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Non-Tenured Teachers and Due Process: The Right to a Hearing and Statement of Reasons

Comments already filed with the FCC by interested parties pursuant to this inquiry have urged a total exemption of all commercial advertisements from the operation of the fairness doctrine.[178] Others have suggested that licensees be required to set aside 20 per cent of all commercial time for the presentation of counter-commercials coupled with the opening up of all commercial time for paid editorial advertisements.[179]

Whatever the outcome, the court's remarks in *Business Executives' Move for Vietnam Peace* might be appropriate:

> We are convinced that the time has come for the Commission to cease abdicating responsibility over the use of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.[180]

JOHN C. MOORE

NON-TENURED TEACHERS AND DUE PROCESS: THE RIGHT TO A HEARING AND STATEMENT OF REASONS

The bounds of academic freedom and the rights to be afforded members of the teaching profession have been recurring problems in the history of American education.[1] One aspect of the problem has been the recent concern over the due process rights to be afforded non-tenured[2] public

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[178]BROADCASTING, Oct. 18, 1971, at 88.

[179]*Id.* at 90.

[180]No. 24,492 at 3 (D.C. Cir. Aug. 3, 1971).

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[1]R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1956).

[2]Adoption of tenure statutes by most states was in response to the teaching profession's desire for stability of employment and protection from political dismissals. *See* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 456-57 (1956); Stover, *The What and Why of Tenure*, NEA JOURNAL, March, 1961, at 47. The following are state statutes containing tenure provisions: ALA. CODE tit. 52, § 352 (1960); ALASKA STAT. § 14.20.150 (1971); ARIZ. REV. STAT. ANN. § 15-251 (Supp. 1971); CAL. EDUC. CODE § 13304 (West 1969); COLO. REV. STAT. ANN. § 123-18-3 (1963); CONN. GEN. STAT. ANN. § 10-151(b) (1958); FLA. STAT. ANN. § 231.36 (Supp. 1971); HAWAII REV. STAT. § 297-9 (1968); IDAHO CODE ANN. § 33-1212 (1963); ILL. ANN. STAT. ch. 122, § 24-11 (Supp. 1971); IND. ANN. STAT. § 28-4511 (Repl. Vol. 1970); IOWA CODE ANN. § 279.13 (Supp. 1971); KAN. STAT. ANN. § 72-5404 (1964); KY. REV. STAT. ANN. § 161.720 (1969); LA. REV. STAT. ANN. § 17:442 (1963); ME. REV. STAT. ANN. tit. 20, § 161 (1964); MD. CODE ANN. art. 77, § 114 (Repl. Vol. 1969); MASS. GEN. LAWS ANN. ch. 71, § 41 (1971);

school teachers upon non-renewal of their teaching contracts or dismissal from a school system.[3] While there is little doubt that a teacher cannot be discharged for reasons that are constitutionally impermissible, such as the exercise of first amendment rights,[4] the present legal controversy centers around the claim by such teachers that the due process clause of the fourteenth amendment[5] requires a statement of reasons for the termination of their employment and a hearing to determine the validity of the reasons.

Two valid interests are brought into conflict by this controversy: the interest of the school system in maintaining an efficient and qualified faculty and the individual teacher's interest in preserving an untarnished reputation in a profession where reputation is important.[6] The difficulty of resolving these interests is reflected in the fact that four United States Circuit Courts of Appeal, in ruling on the question within the past two years, have failed not only to reach a uniform result, but even to agree

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MICH. STAT. ANN. § 15.1991 (Rev. Vol. 1968); MINN. STAT. ANN. § 125.17 (1960); MO. STAT. ANN. § 168.221 (Supp. 1971); MONT. REV. CODES ANN. § 75-6103 (Repl. Vol. 1971); NEB. REV. STAT. § 79-1256 (Repl. Vol. 1966); N.H. REV. STAT. ANN. § 189:14a (Repl. Vol. 1964); N.J. STAT. ANN. § 18A:28-5 (1968); N.M. STAT. ANN. § 77-8-11 (Repl. Vol. 1968); N.Y. EDUC. LAW. § 2573 (McKinney 1970); N.D. CENT. CODE ANN. § 15-47—27 (Supp. 1971); OHIO REV. CODE ANN. § 3319.08 (Baldwin 1971); OKLA. STAT. ANN. tit. 70, § 6-122 (Supp. 1971); ORE. REV. STAT. § 342.845(1) (1969); PA. STAT. ANN. tit. 24, § 11-1121 (1962); R.I. GEN. LAWS ANN. § 16-13-3 (1969); S.D. CODE ANN. § 13-43-10 (Supp. 1971); TENN. CODE ANN. § 49-1402 (Repl. Vol. 1966); TEX. EDUC. CODE § 21.206 (1969); UTAH CODE ANN. § 53-1-13 (Repl. Vol. 1970); VA. CODE ANN. § 22-217.3 (Supp. 1971); W. VA. CODE ANN. § 18A-2-2 (Repl. Vol. 1971); WIS. STAT. ANN. § 118.23 (West Spec. Pamphlet 1970); WYO. STAT. ANN. § 21.1-155 (Supp. 1971). Delaware, Washington, and Nevada do not have formal tenure statutes, but afford rights to a statement of reasons and a hearing to all teachers: DEL. CODE ANN. tit. 14, § 1411, 1413 (Supp. 1970); NEV. REV. STAT. § 391.130 (1967); WASH. REV. CODE§ 28.67.070 (Supp. 1970). Once tenure is granted, a teacher may be dismissed only for "cause," which is usually gross misconduct as defined by the statute. *E.g.*, FLA. STAT. ANN. § 231.36(6) (Supp. 1971) provides: "[C]harges must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude."

[3]Frakt, *Non-Tenure Teachers and the Constitution*, 18 U. KAN. L. REV. 27 (1969).

[4]Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952); Albaum v. Carey, 283 F. Supp. 3 (E.D.N.Y. 1968).

[5]U.S. CONST. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[6]Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970); *see also* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 858-74 for a broader discussion of the interests protected by procedural due process for teachers.

on the proper method of approach.[7] The federal district courts[8] and the two state supreme courts which have decided the question[9] are in equal disarray. This split of authority may soon be resolved by the Supreme Court, since certiorari has been granted in a case directly relating to this problem.[10]

DUE PROCESS IN RELATED AREAS

Much of the reasoning in the cases involving the rights of non-tenured teachers can be better understood after an examination of law relating to the due process rights of governmental employees generally,[11] the special status of professionals and others whose reputations are important in maintaining employment,[12] and the special status afforded the educational process by the courts.[13] Decisions in these areas have been relied upon by the courts in cases involving teachers' rights.

The traditional view saw government employment as a gratuity to be freely revoked at the will of the employer.[14] This view was partly a product of pre-civil service days when the few government jobs available were allocated and later terminated by means of the spoils system. It was given a type of logical formalism by means of the privilege doctrine, which held that government employment was a privilege, not a right, and therefore not entitled to legal protection.[15]

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[7]Roth v. Board of Regents, 446 F.2d 806 (7th Cir.), *cert. granted*, 92 S. Ct. 227 (1971); Orr v. Trinter, 444 F.2d 128 (6th Cir.), *petition for cert. filed*, 40 U.S.L.W. 3126 (U.S. Aug. 18, 1971) (No. 71-249); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970); Thaw v. Board of Public Instruction, 432 F.2d 98 (5th Cir. 1970).

[8]In favor of the teacher's right to a hearing are: Gouge v. Joint School Dist., 310 F. Supp. 984 (W.D. Wis. 1970); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969) (the court vigorously asserting the rights of the teacher, but circumventing the problem by requiring reinstatement). *Contra*, Johnson v. Fraley, 327 F. Supp. 471 (W.D. Va. 1971); Toney v. Reagan, 326 F. Supp. 1093 (N.D. Cal. 1971) (the court avoiding merits by deciding that preexisting administrative procedures were adequate); Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970); Bonner v. Texas City Indep. School Dist., 305 F. Supp. 600 (S.D. Tex. 1969).

[9]Both of the state courts deciding this question have held against the teacher: Fooden v. Board of Governors, Nos. 42460, 42461 (Ill. Sup. Ct., March 1970, *modified*, March 31, 1971), *petition for cert. filed*, 40 U.S.L.W. 3092 (U.S. June 29, 1971) (No. 71-354) (statement of reasons denied); Munro v. Elk Rapids Schools, 383 Mich. 661, 178 N.W.2d 450 (1970) (statement of reasons denied).

[10]Roth v. Board of Regents, 446 F.2d 806 (7th Cir.), *cert. granted*, 92 S. Ct. 227 (1971).

[11]See text accompanying notes 14-37 *infra*.

[12]See text accompanying notes 38-41 *infra*.

[13]See text accompanying notes 42-44 *infra*.

[14]*See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 426-27 (1965).

[15]K.C. DAVIS, DISCRETIONARY JUSTICE 172-76 (1969).

The best enunciation of the privilege doctrine, and certainly the most quoted, is the statement of Oliver Wendell Holmes in the case of *McAuliffe v. Mayor of New Bedford*.[16] Holmes, then on the Supreme Judicial Court of Massachusetts, said: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[17] Apparently, the petitioner had no right to government employment, and his continued employment was subject solely to the will of the government.[18]

The general doctrine as pronounced by Holmes long permeated the thinking of the federal courts. Exemplary of this view is the 1951 case of *Bailey v. Richardson*,[19] where the Court of Appeals for the District of Columbia Circuit held that the dismissal of government employees was a function of Congress and the executive, and not of the judiciary.[20] Responding adversely to the appellant's claim that she was entitled to a hearing under the due process clause of the fifth amendment,[21] the court said that government employment is not life, liberty, or property under the fifth amendment, and therefore no due process rights were infringed.[22]

The *Bailey* view that government employment was an easily terminated privilege, while conceptually logical, created harsh results in actual practice.[23] Consequently, the doctrine underwent considerable ferment after *Bailey*, being criticized by scholars[24] and challenged quite frequently in a series of loyalty cases in the 1950's.[25] The doctrine was tempered considerably by these cases, as evidenced by the 1961 decision of *Cafeteria Workers Local 473 v. McElroy*.[26] Although the Supreme Court held that the right to a hearing for a government employee was not self evident, it

[16]155 Mass. 216, 29 N.E. 517 (1892). Plaintiff was a policeman removed from the New Bedford force after an investigation showed he was engaged in political activity in contravention of police department regulations.

[17]*Id.* at 517.

[18]Holmes followed his initial statement with, "On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.* at 518. This language apparently indicates that he did not mean the privilege doctrine to be an absolute, but rather that governments could impose reasonable restrictions as a public policy.

[19]182 F.2d 46 (D.C. Cir.), *aff'd by an equally divided Court*, 341 U.S. 918 (1951).

[20]182 F.2d at 56.

[21]U.S. CONST. amend. V provides in part that, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[22]182 F.2d at 58.

[23]*See* 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

[24]1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.11-.13 (1958). *See* Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 233-43 (1956); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[25]*E.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

[26]367 U.S. 886 (1961).

did go so far as to say that a court must make a careful examination of the respective interests of each party to determine whether a hearing was called for.

In *Cafeteria Workers*, petitioner had been employed as a cook in a privately owned concession on a government weapons facility for six years. Upon finding that the cook lacked the needed security clearance, the security officer in charge of the facility revoked her entry card and thereby terminated her employment. After being refused a hearing, petitioner brought an action for restoration of the card.[27] The district court granted the government's motion for summary judgment, and this action was affirmed by the Court of Appeals for the District of Columbia Circuit.[28]

The Supreme Court addressed itself to the question of whether there was a denial of due process under the fifth amendment. In a statement that seemed to disparage the privilege doctrine, the Court said that the question could not be resolved by the assertion that the petitioner had no constitutional right to be at the facility.[29] The Court emphasized that while a trial-type hearing is not a constitutional requirement,[30] the essence of due process is flexible response to the circumstances of each particular case.[31]

The Court stated that to determine what constitutes due process in any given situation, the nature of the governmental function must be balanced against the private interest affected by the government's action.[32] In applying this balancing test to the case at hand, the Court noted that the cook was denied only a specific job at one government installation.[33] Therefore, the private interest affected was not the right to follow a particular trade or profession;[34] no badge of infamy was attached to the cook because of the dismissal.[35] Weighed against this private interest, the

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[27]*Id.* at 887-89.

[28]Cafeteria Workers Local 473 v. McElroy, 284 F.2d 173 (D.C. Cir. 1960).

[29]Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 894 (1961). The Court quoted Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961): "One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law." 367 U.S. at 894.

[30]The Court cited as authority Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

[31]The Court cited as authority Hannah v. Larche, 363 U.S. 420 (1960); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1950) (concurring opinion); Communications Comm'r v. WJR, 337 U.S. 265 (1949); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884).

[32]367 U.S. at 886.

[33]*Id.* at 896.

[34]The Court cited as authority Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Truax v. Raich, 239 U.S. 33 (1915); Dent v. West Virginia, 129 U.S. 114 (1889).

[35]The Court cited as authority Wieman v. Updegraff, 344 U.S. 183 (1951); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1950).

government function was viewed not as the power to regulate an entire profession, but rather a proprietary power under which private interests have traditionally been held to be subject to the plenary power of the executive.[36] Having weighed the competing interests, the Court held that the cook was not entitled to a hearing.[37]

The conclusion of *Cafeteria Workers* might have been different had the petitioner been engaged in a profession or other employment where reputation is tantamount to employment itself. In such areas of employment, the courts have recognized that special due process rights apply. The Supreme Court has long held that a state cannot exclude a person from law,[38] medicine,[39] or any other profession[40] or occupation[41] in an arbitrary manner or for reasons that violate due process or equal protection. Members of the educational profession have been held to have similar rights, and the Supreme Court has placed emphasis on the protection of the constitutional rights of teachers.[42] Generally, the courts have regarded the campus as a unique place,[43] and spoken of the special status of scholarship and teaching.[44]

THE PRESENT STATUS OF THE RIGHTS AFFORDED NON-TENURED TEACHERS

A classic application of the balancing test required by *Cafeteria Workers*[45] to the due process rights of non-tenured teachers is the First Circuit case of *Drown v. Portsmouth School District*.[46] The court undertook a detailed analysis of the benefits and burdens that would be placed

[36]The Court cited as authority Jay v. Boyd, 351 U.S. 345 (1956); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909); Buttfield v. Stranahan, 192 U.S. 470 (1904).

[37]367 U.S. at 899.

[38]Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); *Ex parte* Secombe, 60 U.S. (19 How.) 9 (1856).

[39]Dent v. West Virginia, 129 U.S. 114 (1889).

[40]Torcaso v. Watkins, 367 U.S. 488 (1961) (notary public).

[41]Allgeyer v. Louisiana, 165 U.S. 578 (1897) (insurance salesman).

[42]Adler v. Board of Educ., 342 U.S. 485 (1952).

[43]Barenblatt v. United States, 360 U.S. 109 (1959). The Court wrote, "[T]his Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." *Id.* at 112.

[44]*See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). Despite this emphasis, however, the Court has not made academic freedom subject to special scrutiny. *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1065 (1968).

[45]See text accompanying notes 26-37 *supra*.

[46]435 F.2d 1182 (1st Cir. 1970).

on each party by requiring that the teacher be given a statement of reasons for termination,[47] and held:

> [T]he interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and . . . the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.[48]

With regard to the teacher's demand for a hearing, the court engaged in a similar analysis but reached the opposite result, holding that in this instance the potential burden on the board outweighed the advantages to the teacher.[49]

The Seventh Circuit, in *Roth v. Board of Regents*,[50] agreed that *Cafeteria Workers* requires courts to balance the interests of the board and the teacher. It differed from the *Drown* court in its assessment of where the balance lay, however, and held that due process requires both a statement of reasons and a hearing. The court distinguished the facts from those in *Cafeteria Workers*,[51] stressing that more than a single job was involved:

> We think the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it

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[47]The court felt that the benefits to the teacher of such a statement would be as follows: the ability of the teacher to correct a decision made on mistaken facts; the possibility of discovering evidence that would substantiate a claim that employment had been terminated due to constitutionally impermissible reasons; the ability of the teacher to learn for future reference where his performance failed to live up to standards; and the fact that the reasons for non-renewal could actually be a cause for recommendation to another employer. The requirement of a statement of reasons was not seen as inflicting a significant burden upon the school board in that there would be no great administrative burden; the board could still rid itself of incompetents; an objective of the board is to help teachers improve their teaching; and the problem of the creation of friction between administration and teacher is moot when the decision not to rehire has already been made. *Id.* at 1184-85.

[48]*Id.* at 1185.

[49]The teacher's interests were viewed as: the opportunity to improve his methods; the identification of factual mistakes; and the protection of constitutional rights. Weighed against these interests were the board's interest in the need for wide discretion in the employment and discharge of teachers, the need to keep expensive administrative machinery to a minimum, and the ill effects of leaving rehiring decisions to third party review boards. *Id.* at 1185-87.

[50]446 F.2d 806 (7th Cir.), *cert. granted*, 92 S. Ct. 227 (1971).

[51]The court said that "*Cafeteria Workers* itself suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual." *Id.* at 809.

> against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.[52]

In sharp contrast to the liberal outlook of *Roth* is the Sixth Circuit's decision in *Orr v. Trinter*,[53] which denied both a statement of reasons and a hearing, citing the privilege doctrine as enunciated in *Bailey v. Ferguson*[54] as a justification. This reliance on *Bailey* is surprising, since the more flexible doctrine of *Cafeteria Workers* seems to have superseded that case. As a second reason for its decision, the court relied on the existence of the state's tenure system:

> In conclusion we emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education. In the present case Orr seeks to persuade this court to render a decision which would confer certain tenure privileges upon non-tenured teachers—in effect to amend the Ohio statute by judicial decree. This we decline to do.[55]

The Fifth Circuit, in *Thaw v. Board of Public Instruction*,[56] also relied on the existence of the tenure system in denying a hearing in a case where the statement of reasons was not an issue. The Fifth Circuit used its own approach in evaluating the conflicting interests. This approach, developed

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[52]*Id.* There was a strong dissent to the *Roth* opinion which argued against the majority opinion for several reasons. The decision was felt to be unworkable from an administrative viewpoint. It was also felt that the distinction between tenured and non-tenured teachers would be destroyed. A final reason cited by the dissent for its disagreement is that it considered the majority to have gone beyond the present state of the law as set forth by the cases of Jones v. Hopper, 410 F.2d 1323 (10th Cir.), *cert. denied*, 397 U.S. 991 (1970), and Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[53]444 F.2d 128 (6th Cir.), *petition for cert. filed*, 40 U.S.L.W. 3126 (U.S. Aug. 18, 1971) (No. 71-249).

[54]See text accompanying notes 16-22 *supra*.

[55]444 F.2d at 135.

[56]432 F.2d 98 (5th Cir. 1970).

by earlier Fifth Circuit cases with related facts,[57] consists of a determination by the court as to whether the plaintiff belongs to a certain class of teachers to whom the court feels legal protection should be afforded.

The Fifth Circuit affords the right to a hearing and a statement of reasons apparently to three classes of teachers: those who are discharged for constitutionally impermissible reasons; those who hold tenure under state statutes; and those deemed by the court to have an expectancy of employment.[58] The doctrine of expectancy, which is similar to the contract theory of reliance, was promulgated by the Fifth Circuit to protect teachers who reasonably expected to be reemployed due to a particular policy or practice of the institution.

This unique approach was applied in *Thaw*, and the teacher was found not to belong to any of the favored classes. He did not have tenure because his three year period of employment was less than the statutorily required four years.[59] In addition, the institution had established no policy that had given the teacher an expectancy of employment. Lastly, no constitutionally impermissible reasons were alleged to be the cause of termination.[60]

To properly evaluate the due process claims of non-tenured teachers, the balancing of interests test must be employed.[61] In such a determination, the pervasive influence of the tenure system will weigh heavily on the side of the school board.[62] While the distinction between tenured and non-tenured teachers that the tenure system makes does not appear to be subject to direct attack,[63] it does not follow that the existence of the tenure system precludes extension of due process rights to persons unprotected by the system. When the fundamental fairness required by due process is taken into account,[64] the controlling question is not, as some courts[65] apparently believe, whether the system will be altered by the extension of some rights associated with tenure to non-tenured teachers. Rather, the

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[57]Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 403 U.S. 917 (1971); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

[58]Thaw v. Board of Instruction, 432 F.2d 98, 98-99 (5th Cir. 1970).

[59]*Id.*

[60]*Id.* at 99.

[61]See text accompanying notes 26-37 *supra*.

[62]Statutes cited note 2 *supra*.

[63]*See* Shelton v. Tucker, 364 U.S. 479, 486 (1960); Roth v. Board of Regents, 446 F.2d 806, 813 (7th Cir.), *cert. granted*, 92 S. Ct. 227 (1971) (dissenting opinion).

[64]*See* Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[D]ue process embodies the differing rules of fair play . . . ."); Morgan v. United States, 304 U.S. 1, 19 (1938) ("[T]hose fundamental requirements of fairness which are the essence of due process . . . .").

[65]Orr v. Trinter, 444 F.2d 128 (6th Cir.), *petition for cert. filed*, 40 U.S.L.W. 3126 (U.S. Aug. 18, 1971) (No. 71-249); Thaw v. Board of Public Instruction, 432 F.2d 98 (5th Cir. 1970).

primary concern would seem to be the extent to which such changes would frustrate the underlying legislative purpose.

It is in this context that the reasoning of the courts in *Orr*[66] and *Thaw*[67] regarding the right to a statement of reasons appears faulty. These courts have taken a rigid approach, which strikes at the fundamental fairness and flexibility[68] that are the heart of due process. The effects—whether substantial or inconsequential—that a statement of reasons would impose upon the tenure system were not examined.

When the effects of a required statement of reasons are examined, it seems clear that little harm will be done to the system by this addition. The purpose of the scheme—the maintenance of a competent faculty —will not be affected, for the school board's freedom not to renew a teacher's contract will be unaffected. The only adverse effect is the slight administrative problem of processing the statement of reasons, and this is little different from the statement of notice that most systems currently require.[69] That a statement of reasons will not harm the tenure system is evidenced by those states which currently afford such a right to probationary employees, with no apparent adverse effect.[70]

However, the imposition of a hearing seems to have the opposite effect. *Roth*[71] incorrectly assumed that the controlling issue was the reputation of the teacher. While this may be important, it does not adequately assess the effect of a required hearing. While a statement of reasons imposes no appreciable burden, an effective hearing procedure with a modicum of due process requires considerable machinery—an impartial tribunal, the right to counsel, and the right to cross-examine adverse witnesses.[72] Moreover, the rehiring decision would be vested in a group having a primary concern other than that of quality education. These factors, which *Roth* has ignored, would place considerable strain on the tenure system as currently in operation in most states, particularly at a time when funds for the machinery outlined above are limited.

When claims of teachers are evaluated by means of the balancing of

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[66]See text accompanying notes 53-55 *supra*.

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

[68]Hannah v. Larche, 363 U.S. 420, 440, 442 (1960); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (concurring opinion); Communications Comm'r v. WJR, 337 U.S. 265, 275-76 (1949); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708-09 (1884).

[69]*E.g.*, ILL. ANN. STAT. ch. 122, § 24-11 (Supp. 1971).

[70]*E.g.*, ORE. REV. STAT. § 342.845 (1969) provides that "In case the district school board does not renew the contract . . . the board shall furnish a statement of the reason for non-renewal to the teacher or administrator."

[71]See text accompanying notes 50-52 *supra*.

[72]Drown v. Portsmouth School Dist., 435 F.2d 1182, 1183 n.1 (1st Cir. 1970).