.D.N.Y. 1981), the plaintiff was denied tenure because he failed to complete his Ph.D. program on time. A factor contributing to the plaintiff's inability to complete his

The procedural safeguards of the peer review system and the comparatively greater expertise of the university over the judge thus do not justify judicial acceptance at face value of university explanations for their employment decisions. A more substantial argument offered to support the current judicial approach is grounded in the university's academic freedom rights.[131] These rights include the university's right to select its faculty. The *Lieberman* court forcefully stated the argument:

> [T]o infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative " 'to determine for itself on academic grounds who may teach' " is an important part of our long tradition of academic freedom . . . . [T]his important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments.[132]

These concerns have led to suggestions that an academic freedom privilege be recognized to protect the secrecy of votes in the peer review process.[133] In *Gray v. Board of Higher Education*,[134] the Second Circuit

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Ph.D. was the conflicting demands on his time, largely due to the scarcity of Puerto Rican academics. The plaintiff had served as acting chair of the Puerto Rican Studies Department during a time when the university was unable to fill the position, taught a Puerto Rican studies course at another university because no other instructor was available, and rendered substantial service to the Puerto Rican community. Although there were other factors contributing to the plaintiff's failure to obtain his Ph.D., including his having to twice change dissertation topics for reasons beyond his control, the court failed to distinguish between neutral factors and those which were directly related to the plaintiff's status as one of a very small number of Puerto Rican professors. A contrary result on somewhat analogous facts was reached in Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978); *see also* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1343 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982) (view that women's studies is not a substantial topic for scholarly work is evidence of sex discrimination).

[131] *See* Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979).

[132] *Lieberman*, 630 F.2d at 67 (citations omitted).

[133] *See, e.g.*, Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538 (1981). It should be noted that the academic freedom claim belongs to the university and not to the individual members of the peer review committee. Such faculty are acting in their managerial capacity, see NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), and thus have no claim to secrecy independent of the university's. Such an individual claim was properly rejected in *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982). For a detailed analysis of *Dinnan* and *Gray* which argues that academic freedom principles should not protect the secrecy of tenure committee deliberations, see Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits of Academic Freedom*, 16 U.C. DAVIS L. REV. 1023 (1983) (*infra* this volume).

[134] 692 F.2d 901 (2d Cir. 1982).

recognized such a privilege. The court adopted a position advocated by the AAUP and held the votes secret provided that a detailed statement of reasons for the decision is given to the faculty member on request. The court viewed such a rule as properly balancing the academic freedom of the university against the interests of the faculty member in having a fair opportunity to prove his case.

The *Gray* court's view of the balance it struck is misconceived. Even if a plaintiff is provided with a statement of reasons for an employment decision, the identities of those who supported the decision may well be crucial to the plaintiff's ability to establish that the purported reason is pretextual. This is particularly true in group decisionmaking, such as the peer review process, in which the motives of the individuals making the decision may not be the same as the reasons given for the decision.[135] In certain situations, a particularly influential faculty member motivated by illegal prejudice may set forth apparently legitimate arguments against the faculty member's case which, though not sincerely made, are accepted by his unsuspecting colleagues.[136] Such cases will almost certainly go undetected if the university is able to hide the votes behind the veil of a detailed statement of reasons.

There is a more fundamental flaw in the argument that concern for the university's academic freedom justifies the current lack of judicial scrutiny of academic employment decisions. The argument misconceives the relative roles of university and faculty member. The need to protect the university from government interference in its right to select its faculty stems from the relationship between the university and the government. Were the government able to dictate to the university how to select its faculty, it would be able to practice thought control. Thus, the university stands in the same position as the individual citizen regarding government attempts to dictate its hiring practices.

However, the university as employer of faculty is comparable to the government as regulator of citizens. If the university is allowed to base employment decisions on a faculty member's protected expression, it too is able to practice thought control, at least within its own institution. A court called upon to assess allegations that a university is attempting to control the expression of thought by its faculty should consider the case

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[135] The AAUP itself recognized this problem in *University of California at Los Angeles*, 57 AM. A.U. PROFESSORS BULL. 382, 393 (1971).

[136] *See, e.g.*, EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 164 (D. Mass. 1975).

in the same manner as it would any case involving governmental attempts to control the thoughts of its citizens. Although courts may lack academic expertise, they are the most qualified body in society for detecting unconstitutional motivations. Moreover, the fear that courts will end up as super review boards over universities is unjustified. The court receives evidence that the university's justification was insupportable not to ascertain the correctness of the justification, but to evaluate the credibility of the justification against the claim of illegal motive.[137] To properly implement our proposal, courts must be prepared to make these judgments critically instead of simply accepting university-offered justifications at face value.

CONCLUSION

University faculty should enjoy rights to academic freedom which mirror the rights of citizens to free expression. In public institutions such rights are protected directly by the first amendment. Although the first amendment does not restrict the actions of private institutions, identical protection should be read into the academic employment contract. Therefore, faculty should not be penalized simply for expressing a particular viewpoint. Whether a teacher's words concerned matters of public interest should not be considered a relevant factor. Criticism of school administrators or colleagues requires no less protection than a faculty member's opinions on political or social issues. Although courts traditionally have been reluctant to critically evaluate university motivations in employment decision making, they must be prepared to do so to protect academic freedom.

[137] *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).