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## STATE TEACHER TENURE STATUTES: AN APPEAL FOR REPEAL

Academic tenure allows teachers, after serving a probationary period, to receive permanent employment, subject to dismissal only for adequate cause and pursuant to certain procedural requirements. Tenure has been the subject of much debate since its inception<sup>1</sup> and has recently been attacked with renewed vigor.

Tenure effectively creates a permanent teaching staff with a very slow turnover which makes entry into the market difficult.<sup>2</sup> It therefore operates to the disadvantage of young teachers and minorities who cannot break into the profession because most jobs are already closed. The most persuasive criticism of tenure is that it fosters, or at least shelters, mediocrity. Whether due to a mistaken initial evaluation and grant of tenure, a simple change in the teacher's attitude toward teaching, a loss of energy or enthusiasm which may be brought about by age or routine, or the tendency to do only what is necessary, most faculties have a good deal of "deadwood" in their ranks.<sup>3</sup> Administrators, wishing to take advantage of the current surplus of teachers and upgrade their faculties, cannot rid themselves of employees who are not incompetent enough to be dismissed in a formal hearing<sup>4</sup> but are not as qualified as others seeking their positions. In addition, parent-taxpayers are becoming more concerned about the quality of education that their children receive and the quality of teachers that their tax dollars support.<sup>5</sup>

The legislative priority is to provide the best possible education for students. Although educational excellence and a teacher's satisfaction with his job are not unrelated, the perpetuation of an individual teacher's job security is a secondary concern which must yield if it is incompatible with the primary goal. It is essential to remember this priority when evaluating the merit of tenure. A system which promotes teacher security while it impedes academic excellence reverses the legislative priority. Both teachers who have dedicated themselves to the professional responsibility of teaching and governing bodies should discourage this system.

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1. For various arguments pro and con, see COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 14-16 (1973) [hereinafter cited as FACULTY TENURE].
  2. When this fact is taken together with presently decreasing enrollments which reduce the need for teachers, the total number of available teaching positions is small indeed.
  3. FACULTY TENURE, *supra* note 1, at 14.
  4. See notes 16-18 *infra* and accompanying text.
  5. Additional pressure to do away with tenure may be exerted by parent-taxpayers because recent attempts to hold educators accountable through educational malpractice suits have been unsuccessful. See, e.g., *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S. 2d 375 (1979).

This note will examine state tenure statutes, their purposes, and the effectiveness with which they further their purported goals in light of recent Supreme Court decisions. Its primary focus is on tenure statutes which apply to elementary and secondary school teachers,<sup>6</sup> excluding large metropolitan districts.<sup>7</sup> Tenure in higher education and in large metropolitan areas will be discussed only insofar as it helps the reader understand basic concepts; both of these situations have special problems associated with them.<sup>8</sup> This note will also propose that legislatures repeal the present tenure statutes and replace them with the model statute outlined below.<sup>9</sup>

### Examination of Tenure Statutes

Numerous minor variations exist among the tenure statutes of different states. This note will therefore summarize only the basic points. The typical tenure statute<sup>10</sup> has both substantive and procedural provisions<sup>11</sup> which together make it very difficult to fire or not rehire a teacher.<sup>12</sup> Teachers receive these protections after they have taught sat-

6. Most state tenure statutes apply only to elementary and secondary school teachers and this note is directed toward those statutes. A few, however, apply to junior colleges. These, as well as "quasi-statutory" tenure policies set forth in some state university faculty manuals, are beyond the scope of this note.

7. Although "large metropolitan district" may carry different regional meanings, here it refers to those districts where the problems mentioned in note 8 are most likely to arise.

8. Although tenure in higher education may be subject to some of the same criticisms as tenure in lower levels of education, serious problems associated with academic freedom in higher education place it beyond the scope of this note. See note 27 *infra* and accompanying text; but see Olswang and Fantel, *Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles*, 7 J. COLL. & U.L. 1 (1981).

Large metropolitan areas are also excluded because their size may reduce the effectiveness of the electoral process as a safeguard against tyrannical administrators. Poor working parents may not be sufficiently able to keep abreast of their child's education, to know whether teachers are performing adequately, and to put proper pressure on their elected school board. Also, the huge number of administrators and teachers required to staff these large districts may make it very difficult for the school board to have personal knowledge of each teacher and administrator under it. Where this knowledge is lacking this electoral process is unlikely to afford much protection. It is also possible that tenure is necessary to attract teachers to teach in inner-city schools. See note 29 *infra*. Wisconsin may have a possible solution. Teachers are hired on a purely contractual basis in all districts of the state with the exception of the Milwaukee school district, which has a population of more than 500,000. In that large metropolitan district, tenure statutes are deemed necessary due to the problems stated above. See WIS. STAT. ANN. §§ 118.21-.23 (West 1981).

9. See notes 68-74 *infra* and accompanying text.

10. This note distinguishes true tenure statutes which have both substantive and procedural elements, see, e.g., ALASKA STAT. §§ 14.20.170 et. seq. (1975), from "fair dismissal laws" which are basically procedural. Fair dismissal laws typically do not limit discharge to specifically enumerated causes as do tenure statutes; basically any cause is permissible as long as it is not unconstitutional. Their procedural requirements, however, closely resemble those found in tenure statutes. See, e.g., ARK. STAT. ANN. §§ 80-1264 et seq. (1980).

Of the fifty states, twenty-nine have statutes which could be classified as true tenure statutes and ten seem to have fair dismissal laws allowing any cause which is offered in good faith and is not unconstitutional. The remaining eleven states do not strictly conform to either of these classifications. Of note are those which enumerate causes for dismissals during the term of contract but not in cases involving nonrenewal of contracts. See, e.g., N.D. CENT. CODE § 15-47-38 (1981).

11. See 68 Am. Jur. *Schools* § 151 (1973).

12. There are differences in procedural requirements between "dismissals" during a teacher's

isfactorily in the same district for the requisite probationary period, usually two to three years.<sup>13</sup>

Once tenure has been granted, the teacher can be terminated only for one of the substantive causes which the state enumerates. These causes generally include the following: immorality, insubordination, incompetence, neglect of duty, necessity to reduce the number of teachers due to monetary crisis, and sometimes "other just cause."<sup>14</sup> While "incompetence" and "other just cause" might seem to strike at the disease of mediocrity, they frequently do not.<sup>15</sup> In Connecticut, for example, the school board rarely brings a charge of incompetence because the burden of proof is so onerous.<sup>16</sup> In addition, the Iowa Supreme Court's recent decision in *Briggs v. Board of Directors*,<sup>17</sup> which included mediocre performance in the definition of "just cause," drew strong criticism because it did not require specific findings on the substantially detrimental effects which a tenured principal's mediocre performance had on "lowered standards of instruction, lowered test scores of pupils, lowered morale of students or faculty, or of any dissension within the school."<sup>18</sup> One cannot easily quantify the extent of damage which a mediocre teacher does to a student or school system. An inordinate amount of time and energy would be necessary to compile enough evidence to establish conclusively a substantially detrimental effect on education. Few school boards would find such an exercise fruitful unless the teacher were grossly incompetent.

In addition to the difficulty of establishing substantive violations, school boards must follow detailed procedural requirements of notice and hearing. These procedural requirements are often very time-consuming, costly, and cumbersome.<sup>19</sup> For example, the Illinois tenure

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term of contract and "terminations" after his contract has expired. See note 43 *infra*. However, these terms are used interchangeably in this note.

13. Probation periods may range as high as five years. See MO. REV. STAT. § 168.104 (1982).
14. Only thirteen of the twenty-nine states which enumerate specific causes include the broader category of "other just cause."
15. The Illinois statute allows dismissal if the interests of the schools require it. ILL. REV. STAT., ch. 122, § 10-22.4 (1977). Such discretion is subject only to provisions of the Teacher Tenure Act, Ill. Rev. Stat., ch. 122, 24-11 to 24-15 (1977). However, the "interests of the schools" category is rarely used by itself and its repeal has been advocated. See Comment, *A Question of Remediability: Standards of Conduct for Illinois Public School Teachers*, 29 DEPAUL L. REV. 523, 558 (1980).
16. Comment, *Teacher Tenure in Connecticut: Due Process Rights and "Do Process" Responsibilities*, 8 CONN. L. REV. 609, 702-03 (1976).
17. 282 N.W.2d 740 (Iowa 1979). The court stated:  
 [A] "just cause" is one which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students . . . . It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance.  
*Id.* at 743. See also COBB, AN INTRODUCTION TO EDUCATIONAL LAW, 51 (1981) which cites E.C. BOLMEIER, THE SCHOOL IN THE LEGAL STRUCTURE 194 (1973) as stating that "[s]chool boards can demand of teachers only average qualifications, not the highest, in determining incompetency."
18. Note, *Contract Terminations of Iowa Public School Teachers: Considerations of the Substantive Content of "Just Cause" for Termination*, 30 DRAKE L. REV. 123, 131 n.52 (1980-1981).
19. See, e.g., Thurston, *Tenured Teacher Dismissal in Illinois, 1975-1979*, 69 ILL. B.J. 422, 422-23

statute provides for an initial notification to a teacher, outlining his deficiencies and allowing a reasonable amount of time to remedy them.<sup>20</sup> This step is subject to review as to whether or not the amount of time allotted was reasonable.<sup>21</sup> If the reviewing officer decides that sufficient time has elapsed, the school board may then vote to dismiss the teacher. Once this happens, notice must be given stating the reasons for dismissal; and, in large metropolitan areas or when the teacher requests it, a hearing must be set.<sup>22</sup> At the hearing, the school board has the burden of proving by a preponderance of the evidence that the teacher is immoral, insubordinate, *et cetera*. A record of the proceedings is made, and a hearing officer renders a decision. This decision is subject to judicial review.<sup>23</sup> Therefore, it is possible to have two administrative review proceedings in addition to the normal judicial appeals process.

These broad substantive protections and cumbersome procedural requirements make termination of all teachers very difficult. Thus, tenure shields the mediocre and bad as well as the good teacher. Not only does it shield the mediocre teacher, it may be in part responsible for his being so. Many teachers who are secure in their employment and only accountable when they become egregiously incompetent are tempted to do only what they must.

### The Historical Purposes of Tenure: Distinctions Between Higher and Lower Education

Naturally, the tenure system had some merit or it would never have been instituted. As this note will show, however, the historical purposes of tenure are no longer effectively served in primary and secondary public schools.

Tenure originated in higher education where its *raison d'etre* is both the protection of academic freedom and the establishment of economic

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(1981). The possibility of review on several levels makes it time-consuming; the expenditure of school funds on attorney fees, hiring of substitutes for teachers who are testifying at hearings, and reporting fees make it costly.

20. ILL. REV. STAT., ch. 122, § 24-12 (1977). Several other states also require notification of deficiencies. *See, e.g.*, S.D. COMP. LAWS ANN. § 13-43-1.1 (1975); S.C. CODE § 59-25-440 (1976).
21. *See, e.g.*, Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 82 Ill. App. 3d 820, 403 N.E.2d 227 (1980); Thurston, *supra* note 19, at 423.
22. ILL. REV. STAT., ch. 122, § 24-12 (1977) provides:  
The teacher may be present with counsel and offer evidence . . . The board must [issue subpoenas] at the teacher's request, but the teacher is limited to 10 subpoenas . . . A record of the proceedings is to be kept, and the board must employ a competent reporter to take notes of the testimony. The board and the teacher share the reporting costs equally . . . Judicial review of the final administrative decision of the board is governed by the Administrative Review Act. If the board's decision is reversed on review, the board must pay all the court costs.
23. Although judicial review is not available in some states, *see, e.g.*, OR. REV. STAT. § 342.930 (1979); most states provide for it. *See, e.g.*, WASH. REV. CODE ANN. § 28A.58.515 (1970).

security.<sup>24</sup> The 1940 Statement of Principles on Academic Freedom and Tenure<sup>25</sup> states:

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability.<sup>26</sup>

In higher education, academic freedom is an important motivation for tenure. There it encompasses freedom in research, in publication, and in teaching presentation. The type of information discussed in course work at those levels is often controversial in a political or social sense, or within the confines of the specific discipline.<sup>27</sup> Although difficult to imagine in light of the current surplus of teachers, economic security may also have a place in higher education. Higher paying jobs in the business sector may affect a school's ability to attract teachers in professional schools and the sciences.

Subsequent to the acceptance of tenure in higher education, many state legislatures provided for it statutorily in lower levels of education. But, neither "academic freedom" in its pure sense as described above<sup>28</sup> nor "economic security," with the possible exception of large metropolitan areas,<sup>29</sup> applies to lower education. Since few controversial subjects are taught and the curriculum is well-defined, the elementary and secondary schoolteacher, regardless of tenure, is fairly limited with respect to curriculum and methodology.<sup>30</sup> The courts have generally shown a particular sensitivity to the delicate issues associated with the distribution of control in these areas and have expressed their unwill-

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24. For a detailed discussion of the history of academic tenure in America, see FACULTY TENURE, *supra* note 1, at 93-159.
  25. The 1940 *Statement of Principles on Academic Freedom and Tenure* is a joint effort of the American Association of University Professors and the American Association of Colleges and is widely endorsed by colleges and universities. The full text is reprinted at 60 A.A.U.P. Bull. 269 (1974).
  26. *Id.*, 60 A.A.U.P. Bull. at 270.
  27. However, even in upper levels of education, recent Supreme Court decisions make tenure far less important than it once was. The "right of academic freedom" as it concerns teachers has assumed constitutional dimensions and has been protected as such in higher education since *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where the Court said: "mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Id.* at 251. More recently, in *Healy v. James*, 408 U.S. 169 (1972), the Court reaffirmed its intention to protect academic freedom and stated: "The college classroom with its surrounding environs is peculiarly the 'market-place of ideas.'" *Id.* at 180.
  28. Although a teacher's first amendment rights as a citizen are frequently included in the concept of "academic freedom," these rights should be distinguished from "academic freedom" in its pure sense where questions concerning the teacher's course content, presentation, and freedom in research and publication are raised. See also Note, *Cary v. Board of Education: Academic Freedom at the High School Level*, 57 DEN. L.J. 197 (1980).
  29. See note 8 *supra*. There is some need to attract teachers to inner-city schools. However, the simple guarantee of job perpetuation may attract many persons. Administrators justly wish to avoid these candidates since they may rely on job security and perform minimally. Higher salaries perhaps represent a stronger incentive for quality teachers to teach in the inner-city.
  30. Tenure does not allow teachers to use unapproved methodologies or curriculum and teachers who disregard the guidelines set forth by administrations in these areas may be subject to dismissal for insubordination.

ingness to enter those arenas.<sup>31</sup> They have left the final decisions with school administrators rather than individual teachers.<sup>32</sup> This is understandable. Because of the compulsory nature of attendance and the fact that students are in their formative years, both parents and the school boards, in their role as *parens patriae*, have superior claims to those of individual teachers.

While recognizing that "courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems,"<sup>33</sup> the Supreme Court struck down an Arkansas statute which prohibited the teaching of evolution.<sup>34</sup> In so doing, it declared that courts "have not failed to apply the First Amendment's mandate in our educational systems where essential to safeguard the fundamental values of freedom of speech and inquiry and belief."<sup>35</sup> The Court also intervened in the area of course content in *Meyer v. Nebraska*.<sup>36</sup> In reversing the conviction of a teacher who had taught German in violation of state law, the Court stated that the due process clause protects against arbitrary restrictions on the freedom of teachers to teach and students to learn.<sup>37</sup> Interestingly, the foregoing discussion reveals that when protection is afforded academic freedom in lower levels of education, courts rather than tenure statutes have provided it.<sup>38</sup>

Because of the difficulty in defending tenure in primary and secondary schools on grounds similar to those adopted in higher education, tenure statutes reflect a somewhat different purpose in lower education. The immediate goal, there, is often stated as the provision of stability within the teaching profession by assurance of continued service to experienced teachers rather than subjection to dismissals based on political or arbitrary reasons.<sup>39</sup> Thus, tenure supposedly prevents political and arbitrary factors from influencing decisions of whether or not to retain a teacher. This, in turn, should create a situation whereby teachers are retained on merit rather than external factors—undoubtedly a desirable occurrence.

The primary purpose of tenure in lower education is or at least should be "merit-based" retention of teachers and not simple job per-

31. See, e.g., *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980) (curriculum); *Beebee v. Haslett Public Schools*, 406 Mich. 224, 278 N.W.2d 37 (1979) (methodology).

32. Although distribution of control over curriculum between parents and school boards has generated much litigation, it is unlikely that individual teachers will be given that prerogative. See generally Orleans, *What Johnny Can't Read: "First Amendment Rights" in the Classroom*, 10 J. L. & EDUC. 1 (1981), and Comment, *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980), 50 U. OF CIN. L. REV. 188 (1981).

33. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

34. *Id.* at 109.

35. *Id.*

36. 262 U.S. 390 (1923).

37. *Id.* at 400.

38. Tenure statutes probably would not have prevented the dismissals in *Meyer* and in *Epperson* since these teachers violated state laws which would constitute "cause" under many tenure statutes.

39. See, e.g., *Donahoo v. Board of Educ.*, 413 Ill. 422, 425, 109 N.E.2d 787, 789 (1952).

petuation which results in stability. Any argument which proposes a direct relationship between stability in the faculty and excellence of education is unrealistic. Although one teacher with many years of experience may be excellent, another with the same experience may be very poor because he has lost his enthusiasm. There simply is no direct correlation.<sup>40</sup>

Current tenure statutes are not the best means of attaining merit-based retention of teachers. Many of tenure's protections inhibit that goal because they promote the entrenchment of mediocre teachers.<sup>41</sup> Almost all of those protections, which actually further merit-based retention, are already adequately protected.<sup>42</sup> The few additional tenure protections which further merit-based retention<sup>43</sup> may be achieved through less drastic measures<sup>44</sup> than present tenure statutes with their concomitant problems.<sup>45</sup>

### Judicial Protections

In *Shelton v. Tucker*,<sup>46</sup> the Supreme Court of the United States stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>47</sup> In keeping with that statement, the Court has clearly indicated its intent to protect the first amendment rights of teachers regardless of tenure.<sup>48</sup> Although these rights are not absolute, the state must show a compelling state interest in placing restrictions on them.<sup>49</sup>

Accordingly, the Court has held that a teacher's freedoms of association and belief are shielded from legislative as well as school board interference. Statutes requiring political disclaimer oaths and bans on membership in certain political organizations have been held to be un-

40. Statutory provisions for reduction in force (R.I.F.) which require that teachers be retained on the basis of seniority should also be repealed since they bear no relation to competency.

41. See notes 14-23 *supra* and accompanying text.

42. See notes 46-60 *infra* and accompanying text.

43. Dismissal of a teacher during his contract term deprives him of a property interest which triggers the fourteenth amendment's notice and hearing requirements regardless of tenure. *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). However, tenure does buttress the guarantee of procedural due process in cases of nonrenewal where the teacher is not tenured and his contract has expired. In those instances, tenure or some clearly implied promise of continued employment provides the necessary "property" interest without which notice and hearing are not constitutionally required. *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

44. See notes 83-87 *infra* and accompanying text.

45. Not only does tenure promote the entrenchment of the mediocre, it blocks the job market for younger and minority teachers, and most importantly, dulls the quality of education for the youth of this country.

46. 364 U.S. 479 (1960).

47. *Id.* at 487.

48. In *Perry v. Sindermann*, 408 U.S. 595, 598 (1972) the Court stated that "the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights."

49. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (where the Court established a test balancing the teacher's interest as a citizen in making public comment against the State's interest in promoting the efficiency of public services it performs through its employees).

constitutional grounds for teacher dismissals.<sup>50</sup> In *Keyishian v. Board of Regents*,<sup>51</sup> a teacher's failure to sign a certificate stating that he was not a Communist resulted in the nonrenewal of his one-year teaching contract. The Court held this to be a violation of Keyishian's first amendment rights, stating that "[o]ur Nation is deeply committed to safeguarding academic freedom. . . [which is] a special concern of the First Amendment, [and] which does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>52</sup>

The Court has also explicitly indicated its intention to protect freedom of speech. In *Pickering v. Board of Education*,<sup>53</sup> the Court upheld a teacher's freedom of speech and refused to allow the school board to dismiss him for publicly criticizing the board's handling of financial matters even though his criticisms were based on incorrect information. While recognizing that harmony within the teaching staff and good working relations between an employer and employee may be legitimate state interests,<sup>54</sup> the Court held that this kind of criticism does not jeopardize those interests. In so holding, the Court established a strict rule:

Absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.<sup>55</sup>

Thus, according to *Pickering*, the Constitution protects a teacher's freedom to speak on issues of public importance unless it has a direct disruptive impact on the employment relationship.<sup>56</sup> The Court has since expanded this rule to include private speech. In *Givhan v. Western Line Consolidated School Dist.*,<sup>57</sup> statements made in private encounters

50. Questions concerning freedom of association, as it pertains to the rights of homosexual teachers, are still hotly debated. In such situations, tenure should not be employed as a means of enforcing moral standards. In any event, constitutional issues regarding the balance of a teacher's rights against parent and state interests in the child's education supersede tenure. Despite the existence of tenure statutes, teachers have been and will probably continue to be dismissed. For a general discussion of this problem, see Note, *Free Speech Rights of Homosexual Teachers*, 80 COLUMBIA L. REV. 1513 (1980).

51. 385 U.S. 589 (1967).

52. *Id.* at 603.

53. 391 U.S. 563 (1968).

54. The Court explained its exception for speech causing a disruptive impact as follows:

The statements [were] in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board . . . are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

*Id.* at 569-70.

55. *Id.* at 574.

56. See notes 61-66 *infra* and accompanying text.

57. 439 U.S. 410 (1979). Under *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the board could have dismissed Ms. Givhan only if it had proven that its decision to terminate her would have been made in the absence of her private encounters with the principal. Justice Stevens, in his concurring opinion, stated his belief that, in light of the evidence, the school board could not have met this burden of proof. 439 U.S. at 418. See also Note, *First*

with a school principal were deemed impermissible grounds for dismissal.

In addition to concerns over first amendment rights, fears of dismissal because of political patronage have been expressed.<sup>58</sup> However real these fears may have been in the past when many of the present tenure statutes were first enacted, they are now unfounded. The Supreme Court's decision in *Elrod v. Burns*<sup>59</sup> makes it clear that dismissals of teachers based on political patronage are unconstitutional.<sup>60</sup>

The Court's decision in *Pickering* seems to leave a loophole—that of the disruptive impact on the employment relationship. This issue must be briefly examined for it is an area where simple bad feelings between a teacher and principal or administrator could become a reason for dismissal. Imagine the worst scenario: a ruthless and incompetent principal recommends the termination of a very competent teacher because he has offered constructive criticism of the principal. This recommendation is accepted by an incompetent superintendent and board who neither know of, nor care about, the teacher's competence or the principal's incompetence. Assuming the absence of tenure and that the principal recommended termination after the teacher's contract had expired,<sup>61</sup> the teacher would be unjustly discharged. This unlikely scenario of incompetence at every level of administration would allow individual injustices to occur.

Several factors militate against such an occurrence. It is uncertain whether simple constructive criticism will be viewed as sufficient aggravation to constitute a "disruptive" impact on the employment relationship.<sup>62</sup> Two recent Supreme Court decisions have also reduced the likelihood of malicious or arbitrary dismissals. The Court held in *Wood v. Strickland*<sup>63</sup> that individual administrators and school board members are "persons" under section 1983 of the Civil Rights Act of 1971.<sup>64</sup> As such, they are subject to personal liability for their actions which are in violation of well-settled law. Presumably, the possibility of personal liability would make even the most unscrupulous administrator think twice before arbitrarily dismissing a teacher. The Court has also ruled that school boards as entities may be sued under section

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*Amendment Rights—Public Employees May Speak a Little Evil—Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979), 3 W. NEW ENG. L. REV. 289 (1981).

58. Sinowitz, *What About Teacher Tenure?*, N.E.A.J. 40, 41 (April 1973).

59. 427 U.S. 347 (1976).

60. *Id.* at 393.

61. See note 43 *supra*. If a hearing had been required, the board's decision would probably have been reversed. A teacher willing to continue working in this unpleasant environment might be reinstated. A teacher unwilling to continue would be monetarily compensated. The model statute set forth below attempts to deal with this problem. See note 69 *infra*.

62. The Court left open the case of "disruptive" impacts in *Pickering*; it did not feel that Mr. Pickering's letter fell within that category even though the letter included false criticisms of his employer. 391 U.S. 563, 570-73 (1968).

63. 420 U.S. 308, 321-22 (1975).

64. 42 U.S.C. § 1983 (1976).

1983.<sup>65</sup> Taxpayers are unlikely to reelect board members who, by their wrongful actions, have jeopardized the finances of the school district. Thus, the election process should also guard against the prospect of incompetency at all levels of administration and decrease the possibility of individual injustices.<sup>66</sup>

### MODEL STATUTE

Because existing tenure statutes pertaining to elementary and secondary school teachers no longer serve the historical reasons for their creation, in part due to recent judicial decisions, and in part because their language is ill-defined and their procedures excessively cumbersome, legislatures should repeal them. Due to certain potential problems facing the good teacher, legislatures ought to pass a statute which has as its goal academic excellence based on merit-retention of teachers.

The foregoing discussion suggests that a legislature must balance two basic interests when drawing up a statute governing the employment of teachers. The first and most important interest is that of the state in providing students with the best possible education. The second interest which should be protected is that of the individual teacher to merit-based retention.

The following statute furthers those ends. It allows school boards more easily to dismiss unmotivated and tired teachers and to replace them with others who are energetic and dedicated. At the same time, it grants substantive protections against arbitrary and purely economic<sup>67</sup> dismissals, both of which obstruct merit-based retention. It also attempts to prevent the complacency which occasionally turns energetic teachers into dull teachers.

#### The Statute<sup>68</sup>

1. This is not a tenure statute and does not create any expectancy of continued employment. It grants only the limited procedural pro-

65. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980).

66. Reliance on the election process to produce a system of accountability has the added advantage of correcting deficiencies throughout the different administrative levels. Elected boards, dependent on support from parent-constituents, would be pressured into appointing conscientious superintendents who would keep informed about the competency of both teachers and principals under their control. Such a system is preferable to tenure's statutory morality which is, at best, a "Band-Aid" approach.

67. See Sinowitz, *supra* note 58.

68. This model statute is meant to be only skeletal in form. The disparity in the structure of different school systems and in the delegated powers of administrators dictates this. In addition, the model is a composite of several different statutes and many of its provisions are already present in more detail in existing statutes. See, e.g., note 75 *infra*.

In states where tenure statutes provide a contractual relationship between the teacher and state, prospective application of the model statute may be necessary since retroactive application may violate the contract clause of Art. I, § 10 of the Constitution. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-32 (1977). In states where there is no contractual relationship, retroactive application would be permissible. See COBB, *supra* note 17, at 40.

Although the terms such as "principal," "superintendent," and "school board" are widely

- tections which are explicitly set forth.<sup>69</sup>
2. All teachers shall be hired on an annual contractual basis.
  3. Yearly evaluations shall be made.<sup>70</sup> These shall include:
    - a. principal evaluations of teachers,<sup>71</sup> and
    - b. teacher evaluations of the principal.<sup>72</sup>
  4. Recommendations for teacher dismissals or nonrenewal of their contracts shall be made by the principal. This recommendation must include the specific charges against the teacher. These recommendations shall be transferred, along with all yearly evaluations, to the superintendent. If the superintendent decides to affirm that recommendation based on his personal knowledge and the evaluations, he shall send those evaluations and his comments to the school board for final determination.
  5. The school board shall not base a decision of nonrenewal of a teacher's contract on the following:
    - a. any constitutionally impermissible grounds, or
    - b. arbitrary or capricious grounds, not reasonably related to improvement of the quality of education provided students, or<sup>73</sup>
    - c. purely economical grounds, without regard to teaching ability and job performance.<sup>74</sup>
  6. Notice of nonrenewal shall be given to all teachers for whom the board has made a decision of nonrenewal. This notice shall be timely<sup>75</sup> given and shall state the specific reasons for the decision.
  7. A hearing shall be granted when requested.<sup>76</sup> The hearing shall be conducted before a hearing officer who does not reside in the district involved. The hearing officer will be chosen in the following way. The state board of education will supply the local board and teacher with a list of five neutral officers.<sup>77</sup> Each party will alter-

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accepted, some states do not use them. It is assumed that these states will substitute their own terminology accordingly.

69. See *Arnett v. Kennedy*, 416 U.S. 134, 156-58 (1974), and *Bishop v. Wood*, 426 U.S. 341, 343-47 (1976), which allow limited procedural protections which do not amount to a cognizable "liberty" or "property" interest under the fifth and fourteenth amendments.
70. A principal recommending termination at the end of a teacher's first year should, of course, make his evaluation prior to the end of that year so that notice may be timely filed and the teacher may look elsewhere for employment.
71. Some states have already provided teacher evaluation procedures. *E.g.*, S.D. COMP. LAWS ANN. § 13-43-9.1 (1975); ARIZ. REV. STAT. ANN. § 15-537 (Supp. 1981).
72. Where teacher evaluations of their immediate supervisor are made, possible problems arising in the supervisor's competence rather than the teacher's competence may surface. The superintendent or school board would then be in a better position to make an informed decision regarding the teacher's dismissal.
73. "Reduction in force," accomplished on the basis of merit rather than seniority, would not constitute "arbitrary" termination. See note 40 *supra*.
74. This provision is not meant to prohibit (R.I.F.). See note 33 *supra*. Here, however, since merit is not in question, seniority should prevail.
75. Most states already define "timely notice" and require that it be given two months or more prior to termination.
76. See note 61 *supra*.
77. Although some states do not require that the hearing officer be a non-board member, see *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assn.*, 426 U.S. 482, 497 (1976) (where the Court in determining whether, as a member of the board, the hearing officer was neutral, stated: "[there is a] presumption of honesty and integrity in policymakers with decisionmaking power."). It would appear more fair if the hearing officer were chosen as outlined here. However, this procedure may not be possible in some states where issues of

nately strike one name and the remaining officer will conduct the hearing.

8. Both parties may be present with counsel at the hearing and may present evidence. The teacher has the burden of proving by a preponderance of the evidence that nonrenewal was based on impermissible grounds as set forth in § 5 (a-c).
9. The hearing officer's decision may be appealed in the judicial courts of this state.<sup>78</sup> If the school board's decision is reversed on review, it must pay all court costs and attorney fees.

### Flexibility for School Boards and Their Appointed Administrators

Several sections of the statute provide added flexibility for school boards and their appointed administrators. Sections one and two effectively substitute the continuous employment of teachers presently supplied by tenure statutes with a system based on yearly contracts.<sup>79</sup> These provisions require teachers to remain competitive in the job market and should allow administrators to seek out and hire the most competent teachers available.

At first glance this might seem to imply perpetual and disconcerting turnover in the ranks of teachers. However, experience in the business world shows this is not likely. The employer and management sectors have a natural bias in favor of retaining the "known entity," if that person is competent and dependable. Continual hiring and firing is not in the interest of management (principal and superintendent) or employer (school board) since it inhibits the smooth operation of a school. In addition, most people who work together develop certain bonds of friendship and understanding which also inhibit a continual hiring and firing policy.

The substantive and procedural protections presently encountered under tenure statutes make it difficult to discharge a teacher.<sup>80</sup> Sections five and eight of the model statute strike at those provisions and greatly ease that difficulty.

Section five represents the converse of the corresponding substantive provisions of tenure statutes. It enumerates specific grounds for which dismissals are forbidden and implies that all others are permissible.<sup>81</sup> Contrary to existing tenure statutes, it presumes honesty and integrity in public elected officials and gives school boards needed flexibility to upgrade their faculties.

Section eight shifts the burden of proof from the school board to the

municipal sovereignty would prohibit relinquishment of control over hiring and firing to the state.

78. Judicial review may not be feasible in all states. A few must leave the final decision with the school board. *See* note 77 *supra*.

79. *See* note 69 *supra*.

80. *See* notes 15-23 *supra* and accompanying text.

81. Tenure statutes enumerate grounds for which dismissals are permitted and thereby imply that others are not.

teacher.<sup>82</sup> Although placing the burden of proof on the teacher may appear harsh, it is mitigated by the following. First, the dismissal notice which the school board issues to the teacher must be specific in its statement of reasons. Secondly, when the decision to dismiss has been reached, it has been arrived at by the mutual examination of principal, superintendent, and school board, based on a study of all evaluations of both teacher and principal. The statute presumes that the joint decision of a number of people should receive more weight than the individual teacher's self-appraisal.

These provisions should decrease the number of hearings and promote only genuine challenges to the school board's decisions. Thus, school boards should no longer be deterred from making legitimate decisions to dismiss teachers because of the prospect of a costly and time-consuming hearing.

### Protections for Teachers

The second goal of this statute is to provide certain protections for teachers so that merit-based retention is promoted. Although it is impossible to entirely eliminate subjectivity from decisions to renew a teacher's contract, this statute can diminish it.<sup>83</sup>

The evaluation procedures of sections three and four should minimize the likelihood of arbitrary or malicious dismissals.<sup>84</sup> Both superintendents and school boards will be less likely to rely solely on a principal's recommendation if that recommendation does not coincide with evidence in the evaluations before them.<sup>85</sup>

In the absence of any statute, teachers would be employed, like most other salaried employees, at the will of their employer, the school board. This would mean that a teacher could be fired when his contract expired without being given notice or a hearing.<sup>86</sup> Although the business sector works smoothly under this process, few would object to a notice requirement.<sup>87</sup> Therefore, section six provides for timely notice which states specific reasons for the decision of nonrenewal. Such

82. This structure parallels that set forth in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). In that case, a teacher claimed that he was terminated because of conduct which was constitutionally protected. The Court held that the teacher had the burden of proving that his conduct was indeed protected and represented a substantial motivating factor in the board's decision to fire him. Once this was shown, the burden would shift to the board to show that, absent that protected speech, it would have made the same decision. *Id.* at 284-87; see note 57 *supra*.

83. With or without tenure, there is no real check on the subjective way in which teachers are hired. In light of this, tenure would serve to make it difficult for later administrations to terminate an employee who was not initially hired on the basis of merit.

84. These evaluations promote thoughtful decisionmaking and thus prevent innocent as well as arbitrary errors.

85. See also notes 63-66 *supra* and accompanying text.

86. See note 43 *supra*.

87. Only serious charges such as immorality would infringe upon a teacher's "liberty" interest and require a hearing. This should not unduly burden administrations since few of these charges are filed. Indeed, notice requirements benefit school boards by fostering trust and confidence and also by precluding claims of arbitrariness made by terminated employees.

notice will not burden administrators for they must already know the reasons for their decision and need only state them. As Justice Marshall said in his dissent in *Roth*:

[I]t is not burdensome to give reasons when reasons exist. . . . As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.<sup>88</sup>

Not only will this notice provision aid teachers by rendering arbitrary actions more difficult, it will also help them in preparing their case against the decision, if indeed it was arbitrarily made. Once specific charges are stated, they are more easily refuted.

Sections five (b) and nine also provide protection against frivolous termination proceedings. Section five (b) explicitly prohibits arbitrary dismissals and requires a hearing when a teacher claims that the board's decision was arbitrary. Section nine provides that the school board pay court costs and attorney fees if its decision to terminate a teacher is reversed on review.<sup>89</sup>

Unlike fair dismissal laws,<sup>90</sup> this statute does not require a teacher to have served a set number of years before its protections apply. All teachers should be free from arbitrary dismissals and there seems to be no compelling reason to differentiate between them according to their length of employment.

Proponents of tenure frequently claim that tenure is necessary to prevent purely economical dismissals.<sup>91</sup> Such dismissals are contrary to merit-based retention and should be avoided. While dismissals on a purely economic basis might be acceptable in some sectors of the business world, since the goal there is often simply to produce a good and cheap product, it is not the view of this note that education itself can be given a cost/efficiency price tag like that of a manufactured object. The talent of a good teacher to inspire students cannot be so simply quantified as the cost/efficiency of producing a car. Therefore, it would not be in the long-range interest of academic excellence to fire one teacher who is meritorious and has worked ten years in the system in favor of another teacher who is also meritorious but has worked only two years and is drawing a much lower salary. This would inevitably produce an unhealthy psychological climate among teachers and would be a serious detriment to the quality of education, where so much of that quality depends upon the individual teacher's psychological verve.

The specific problem of purely economic dismissals which is detailed above is addressed in section five (c). Ideally, administrators would not dismiss a highly competent teacher for this reason. Yet, con-

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88. 408 U.S. at 591.

89. See note 44 *supra*.

90. See note 10 *supra*.

91. See Sinowitz, *supra* note 58.

cerns over budgetary cuts may make it difficult even for conscientious administrators to resist doing so and hiring another qualified teacher at a much lower salary. It seems, therefore, preferable to prevent this situation by statutory means.

#### **Accountability**

The final goal of this statute is the prevention of complacency which often turns good teachers into mediocre teachers. Annual evaluations will keep the teacher apprised of his performance level, and an annual contract will keep him accountable for the quality of his teaching. This system of accountability rather than job security requires teachers to stand on their merit. It therefore promotes quality educators and quality education.

#### **CONCLUSION**

The increasing disenchantment with tenure and its weakened position due to recent Supreme Court decisions suggest that state legislatures will be called upon with greater frequency to reevaluate their tenure statutes. States have a duty to provide their youth with the best quality of education they can. The professed purpose of tenure statutes, improvement of state school systems, is in keeping with this duty. However, existing statutes, rather than improving school systems, have a tendency to perpetuate mediocrity. These statutes should be repealed. A statute similar to the above model will improve the educational system and serve the dual function of allowing school boards to upgrade their faculties while maintaining basic fairness for teachers.

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