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X. Education Law

evidence.[59] Decisions at variance with the *Massiah-Brewer-Henry* line of cases are explained by the absence of governmental intent to violate the defendant's sixth amendment right to counsel.[60]

Henry v. United States reaches the correct result in affording sixth amendment right to counsel protection for a criminal defendant against whom incriminating evidence was gathered through post-indictment conversations with a government informant.[61] Without any knowledge that he was being interrogated,[62] the defendant Henry was unable to invoke his right to counsel during the government's intentional plan to elicit information from him absent counsel.[63] Although the Fourth Circuit's analysis is somewhat attenuated in reaching its result within an interrogation framework,[64] *Henry* rests soundly upon the necessary judicial protection against governmental intent to violate the defendant's sixth amendment right to counsel.[65] *Brewer* and interrogation in the post-indictment context await further Supreme Court clarification. Ultimately, the government's intent to obtain incriminating statements in the absence of counsel justifies *Henry* as a logical successor to *Brewer* and *Massiah*.

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X. EDUCATION LAW

Financial Exigency and Academic Tenure

Academic tenure is a status granted to a teacher after a probationary period of employment.[1] Tenure is designed to protect academic freedom

[59] *See* text accompanying notes 8, 13 & 21 *supra*.

[60] *See, e.g.*, United States v. Hearst, 563 F.2d 1331, 1348 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978)(where electronic monitoring was result of usual prison policy regarding highly publicized cases and those involving high security risks, defendant's statements so obtained were admissible); United States v. Garcia, 377 F.2d 321, 324 (2d Cir. 1967)(defendant's voluntary statement held admissible where agent was unaware of indictment and was seeking no incriminating information); Stowers v. United States, 351 F.2d 301, 302 (9th Cir. 1965)(where defendant was not employed by government, his voluntary testimony concerning defendant's post-indictment jailhouse statements held admissible); United States v. Accardi, 342 F.2d 697, 701 (2d Cir. 1965)(where known government agent's only purpose was to serve subpoena on another person, defendant's voluntary post-indictment statements absent counsel held admissible).

[61] *See* text accompanying notes 21-22 *supra*.

[62] *See* text accompanying note 21 *supra*.

[63] *See* text accompanying notes 46-50 *supra*.

[64] *See* text accompanying notes 51-55 *supra*.

[65] *See* text accompanying notes 56-60 *supra*.

[1] *See* Collins v. Parsons College, _ Iowa _, _, 203 N.W.2d 594, 597 (1973). *See generally* C. BYSE & L. JOUGHLIN, TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES AND THE LAW (1959) [hereinafter cited as BYSE & JOUGHLIN]; B. SHAW, ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION (1971); Van Alystyne, *Tenure: A Summary, Explanation and "Defense,"* 57 AAUP BULL. 328 (1971). *See also* Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 280 (1977) [hereinafter cited as *Tenure Rights*]. Typically, tenure is granted to a faculty member after teaching three to seven years at a particular college or university. BYSE & JOUGHLIN, *supra* at 9-10. The criteria used to confer

and to attract competent personnel by ensuring that the tenured individual will not be dismissed without cause.[2] Although tenure at state funded schools may be controlled by statute,[3] tenure at state and private institutions typically is defined in terms of a contractual relationship between the tenured professor and the academic institution.[4] Until recently, disputes over the rights of tenure have been resolved primarily by resort to the internal grievance procedures of the particular college or

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tenure include teaching skills, research, publication, and service to the college or university. *Id.* at 28-34. Academic tenure plans exist at all public and private universities and at ninety-four percent of the nation's private colleges. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: A REPORT AND RECOMMENDATIONS 1 (1973). In a study of tenure plans at eighty colleges and universities, fourteen of those institutions did not formally document the provisions of their tenure systems. BYSE & JOUGHLIN, *supra* at 77 n.10. The lack of a documented tenure plan may result from a belief that custom and tradition in academic institutions are preferable to written rules and regulations. *Id.* at 135.

[2] *See* Drans v. Providence College, _ R.I. _, _, 383 A.2d 1033, 1039 (1978); *Tenure Rights, supra* note 1, at 279-82. Tenure is designed to foster society's interest in research and learning by eliminating the threat of a teacher's discretionary dismissal. Browzin v. Catholic Univ. of Amer., 527 F.2d 843, 846 (D.C. Cir. 1975), *citing Academic Freedom and Tenure: 1940 Statement of Principles*, 60 AAUP BULL. 269 (1974) [hereinafter cited as *1940 Statement*]. The 1940 Statement of Principles on Academic Freedom and Tenure, promulgated by the American Association of Colleges, reflects widely accepted standards of conduct in the national academic community. *See* Browzin v. Catholic Univ. of Amer., 527 F.2d at 847 n.8; Furniss, *The Status of "AAUP Policy"*, 1978 EDUC. REC. 7, 19, 22 [hereinafter cited as *The Status of AAUP Policy*]; *1940 Statement, supra* at 269; Note, *Financial Exigency as Cause For Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions*, 62 IOWA L. REV. 481, 504, 509 (1976) [hereinafter cited as *Financial Exigency*]. The 1940 Statement often is incorporated by reference into the employment agreements at educational institutions. Finkin, *Toward a Law of Academic Status*, 22 BUFF. L. REV. 575, 597 n.84, 597-98 (1973); *see, e.g.*, Holliman v. Martin, 330 F. Supp. 1, 3 (W.D. Va. 1971). The 1940 Statement provides that the employment of a tenured faculty member may be terminated upon retirement, upon a showing of "cause," or upon an institution's strained financial condition that necessitates reduction of faculty size. *See* AAUP v. Bloomfield College, 129 N.J. Super. 249, 264, 322 A.2d 846, 854-55 (Ch. Div. 1974), *aff'd in part*, 136 N.J. Super. 442, 346 A.2d 615 (App. Div. 1975); *1940 Statement, supra* at 270. *See also* note 10 *infra*. The 1940 Statement provides a procedure for termination of tenure for cause and requires that termination of tenure for reason of financial exigency be "demonstrably bona fide." *1940 Statement, supra* at 270. *See also* note 44 *infra*.

[3] *See* Johnson v. Board of Regents, 377 F. Supp. 227, 231 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975). The *Johnson* court decided the claims of state university faculty members who derived tenured status directly from a state statute. *Id.*; WIS. STAT. ANN. § 37.31 (West) (repealed 1973). Most state university tenure systems, however, are established by the institution's governing board. *See* Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L. J. 417, 419 (1976) [hereinafter cited as *Dismissal of Tenured Faculty*].

[4] *See Financial Exigency, supra* note 2, at 509 n.166; *see, e.g.*, Rose v. Elmhurst College, 62 Ill. App. 3d 824, 826, 379 N.E.2d 791, 792 (1978) (private); Brady v. Board of Trustees of Neb. State College, 196 Neb. 226, _, 242 N.W.2d 616, 618 (1976); Hillis v. Meister, 82 N.M. 474, _, 483 P.2d 1314, 1315-16 (Ct. App. 1971) (state); Fazekas v. University of Houston, 565 S.W.2d 299, 304-07 (Ct. App. Tex. 1978), *appeal dismissed*, 440 U.S. 952 (1979) (state). Although most state supported colleges and universities enter into an employment contract with teachers, these contracts may be subject to unilateral modification by the state on the theory that they incorporate a statutory-based reservation of the power to change institutional rules. *See* Fazekas v. University of Houston, 565 S.W.2d at 304-07. *See also* note 31 *infra*.

university.[5] Since the early 1970's, however, there has been a significant increase in litigation on the issue of whether a tenured teacher may be dismissed due to the precarious financial condition of an institution.[6] While tenure disputes generally are resolved by reference to the specific contract or statute which created the employment relationship,[7] courts may also rely on national custom and practice to supplement an employment contract.[8] In *Krotkoff v. Goucher College*,[9] the Fourth

[5] *See Tenure Rights, supra* note 1, at 279-80.

[6] *Id.* at 279. The expansion of college and university faculties to meet the massive student enrollments of the 1960's has been reversed by a declining student population in the 1970's. *See* New York Inst. of Tech. v. State Div. of Hum. Rights, 40 N.Y.2d 316, 323, 353 N.E.2d 598, 603 (1976). Continuing inflation and the reduction in student enrollments have resulted in operating deficits that have necessitated terminating the employment of many tenured faculty members. *See* M. MIX, TENURE AND TERMINATION IN FINANCIAL EXIGENCY 1 (1978) [hereinafter cited as MIX]. *See generally* Tucker, *Financial Exigency—Rights, Responsibilities, and Recent Decisions*, 2 J.C. & UNIV. L. 103, 103 (1974) [hereinafter cited as Tucker]; Note, *Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom*, 52 DENVER L.J. 911, 913 (1975); *Dismissal of Tenured Faculty, supra* note 3, at 419. *See also* Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty*, 6 J.C. & UNIV. L. 187, 187 (1977) [hereinafter cited as *Recent Cases Involving Financial Exigency]; Financial Exigency, supra* note 2, at 482.

[7] *See, e.g.*, Scheuer v. Creighton Univ., 199 Neb. 618, _, 260 N.W.2d 595, 595 (1977); Hillis v. Meister, 82 N.M. 474, _, 483 P.2d 1314, 1315 (Ct. App. 1971); Fazekas v. University of Houston, 565 S.W.2d 299, 307 (Ct. App. Tex. 1978). Interpretation of employment contracts at state supported schools also may involve reference to the state constitution and the enabling statute which authorized the agreement. *See Tenure Rights, supra* note 1, at 291-92. *See also* note 3 *supra*.

Besides remedies for breach of contract, faculty members at state supported colleges and universities have constitutional protection under the fourteenth amendment. *Tenure Rights, supra* note 1, at 297; *see* Pickering v. Board of Educ., 391 U.S. 563, 565, 574 (1968) (school violated first amendment); Note, *Judicial Protection of Teachers' Speech: The Aftermath of Pickering*, 59 IOWA L. REV. 1256, 1257 (1974). *See generally* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841. A state university teacher's due process rights under the fourteenth amendment require that a state must provide a hearing if a dismissed teacher is deprived of a property right such as tenure. *See* Perry v. Sindermann, 408 U.S. 593, 600 (1972). *See generally* Note, *The Effect of Tenure on Public School Teachers' Substantive Constitutional and Procedural Due Process Rights*, 38 MO. L. REV. 279 (1973). The constitution, however, may regulate a private university or college if that institution engages in sufficient "state action" under the fourteenth amendment. *Tenure Rights, supra* note 1, at 297; *see, e.g.*, Buckton v. National Collegiate Athl. Ass'n., 366 F. Supp. 1152, 1156-57 (D. Mass. 1973). *See generally* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1083-86 (1960); O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155, 155 (1970); Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323, 323 (1970); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1056 (1968). Whether a nominally private institution is actually an instrumentality of the state, and thus subject to the fourteenth amendment, depends in part on the amount of state governmental aid received and the extent to which the institution acts in the public interest. Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), *cert. denied*, 426 U.S. 927 (1975); *see* Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959, 963, 970 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

[8] *See, e.g.*, Karlen v. New York Univ., 464 F. Supp. 704, 706-07 (S.D. N.Y. 1979); Rose v. Elmhurst College, 62 Ill. App. 3d at 827 n.2, 379 N.E.2d at 794 n.2; Drans v. Providence College, _ R.I. _, _, 383 A.2d 1033, 1038 (1978). In *Drans*, the court referred to custom and usage in the national academic community while deciding that a college could legally set a mandatory retirement age that would bind faculty members who were granted tenure before

Circuit recently addressed the issue of whether the employment of a tenured teacher could be terminated due to the financial exigency[10] of the employer institution.[11] The *Goucher* decision is significant because the dismissed teacher's tenure agreement did not expressly condition her employment on the financial stability of the college.[12]

Goucher, a private college for women in Towson, Maryland, experienced severe financial problems in the late 1960's.[13] Pursuant to a program of fiscal retrenchment, the Goucher Board of Trustees dismissed Krotkoff and three other tenured faculty members on the basis of projected student enrollment and necessary curriculum changes.[14] Although dismissal of another teacher, Ehrlich, who had less seniority

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the retirement provision was established. _ R.I. at _, 383 A.2d at 1038-39. In addition to referring to national custom, courts frequently consider the custom and practice of a particular college or university while deciding employment disputes. *See* Perry v. Sindermann, 408 U.S. 593, 600 (1972); Greene v. Howard Univ., 412 F.2d 1128, 1135-35 (D.C. Cir. 1969); Bruno v. Detroit Inst. of Tech., 36 Mich. App. 61, 64, 193 N.W.2d 322, 324 (1974); Hillis v. Meister, 82 N.M. 484, 483 P.2d 1314, 1316 (1971). *See generally* Bakken, *Campus Common Law*, 5 J. LAW & ED. 201 (1976). In *Sindermann*, the Supreme Court found that the express contractual provisions of a college's employment contract could be supplemented by a particular university's unwritten "common law" of customary practices. 408 U.S. at 603. In *Greene*, the court held that policy statements contained in the faculty handbook, through custom and usage, became part of a teacher's employment contract notwithstanding a disclaimer in the handbook that stated its provisions were not binding on the university. 412 F.2d at 1134-35.

[9] 585 F.2d 675 (4th Cir. 1978).

[10] "Financial exigency" has been defined as a state of financial urgency that threatens the continued existence of the college or university. *See* AAUP v. Bloomfield College, 136 N.J. Super. at 446, 346 A.2d at 617. One court has held that dismissals of tenured faculty members may be due to financial exigency on a departmental level, rather than because the university as a whole is experiencing a financial crisis. Scheuer v. Creighton Univ., 199 Neb. 618, _, 260 N.W.2d 595, 600-01 (1977). The existence of a state of financial exigency is determined by a school's continued operating deficits but is not predicated on impending bankruptcy or exhaustion of endowment funds. *See id.* at _, 260 N.W.2d at 601; *Dismissal of Tenured Faculty, supra* note 3, at 423. *See also* note 44 *infra*. Although the 1940 Statement does not define financial exigency, a recent pronouncement of the AAUP, the 1976 Recommended Institutional Regulations Concerning Termination of Faculty Appointments Because of Financial Exigency, provides that financial exigency must be demonstrably bona fide and must be "an imminent financial crisis which threatens the survival of the institution as a whole and which can not be alleviated by less drastic means." *Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons*, 62 AAUP BULL. 17, 17 (1976) [hereinafter cited as 1976 RIR]; *see Financial Exigency, supra* note 2, at 504-06. One court has rejected the 1976 Recommended Institutional Regulations as dispositive of the interpretation of a tenure contract by reasoning that this regulation was adopted after the contract was formed. 199 Neb. at _, 260 N.W.2d at 600.

[11] 585 F.2d at 678.

[12] *Id.*

[13] *Id.* at 677.

[14] *Id.* Subsequent to Goucher's decision to terminate the four tenured professors, the faculty elected a committee which reviewed the administration's proposals and ultimately persuaded the college to retain a position for which two of the four professors, Krotkoff and Ehrlich, were eligible. *Id.* at 678. The college decided to retain Ehrlich, rather than Krotkoff, because Ehrlich had more experience in the particular course to be taught and because she was qualified to teach another subject. *Id.* Krotkoff appealed this decision to the faculty grievance committee which recommended her retention but did not suggest the dismissal of Ehrlich. *Id.*

than Krotkoff, was an alternative to appellant's dismissal, the college decided that Ehrlich enjoyed more versatile skills and thus Krotkoff's employment at Goucher was terminated.[15] Following appellant's dismissal, Goucher provided her with a list of all unfilled teaching positions at the college.[16] Since the only position suitable to Krotkoff would have required the college to finance two years of training in another discipline,[17] Goucher terminated Krotkoff's appointment one year after giving notification.[18]

Krotkoff subsequently sued Goucher in federal district court for breach of her employment contract which was evidenced by the college's by-laws and a letter granting her "indeterminate tenure."[19] Krotkoff conceded that the college officials did not act in bad faith when they selected her for dismissal. Nevertheless, she argued that Goucher could not terminate a tenured position because of the school's financial troubles.[20] Since Krotkoff's employment contract for tenure did not expressly provide for dismissal due to the college's financial distress,[21] the primary issue at trial was whether Goucher could prove that a financial exigency provision should be read into the tenure agreement.[22] The trial court instructed the jury that the college had the burden of proving that the trustees reasonably believed that a financial crisis existed at Goucher, that the college used uniform standards in selecting Krotkoff for dismissal, and that the college made reasonable efforts to find alternate employment for Krotkoff at Goucher.[23] The jury found damages of $180,000 for Krotkoff, but the district judge entered a judgment notwithstanding the verdict, ruling that the evidence did not support the

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[15] *Id.*

[16] *Id.*

[17] *See id.* Krotkoff, who was a German teacher, expressed an interest in filling a vacancy in the school's economics department. *Id.*

[18] *Id.*

[19] *Id.* at 678. In 1967, Goucher sent Krotkoff a letter granting her tenure, which the college's by-laws defined to mean the right to continued service until retirement age was reached or unless cause or serious disability was proven. *Id.* In deciding disputes over tenure agreements, courts typically examine the institution's by-laws as evidence of the faculty member's employment contract. *See, e.g.*, Brady v. Board of Trustees, 196 Neb. 226, _, 242 N.W.2d 616, 618 (1976); Bellak v. Franconia College, 118 N.H. 313, _, 386 A.2d 1266, 1267 (1978).

[20] 585 F.2d at 676, 681. Krotkoff also alleged that Goucher violated 42 U.S.C. § 1983 (1976), by depriving her of her property rights to tenured employment and her due process right to a fair hearing as protected by the fourteenth amendment. Complaint, Krotkoff v. Goucher College, Civil No. W76-877 (filed June 10, 1976). The trial judge rejected this claim without opinion on a motion for summary judgment. Order, Krotkoff v. Goucher College, Civil No. W76-877 (D. Md., Dec. 17, 1976) (granting summary judgment).

[21] *See* 585 F.2d at 678; note 19 *supra.*

[22] 585 F.2d at 678. At trial, Krotkoff and three other dismissed faculty members testified that they understood tenure at Goucher to preclude dismissal due to the school's financial distress. *Id.* at 680. Four faculty members who were not dismissed testified to a contrary understanding. *Id.* Additional testimony indicated that the national academic community commonly understood that tenure allowed dismissal due to an institution's financial exigency. *Id.*

[23] *Id.* at 677.

jury's decision.[24]

On appeal, the Fourth Circuit held that appellant's tenure contract implicitly allowed for dismissal should the college experience severe financial difficulties.[25] The *Goucher* court could have construed Krotkoff's tenure contract to require that she was absolutely entitled to continued employment at Goucher until retirement age, unless cause or serious disability was shown.[26] The court instead decided that the tenure contract incorporated the common understanding of the national academic community that a grant of tenure does not preclude dismissal due to a college's financial distress.[27] The court relied on a widely adopted guide to institutional policy promulgated by the American Association of University Professors (AAUP). In 1940, the AAUP issued the Statement of Principles on Academic Freedom and Tenure, which provides that a tenured faculty member may be dismissed due to a college's financial instability.[28] The Fourth Circuit thus construed Krotkoff's contract as including the nationally recognized financial exigency provision because Krotkoff introduced no evidence that the Goucher community considered tenure in a different manner than the national academic community.[29]

The *Goucher* court departed from the usual method of recognizing the existence of a financial exigency provision in a tenure contract. Earlier cases involving financial exigency dismissals have found a contract provision for dismissal due to financial problems of the employer institution in the express rules and regulations of the particular institution.[30] *Goucher* is the first case to hold, in the absence of an express contractual provision, that the status of tenure does not prevent the dismissal of faculty members due to an institution's financial

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[24] *Id.*

[25] *Id.* at 680.

[26] *See* note 19 *supra*; *see, e.g.*, Collins v. Parsons College, _ Iowa _, _, 203 N.W.2d 594, 597-98 (1973); Lumpert v. University of Dubuque, No. 2-57568 (Iowa Ct. App., filed Apr. 14, 1977); Bruno v. Detroit Inst. of Tech., 36 Mich. App. 61, 64, 193 N.W.2d 322, 324 (1971). The *Collins* court, refusing to examine the general meaning of tenure, ruled that the specific provisions of the by-laws must control an employment contract for tenure. _ Iowa at _, 203 N.W.2d at 597-98. In *Bruno*, the court interpreted an employment contract by construing the contract most strongly against the preparer. 36 Mich. App. at 64, 193 N.W.2d at 324. *But see* Cusumano v. Ratchford, 507 F.2d 980, 984-86 (8th Cir. 1974). In *Cusumano*, the court interpreting an employment contract found the terms of the 1940 Statement to be merely precatory, notwithstanding that the 1940 Statement was expressly incorporated by reference into the employment relationship. *Id.*

[27] 585 F.2d at 680.

[28] *Id.* at 679; *see* notes 2 & 10 *supra*.

[29] 585 F.2d at 680. The testimony of Krotkoff and the three other dismissed faculty members, *see* note 22 *supra*, may be considered insufficient evidence for the purpose of establishing the meaning of their tenure contracts because traditional contract doctrine rejects subjective intentions in favor of attaching a reasonable construction to the party's actions. *See* Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1141 (8th Cir. 1974); CALAMARI & PERILLO, CONTRACTS 23 (2d ed. 1977) [hereinafter cited as CALAMARI & PERILLO].

[30] *See* Browzin v. Catholic University, 527 F.2d 843, 845 (D.C. Cir. 1975) (parties stipulated to financial exigency provision); Rose v. Elmhurst College, 62 Ill. App. 3d 824, 826, 379 N.E.2d 791, 792 (1978); Lumpert v. University of Dubuque, No. 2-57568, slip op. at 2 (Iowa Ct. App. Apr. 14, 1977); Scheuer v. Creighton Univ., 199 Neb. 618, _, 260 N.W.2d 595, 596-

instability.[31] Nevertheless, the Fourth Circuit's decision is consistent with the purpose of tenure which is not to guarantee employment during times of economic stress, but rather to prevent arbitrary or retaliatory dismissals.[32]

The Fourth Circuit's decision to follow national custom instead of strictly adhering to the provisions of the Goucher by-laws reflects the court's apparent belief that the economic viability of private educational institutions must be maintained.[33] While courts must often construe agreements that do not provide for unforeseen situations,[34] the imposition of an implied term is not inevitable when a contract is silent on a particular issue.[35] Rather, the use of an implied term is often a policy decision designed to promote public welfare.[36] The *Goucher* decision

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97 (1977) (stipulated); Bellak v. Franconia College, 118 N.H. 313, _, 386 A.2d 1266, 1267 (1978); AAUP v. Bloomfield College, 129 N.J. Super. at 253, 322 A.2d at 848 (Ch. Div. 1974).

[31] *See* 585 F.2d at 679. In *Goucher*, the Fourth Circuit relied on two cases involving the dismissal of tenured faculty from state supported institutions as authority for allowing colleges the right to terminate tenured employment for financial reasons. *See id.*; Johnson v. Board of Regents, 377 F. Supp. 227, 234-35 (W.D. Wis. 1974); Levitt v. Board of Trustees, 376 F. Supp. 945, 947-48 (D. Neb. 1974). Although *Johnson* and *Levitt* lend support to the Fourth Circuit's conclusion that tenure is generally understood not to preclude dismissal due to an institution's financial troubles, they are not dispositive of the *Goucher* issue as neither case determined that their respective plaintiffs enjoyed enforceable tenure rights. *See* 377 F. Supp. at 952; 376 F. Supp. at 945. Only if *Johnson* and *Levitt* had found enforceable tenure interests based upon a contract or statute could these decisions be instructive to the *Goucher* court as an interpretation of Krotkoff's tenured status. *See* MIX, *supra* note 6, at 5-6. In *Johnson*, the court rejected the plaintiffs' procedural due process claims that they were dismissed without a hearing, noting that the Wisconsin state courts probably would uphold the state's right to dismiss tenured faculty members notwithstanding a statute which specifically provided for their permanent employment. 377 F. Supp. at 234; *see* note 3 *supra*. A comparison of Krotkoff's contract rights to the statutory rights of the *Johnson* plaintiff may be misleading because a state is free to abolish the legislatively created status of a state university faculty member. *See* Phelps v. Board of Educ., 300 U.S. 319, 321 (1937) (no intent of state to create contractual status); Malone v. Hayden, 329 Pa. 213, _, 197 A. 344, 345 (1938). *But see* Anderson v. Brand, 303 U.S. 95, 100-04 (1938) (statutory intent to create contractual status). In *Levitt*, the court rejected the complaints of discharged faculty members that the college had unconstitutionally deprived them of their right to continued employment as guaranteed by the college by-laws. 376 F. Supp. at 952. The *Levitt* opinion also is inapposite to *Goucher* because the Nebraska district court did not rule on the interpretation of plaintiffs' tenure rights, but rather decided whether the termination procedure complied with due process. *See id.* at 949-52; *Recent Cases Involving Financial Exigency*, *supra* note 6, at 189.

[32] *See* Browzin v. Catholic Univ., 527 F.2d at 846; note 2 *supra*.

[33] *See* Scheuer v. Creighton Univ., 199 Neb. 618, _, 260 N.W.2d 595, 601 (1977). In *Creighton*, the court decided the issue of whether financial exigency existed at Creighton. In particular, the court took judicial notice of the financial plight that many private universities were facing, explaining that "[t]he rapidly changing needs of students and society demand that university administrators have sufficient discretion to retrench in areas when faced with financial problems." *Id.* at _, 260 N.W.2d at 601.

[34] *See* Farnsworth, *Disputes Over Omissions in Contracts*, 68 COLUM. L. REV. 860, 860-61 (1968); *see, e.g.*, Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966); Parev Prods. Co. v. I. Rokeach & Sons, 124 F.2d 147, 148 (2nd Cir. 1941).

[35] *See* note 34 *supra*.

[36] *See* Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 741 (1919); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Recognition of an implied term or condition by means of contract construction is the method by which courts import

accomplishes the desirable result of allowing a private educational institution to shift resources in times of financial stress.[37] Unless a private college is able to maintain a curriculum attractive to changing student demands, the college may suffer declining enrollments that could eventually bankrupt the institution.[38]

In combination with considerations of public policy, the informal nature of Krotkoff's contract facilitated the *Goucher* court's ability to imply a financial exigency provision. While the hallmark of a commercial contract is a bargained-for exchange of mutual promises,[39] most academic tenure contracts are not the result of a detailed negotiations process in which the expectations of the parties are clearly defined.[40] Thus, the readiness of the *Goucher* court to imply a financial exigency provision seems a function of the absence of a thoroughly negotiated contract and the desirability of the continued existence of private colleges.[41] Perhaps in recognition of the judicial license to supplement the provisions of an incompletely documented tenure contract, faculties in higher education are increasingly participating in collective bargaining.[42]

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desirable public policy into individual relationships. *See* CALAMARI & PERILLO, *supra* note 29, at 388; *see, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075, 1080 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)(warranty of habitability implied in lease contracts).

[37] *See* Scheuer v. Creighton Univ., 199 Neb. at _, 260 N.W.2d at 601; note 33 *supra*.

[38] *See* AAUP v. Bloomfield College, 136 N.J. Super. at 446 n.1, 346 A.2d at 617 n.1. Bloomfield College filed a petition for reorganization in federal bankruptcy court after the trial court's decision to reinstate thirteen former faculty members who had been dismissed because of the college's financial exigency. *Id.*

[39] *See* Higgins v. Monroe Evening News, 404 Mich. 1, 20, 272 N.W.2d 537, 543 (1978). Due to the frequency of disputes over employment contracts for "continued" or "permanent" employment in commercial settings, courts often resolve the enforceability of an employment contract by determining whether consideration was mutually bargained-for and exchanged. *See* CALAMARI & PERILLO, *supra* note 29, at 48-49; *see, e.g.*, Laird v. Eagle Iron Works, _ Iowa _, _, 249 N.W.2d 646, 647 (1977). As a tenured professor typically does not promise continued employment, a college or university being sued may attack the enforceability of a tenure contract on the grounds of lack of consideration. *See* Collins v. Parsons College, _ Iowa at _, 203 N.W.2d at 598. The custom in higher education, however, is to grant permanent tenure and courts therefore will likely reject the defense of lack of consideration. *See* Collins v. Parsons College, _ Iowa at _, 203 N.W.2d at 597-99; *Tenure Rights, supra* note 1, at 288-91; *Financial Exigency, supra* note 2, at 498-502. In *Collins*, the court rejected the contention that an employment contract for tenure was unenforceable for lack of consideration where a professor had given up a tenured position at another school to teach at Parsons College. _ Iowa at _, 203 N.W.2d at 599. *See generally* Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969). *See also* Greene v. Howard Univ., 412 F.2d 1128, 1134 & n.8, 1135; *Tenure Rights, supra* note 1, at 290-91.

[40] *See* Moskow, *The Scope of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 33, 41 & n.4. A common practice at colleges is to inform the faculty member of an offer of tenure by letter, which the person may sign and return to the administration to signify acceptance. *Id.*; *see, e.g.*, 585 F.2d at 678; Rose v. Elmhurst College, 62 Ill. App. 3d at 824, 379 N.E.2d at 792. *But see* Collins v. Parsons College, _ Iowa at _, 203 N.W.2d at 597 (face-to-face, bargained-for negotiations for tenure).

[41] *See* text accompanying notes 33 & 40 *supra*.

[42] *See* McHugh, *Collective Bargaining with Professionals in Higher Education: Problems in Unit Determination*, 1971 WIS. L. REV. 55, 55. *See generally* Wollett, *The States and Trends of Collective Negotiations for Faculty in Higher Education*, 1971 WIS.

After finding that Krotkoff's contract permitted dismissal due to Goucher's financial instability, the Fourth Circuit rejected the appellant's argument that a jury should have determined whether a condition of financial exigency existed at the college.[43] The *Goucher* court applied an accepted standard that dismissals alleged to be due to an institution's financial instability must directly result from a legitimate condition of financial exigency.[44] The Fourth Circuit found that Goucher had satisfied this requirement, concluding that the college's financial troubles caused Krotkoff's dismissal.[45] The court emphasized that the college's trustees did not dismiss Krotkoff in bad faith[46] and that the trustees reasonably believed that the college was in an unstable financial condition.[47] The *Goucher* court refused to review the propriety of the trustees' handling of the Goucher endowment and ruled that the existence of financial exigency should be judged by an institution's operating funds instead of

L. REV. 2. Due to current economic conditions and the relative scarcity of available tenured positions to qualified professionals, a collective bargaining contract represents an attractive alternative to the traditional status of tenure. *See* Kirp, *Collective Bargaining in Education: Professionals as a Political Interest Group*, 21 J. PUB. L. 323, 328 (1972) [hereinafter cited as Kirp]; *Tenure Rights*, *supra* note 1, at 307. Since the AAUP has begun to pursue collective bargaining as a means of realizing higher education goals, *see* Kirp, *supra* at 324, recent AAUP promulgations, such as the 1976 Recommended Institutional Regulations, *see* note 10 *supra*, may not represent national norms because a union's bargaining position often requires demanding greater benefits than the union ultimately expects to receive. *The Status of AAUP Policy*, *supra* note 2, at 8. In NLRB v. Yeshiva Univ., 48 U.S.L.W. 4175 (1980), the Supreme Court recently denied a private university's faculty union the benefits of the National Labor Relations Act (NLRA). *Id.* at 4180. The Court sanctioned Yeshiva University's refusal to bargain with the union, reasoning that full-time Yeshiva faculty members are managerial employees and thus excluded from the NLRA's coverage. *Id.* at 4179-80. In determining that the Yeshiva faculty performs managerial duties, the Court's majority relied on the faculty's absolute authority in academic matters. *Id.* at 4179. Thus, depending on a school's particular method of institutional governance, *Yeshiva* may frustrate collective bargaining attempts in private universities.

[43] 585 F.2d at 681; *accord* Lumpert v. University of Dubuque, No. 2-57568, slip op. at 10 (Iowa Ct. App. Apr. 14, 1977). The *Lumpert* court ruled that the issue of whether a state of financial exigency existed at the University of Dubuque was not a jury question unless the dismissal of tenured faculty was alleged to be for a reason other than the strained financial condition of the university. *Id.* Over a four year period, the University of Dubuque had approximately a half-million dollar deficit which depleted unrestricted endowments from $170,000 to $114. *Id.* at 6.

[44] *See* 585 F.2d at 681; *1940 Statement*, *supra* note 2, at 270. The requirements of causation and an actual financial crisis as the criteria for a demonstrably bona fide dismissal were established in AAUP v. Bloomfield College, 136 N.J. Super. at 447, 346 A.2d at 617. *Bloomfield* found the dismissal of tenured faculty members to be improper as the college had not met the burden of proving that the terminations related to a condition of financial exigency. *Id.* at 447, 346 A.2d at 618. The determinative fact in *Bloomfield* seems to be that the college immediately hired twelve teachers after the thirteen plaintiffs were dismissed. *See* 129 N.J. Super. at 269, 322 A.2d at 856; Tucker, *supra* note 6, at 105-06.

[45] 585 F.2d at 681.

[46] *Id.* at 681; *see* text accompanying note 20 *supra*. *See also* Karlen v. New York Univ., 464 F. Supp. 704 (S.D. N.Y. 1979). In *Karlen*, the court found a cause of action to exist when the plaintiff alleged that the university's lowering of the mandatory retirement age was a bad faith response to the school's actual economic condition. *Id.* at 707-08.

[47] 585 F.2d at 681.

its capital assets.[48] Since courts typically are reluctant to displace an institution's financial planning with judicial opinion,[49] the Fourth Circuit correctly concluded that the trustees' disposition of Goucher's capital assets was not a jury question.

The *Goucher* court next rejected Krotkoff's contention that a jury should have considered the reasonableness of the standards used to select her for dismissal.[50] Although procedures for the termination of tenure at Goucher were not set forth in Krotkoff's employment contract,[51] the court accepted the appellant's claim that her contract required fair and reasonable termination standards.[52] Nevertheless, acknowledging that the necessity for revising Goucher's curriculum was undisputed,[53] the Fourth Circuit ruled that the college's termination standards were fair and reasonable.[54] As the college demonstrated a rational justification for the retention of Ehrlich rather than Krotkoff,[55] the court correctly abstained from judicial interference with Goucher's academic affairs.[56]

The Fourth Circuit also rejected Krotkoff's assertion that a jury should have evaluated the reasonableness of the college's efforts to find her alternate employment.[57] The *Goucher* court accepted Krotkoff's claim that the tenure contract required a reasonable effort to find her alternate employment.[58] Finding no evidence that the college failed to make reasonable efforts to secure alternate employment for Krotkoff,[59] however, the Fourth Circuit properly denied Krotkoff relief.[60]

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[48] *Id.* at 681; *accord* Karlen v. New York Univ., 464 F. Supp. at 707. *See also* note 10 *supra.*

[49] *See* Lumpert v. University of Dubuque, No. 2-57568, slip op. at 10 (Iowa Ct. App. Apr. 14, 1977); AAUP v. Bloomfield College, 136 N.J. Super. at 446, 346 A.2d at 617 (App. Div. 1975). The *Bloomfield* court found that the disposition of a multi-million dollar tract of land was beyond the scope of judicial review. *Id.*

[50] 585 F.2d at 682.

[51] *Id.*; *see* note 19 *supra.*

[52] 585 F.2d at 682.

[53] *Id.*

[54] *Id.*; *see* text accompanying note 14 *supra.* Although they were not challenged, the termination procedures in Rose v. Elmhurst College, 62 Ill. App. 3d 824, 825-26, 379 N.E.2d 791, 793 (1978), and Scheuer v. Creighton Univ., 199 Neb. 618, ___, 260 N.W.2d 595, 597 (1977), were substantially similar to those followed in *Goucher. See* 585 F.2d at 677-78.

[55] *See* 585 F.2d at 678; note 14 *supra.*

[56] *See* 585 F.2d at 681. In New York Inst. of Tech. v. State Div. of Hum. Rights, 40 N.Y.2d 316, 322, 353 N.E.2d 598, 602 (1976), the New York Court of Appeals stressed that the managing officers of a university are best able to perform the special skills needed in the sensitive areas of faculty appointment, promotion and tenure. *Id.; accord* Cusumano v. Ratchford, 507 F.2d 980, 987 (8th Cir. 1974).

[57] 585 F.2d at 682-83.

[58] *Id.* While the 1940 Statement of Principles contains no mandate that a college assist a dismissed faculty member to secure alternate employment at the same institution, the AAUP's 1976 Recommended Institutional Regulations, *see* note 10 *supra,* require an institution to make every effort to find the faculty member another suitable position before the teacher is dismissed. 1976 RIR, *supra* note 10, at 18. This requirement is consistent with the purpose of tenure in protecting an unpopular teacher from arbitrary dismissal under the guise of financial exigency. *See* Browzin v. Catholic Univ. of Am., 527 F.2d at 847.

[59] 585 F.2d at 682-83.

[60] Goucher's refusal to train Krotkoff in economics, *see id.* at 678; text accompanying