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*331 ADEQUATE CAUSE FOR DISMISSAL: THE MISSING ELEMENT IN ACADEMIC FREEDOM

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I. INTRODUCTION

Dr. Joycelyn Elders, former United States Surgeon General, espouses some controversial views, to say the least. Her openmindedness about condom distribution, masturbation, and legalizing drugs cost her the Surgeon General post. If some neophyte conservative legislators in Arkansas had their way, these views would also have cost Dr. Elders her position as a pediatrics professor at the University of Arkansas for Medical Sciences. [FN1] It seems these legislators feared that the good doctor would infect young, impressionable medical students with her radical ideas. What those legislators failed to consider, however, is that Dr. Elders, a tenured professor, has the right not only to believe as she does, but also to espouse those beliefs in the classroom. That right is called academic freedom.

Teachers and researchers in American universities [FN2] enjoy broad academic freedom in their professional lives. Embodied in this freedom is the ability to exercise "full freedom in research and in publication of the results, . . . freedom in the classroom in discussing his subject, . . . and f ree dom from institutional censorship or discipline" [FN3] in extramural utterances. In order to protect these freedoms, faculty members who are deemed competent by their peers [FN4] are granted "permanent or continuous tenure, and their service shall be terminated only for *332 adequate cause . . . ." [FN5] The protection afforded by tenure, it is argued, is necessary to compel institutions to dismiss faculty members only for "ideologically neutral" [FN6] reasons and, therefore, "permits thought and inquiry to be truly disinterested . . . ." [FN7] This reliance on ideological neutrality as opposed to dogma is the cornerstone of academic freedom in America. [FN8]

Inevitably, tenure has also become the lightning rod for criticism of the academic community and the American higher-education system. Critics contend that tenure erects an impenetrable barrier to removing the teacher who cannot teach, the scholar who cannot publish or the poor university citizen. [FN9] The result, say critics, is an education system which is ill-equipped to educate students and advance research and scholarship. Moreover, taxpayers and education consumers are forced to subsidize incompetence. [FN10]

This dichotomy of thinking is unfortunate and unnecessary. Academic freedom, as a theory and a right, assumes that the scholar is both competent and active. [FN11] This assumption is manifested in the provision that any faculty member may be removed from his tenured position for "adequate cause." However, no working definition of adequate cause exists. The American Association of University Professors (AAUP), the group generally credited with establishing the notion of academic freedom in the United States, defers to the individual universities for a definition. [FN12] Courts are reluctant to establish a definition, preferring instead to focus on whether a dismissed faculty member has been afforded adequate procedural due process. [FN13] This reluctance is a natural byproduct of the courts' deference to the professional judgment of university administrators and faculty committees. [FN14] As a result, administrators *333 in some situations create

adequate cause for termination out of minor infractions. Conversely, in other situations administrators take no action against clearly incompetent faculty members. This reluctance to act may be partially attributed to having too little guidance as to what substantiates adequate cause for termination. It may also be attributed to administrative recalcitrance. In other words, it is easier to look the other way when a tenured faculty member slips below the competence standard than it is to take action to remedy the situation or begin the dismissal procedure. [FN15]

A working definition of the term "adequate cause for termination" is needed. This definition should be grounded in the purposes and consistent with the policies of academic freedom as it is understood in the American higher- education system. It should be consistent with the notion that removing the competent and active scholar should be difficult, and yet still be an effective tool for ridding the academic community of incompetent and ineffective faculty members. Finally, this definition must be precise enough to prevent it from being used as a pretense for dismissing the faculty member who falls out of favor with university administrators.

However, merely defining the term stops short of solving the problem. A standard must be implemented before it can serve any purpose. Therefore, several catalysts will be examined which, alone or in conjunction with one another, may serve as a mechanism to trigger the inquiry into whether adequate cause exists for the dismissal of a faculty member. Each of these catalysts must be consistent with the idea of lifetime tenure for the active and competent scholar. Additionally, these catalysts must address the related concerns that adequate cause is often used as a pretext for removing a "nuisance" from the faculty or for dismissing a faculty member who has exercised his First Amendment rights. These concerns frequently create litigation between institutions ***334** and dismissed faculty members. [FN16] On the other hand, these catalysts should consider the basic premise that the rights granted by academic freedom also impose a responsibility on the academy to ensure professional integrity.

II. PRELIMINARY MATTERS

Before moving to a consideration of academic freedom and adequate cause for dismissal, some preliminary issues must be addressed. The first issue concerns the expectations institutions should have of faculty members. This article refers to three areas of academic activity: teaching, scholarship and community service. Those, indeed, are the areas where professors are expected to be active and competent.

However, academic freedom does not require that all professors achieve the same degree of activity and participation in all three areas. It is certainly acceptable, for instance, for a faculty member to excel in the classroom and give large amounts of time to community service, yet not actively advance the scholarship in her field. As long as she remains current on the developments in her field, a lack of publication or research should not, alone, call her reputation into question. Faculties need to balance and the inquiry into whether a professor is active and competent should contemplate that balance. [FN17]

Second, the continued viability of the tenure system is not questioned here. Commentators have argued that tenure, as it currently exists, should be discarded. [FN18] The basic premise of these critics is that the costs of tenure outweigh the benefits. Conversely, other commentators argue that without tenure, academic freedom is impossible. [FN19] This article does not join that debate.

Rather, it will be assumed that tenure should be granted and will continue to be granted in the future. The thesis of this article is that the mechanism for addressing the costs of tenure already exists in the concept of removal for adequate cause. What is absent is a proper definition and application of that mechanism.

Third, this article should not be seen as an administrator's handbook demonstrating the court-approved methods for dismissing tenured faculty***335** members. [FN20] The courts usually limit their inquiry to whether the proper procedural due

process has been granted. [FN21] If so, the courts will generally find the stated substantive grounds to be adequate, [FN22] regardless of how trivial they may be. [FN23] Instead, the purpose of this article is to define adequate cause for dismissal consistent with the goals and purposes of academic freedom. This approach is necessary because dismissing tenured faculty members when cause exists is an integral element of academic freedom.

Academic freedom presupposes active, competent teaching and scholarship, as well as a good university citizen. [FN24] If a particular faculty member does not meet these standards, the goals and purposes of academic freedom are not being fulfilled. Therefore, the concept of academic freedom not only allows but contemplates dismissal for adequate cause. This line of reasoning, not safeguarding administrators from litigation, motivates this article.

Fourth, and as a corollary to the previous discussion, this article does not define adequate cause by "categorizing" certain types of behavior which provide grounds for dismissal. [FN25] That approach, though useful and often accurate, neglects the essential inquiry: why does the particular behavior amount to adequate cause for dismissal? Rather, a standard will be proposed by way of a definition of adequate cause. Then various types of behavior will be examined in light of that ***336** standard to determine whether academic freedom requires dismissal.

Finally, when this article refers to tenure, it is referring to the traditional understanding of tenure. Tenure in that respect is "permanent or continuous." [FN26] Certainly, other systems exist, such as a series of terminal contracts or no contractual job protection at all. However, those systems are outside the scope of this article, and, in fact, could be considered a negative reaction to problems traditional tenure supposedly created. [FN27]

III. ACADEMIC FREEDOM IN AMERICA

To define adequate cause for dismissal of a tenured faculty member, it is necessary to understand the concept of academic freedom in American education. [FN28] This approach is required because dismissal for cause is an integral element of academic freedom. Therefore, the development and current understanding of academic freedom must be detailed.

A. Historical Underpinnings [FN29]

Early American institutions of higher education were vastly different from modern institutions. The earliest institutions were created and controlled by the church. [FN30] Arguably, many religious orders saw higher ***337** education as their avenue of influence when the Constitution removed them from the political spectrum. [FN31]

The result of this domination was that the goals of institutions centered around dogma and discipline rather than research and teaching. Teachers spent their class sessions drilling students in the languages and accepted dogma. [FN32] They were entrusted with in loco parentis responsibilities to produce young men and women of good moral character. [FN33] Moreover, academics were expected to conform to and express orthodox views. [FN34] Any deviation or expression of a contrary point of view would result in dismissal. [FN35] Certainly, academic freedom, as it exists today, allowing freedom to question and debate accepted views, "simply had no meaning." [FN36]

As the United States entered the industrial revolution following the Civil War, it became increasingly apparent that institutions were not equipping students for the requirements of an increasingly complex and technical society. A new university system, emphasizing science, languages, agriculture and engineering was needed. [FN37] Moreover, the morality/discipline-centered university was not a particularly enjoyable place for students. Therefore, student unrest and disorder became prevalent. [FN38]

The result of this failure to meet the needs of society and students was predictable. Institutions found it difficult to attract students. Low enrollment and an inadequate curriculum led to difficulty in obtaining the funding necessary to employ faculty and operate a university. [FN39] Institutions were faced with the choice of ceasing to exist or adapting to the changing needs of society. [FN40]

New institutions with a new curriculum based on science and technology emerged. These institutions were controlled by boards of trustees through a strong president. Teachers were expected to meet the needs of industry. Yet still, there was no freedom for the academy. Presidents and trustees could dismiss a faculty member for any or no reason. [FN41] Falling out of favor with the power structure by questioning accepted norms or speaking out on policy was the death knell for an academic career.

This movement toward meeting the increasingly complex needs of business and industry quite naturally led to the need for greater talent ***338** and expertise among the teaching corps. Rather than needing young clerics preparing for a life in the clergy, institutions needed highly trained and professional instructors to teach the subjects which would equip students to meet the needs of industry. [FN42] This was intensified by the growth of graduate, as opposed to undergraduate, education. The natural result was the beginning of the modern academy. Instructors began to demand higher salaries and greater professional autonomy, including some sort of employment security. Because their skills and talents were needed, their demands had to be given due consideration. [FN43]

These economic factors were not the only, nor arguably the most important, catalysts for change in the academic community. The academy began to place value on the freedom to question and contradict accepted dogma, practices and principles. [FN44] The value of questioning first became evident in the sciences with the need to experiment and hypothesize. [FN45] Only through constant questioning could the ultimate truth be discovered. [FN46]

Squarely opposing this movement was the historic notion that faculty members must not contradict the accepted notions of those who controlled the institution. First the church, then the trustees and presidents, expected their academic community to advocate the accepted points of view. Any attempt to challenge dogma could, and usually would, result in dismissal. [FN47] In such an environment, the experiment/hypothesis notion was unacceptable. On the other hand, it was becoming increasingly apparent that advancement within the modern, technological world would require such a system. [FN48] Advances in the sciences could only come through questioning the status quo and striving toward improvement.

The modern notion of academic freedom emerged from this struggle. Professors demanded better pay and greater autonomy in their professional lives. Society needed an academic community which was free to question accepted norms in the pursuit of truth and a better world with the security that they could not be dismissed on dogmatic grounds. Competence, not dogma, needed to be the standard against which the profession would be judged.

B. Academic Freedom Emerges

This conflict between the academy and its employers created academic freedom in America. The political, moral and religious constraints placed on the academy by "outsiders" came to be seen as the ***339** major retarding factor in the advancement of science. [FN49] The academy began to demand a new system in which scientists would not only be allowed to question and experiment, but would be encouraged to do so. [FN50] In this new system, scholars would be judged according to their professional competence alone. [FN51]

Judgment based on competence rather than dogma or substantive point of view was only half of the reform equation. Central to the concept of academic freedom was the idea that only a professor's peer group should judge her professional competence. [FN52] A peer-review system should be established which would evaluate the

competence of a particular scholar. This system would look only to the competence of a member of the academy rather than his substantive point of view. [FN53] This reform reflected the feeling among the academy that the chief obstacle to advancement within the sciences was interference from unqualified outsiders. [FN54]

These notions of academic freedom were formulated in the AAUP's 1915 General Declaration of Principles, [FN55] '?he single most important document relating to American academic freedom." [FN56] The committee, comprised exclusively of professors, believed that all truths could be revealed if scholars only had the freedom to pursue them. To that end, the committee declared that "the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity." [FN57] The committee made this "claim to freedom of teaching" [FN58]in order to protect the "integrity and the progress of scientific inquiry." [FN59] To ensure this freedom, the committee declared that "restraints as to the matter or manner of individual teacher's utterances" [FN60] could not be imposed ***340** by "bodies not composed of members of the academic profession." [FN61] Therefore, academic freedom, as the committee conceived it, would generally insulate individual professors from interference both "within" and "without" the university, but would allow for a peer-review system which would judge university professors solely on their academic competence. [FN62]

It is this notion, now memorialized in the AAUP's 1940 Statement of Principles, [FN63] which has been endorsed by virtually every major higher- education organization in the country; [FN64] scholars should be free from interference in their professional research, teaching, and scholar-ship by those outside their academic profession, which embodies academic freedom today. The individual scholar has the freedom to research, question and conclude as he pleases. The substantive point of view held by the scholar is unimportant. He may be judged only on grounds of professional competence. Through this system truth will be found and advanced. [FN65]

It is important at this point to take note of a concept which is crucial to understanding adequate cause for dismissal as an element of academic freedom. The academy, by undertaking the reforms which led to academic freedom, not only gained a right but also assumed a responsibility. [FN66] The right gained is to speak and research freely without ***341** fear of reprisal for the substantive point of view taken. The responsibility is to act affirmatively in removing from its professional ranks members of the academy who do not meet minimum levels of competence. The two are integrally linked and combine to create the total concept of academic freedom.

The academy has at its disposal two methods for meeting its duty to remove incompetent faculty members. First, and hopefully most common, is the process of granting tenure. Each member of the academy must pass through a rigorous probationary period lasting a period of years. [FN67] During this period, the faculty member is employed on a term basis. The institution is under no obligation to renew his contract, so long as the basis for nonrenewal is not precluded by public policy. [FN68] During this probationary period, the peer-review process has its first opportunity to exclude those who cannot meet professional standards.

The second, and more drastic, method is the subject of this article: removal for adequate cause. Ideally, this measure should be necessary only rarely. Moreover, the burden on the institution and on the peer-review process is, and should be, heightened. In this situation, the burden is on the institution to demonstrate cause, [FN69] whereas in the case of the initial tenure decision, the burden is on the candidate to demonstrate competence.

This burden is correct for two reasons. First, when the scholar has earned tenure, he has demonstrated competence and gained a right which the institution is attempting to take from him. Such a process should, in all fairness, be difficult and carefully scrutinized. On the other hand, the candidate for tenure has not yet demonstrated competence and, therefore, has earned no right at all. The institution owes him nothing beyond the termination of his contract.

Second, the whole notion of academic freedom requires dismissal of a tenured faculty member to be difficult. If finding adequate cause were easy, freedom in research and teaching would be at risk. Remember, a large part of academic freedom is justified by making the individual scholar secure in expressing controversial, yet competent, points of view. [FN70]

***342** C. Constitutional Advances

The reforms noted above occurred primarily due to changes in employment agreements. [FN71] Within private institutions, they remain, by and large, matters of employment agreements today. [FN72] However, within the domain of state colleges and universities, many of the concepts developed under the auspices of academic freedom have found protection under the First Amendment [FN73] to the United States Constitution.

In the landmark case of Sweezy v. New Hampshire, [FN74] the Supreme Court of the United States placed academic speech on the same elevated plane as political speech. [FN75] The Court described the "liberties" of academic freedom and political expression as "areas in which government should be extremely reticent to tread." [FN76] Moreover, the Court could "not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." [FN77] This strong language clearly supports the notion that academic speech, like political speech, is "a special concern of the First Amendment." [FN78]

The Court's reasons for extending this high level of First Amendment protection are as important for academic freedom as the protection itself. In the plurality opinion, Chief Justice Warren stated that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [FN79] Justice Frankfurter, in his concurrence, was even more telling:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature ***343** are born of hypothesis and speculation.... For society's good-if understanding be an essential need of society-inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. [FN80]

These statements stand for the proposition that academic speech, and therefore academic freedom, are special and deserve the highest degree of protection because of their value to society. Academic freedom is valuable because it leads to the "'advancement of scientific knowledge."' [FN81] The "necessary preconditions" of this advancement are the ability to "'question, modify or reject traditional ideas and beliefs."' [FN82]

Notably, this reasoning is identical to the reasoning used by the academy to justify the concept of academic freedom in the modern university. [FN83] The Court placed First Amendment implications on any attempt by government to "impose any straight jacket" [FN84] on the freedom of the individual scholar "to inquire, to study and to evaluate ...." [FN85] In so doing, the Court raised academic freedom for the individual scholar to the level of a fundamental constitutional right. [FN86]

It has also been argued that the Court, and in particular Justice Frankfurter's concurrence, established a right to institutional academic ***344** freedom grounded in the First Amendment. [FN87] This argument is based on Justice Frankfurter's reliance on the "four essential freedoms" of the university in support of academic freedom. Those freedoms are "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."' [FN88] The argument is that this language establishes constitutional protection for the peer-review system in the university setting. [FN89]

The Supreme Court's most recent academic-freedom case ignited much debate and discussion. [FN90] In University of Pennsylvania v. E.E.O.C., [FN91] the E.E.O.C. was investigating charges by a teacher who had been denied tenure. The teacher claimed that the denial was based on gender bias, in violation of federal law. As a result, the E.E.O.C. requested access to the confidential peer-review records.

The university attempted to prevent access by establishing a special privilege against discovery of peer-review evaluations. Relying heavily on Justice Frankfurter's concurrence and the four freedoms in particular, the university argued that the peer-review system would be contaminated if professors knew that their evaluations might become public. The Court, however, found this reliance on the "so-called academic-freedom cases" [FN92] to be misplaced. [FN93]

The Court distinguished the cases by focusing on the attempt by the government to "influence the content of academic speech," [FN94] and the government's attempt to directly infringe "on the asserted right to 'determine for itself on academic grounds who may teach,"' [FN95] which was present in Sweezy and Keyishian v. Board of Regents. No such attempt, according to the Court, was present in this case. [FN96] Rather, this case was analogous to Branzburg v. Hayes, [FN97] where the Court held that ***345** a reporter could be compelled to testify regarding confidential information without a showing that the information was necessary. [FN98] In both Branzburg and University of Pennsylvania, the feared "chilling effects" of inhibiting the free flow of information to the press and in the peer-review process, were both too attenuated and too speculative to justify the broad- based protection that was sought. [FN99] Furthermore, both cases represented the type of "'incidental burdening ... that may result from the enforcement of civil or criminal statutes of general applicability."' [FN100]

Thus, one may assume that the content of academic speech, as well as the ability to choose who will teach on academic grounds, is protected by the First Amendment. Where this protection applies, moreover, it is extreme. [FN101] However, the academic world, like the press, must comply with neutral laws of general applicability, particularly when they have a speculative impact on the rights that the First Amendment protects.

Another case which has stirred debate recently is Jeffries v. Harleston. [FN102] There, professor Leonard Jeffries was removed from his position as chair of the Black Studies Department at City College of New York because of statements that he had made in a speech. [FN103] The Second Circuit Court of Appeals upheld Jeffries' dismissal from this "ministerial position." [FN104] It did so by applying the standard for determining "when the First Amendment protects speech by a government employee" [FN105] announced in Connick v. Myers [FN106] and Pickering v. Board of Education. [FN107]

***346** Two concerns arise from Jeffries. Initially, the Second Circuit arguably misapplied the Connick/Pickering standard. The court based its decision on the fact that the jury in the initial trial found that, while Jeffries' speech did not actually harm the College, he was fired because of a "reasonable expectation" that it would. [FN108] This "potential disruptiveness," in turn, "was enough to outweigh whatever First Amendment value" Jeffries' speech had. [FN109]

The troubling part of this analysis is that the Second Circuit may be giving too little weight to Jeffries' comments. True, they were offensive and ill-put. Nevertheless, they were his apparently heart-felt views regarding "the bias of New York State's public school curriculum and the history of black oppression." [FN110] Thus, they were statements regarding issues of public concern, made by a member of the academy, deserving the highest degree of protection. A jury finding, with scant appellate review of that finding, should not be enough to outweigh a high degree of First Amendment protection. [FN111]

The more bothersome concern raised by this case is that the public-employee standard even was used. The Second Circuit made a point of stating that Jeffries was only being removed from his "ministerial" position, and that his "tenured professor" position was not in jeopardy. [FN112] In doing so, the court held that the

protections of academic freedom did not apply to Jeffries' position as a department head. [FN113]

This dichotomy of thinking is both encouraging and dangerous. It is encouraging because it clearly draws a line in the sand at the professorial position that should not be crossed. In other words, while the standard applied to a ministerial position, it did not (presumably) apply to a faculty position. Thus, viewed in this light, Jeffries does nothing to reduce the protection provided by academic freedom.

This reasoning is dangerous because, first, it is inaccurate. Jeffries was not a groundskeeper, a nurse, or a deputy sheriff. He was a department head charged, presumably, with guiding his department; this responsibility was an academic endeavor. Thus, in a real sense, Jeffries was deprived of an academic position.

***347** Second, this reasoning is dangerous because of what some overzealous administrators may think it says. One can envision efforts to redefine academic positions as ministerial or other non-academic positions in order to defeat the protection of academic freedom. Alternatively, perhaps some administrators see Jeffries as a weakening of the academic-freedom cases. Jeffries should not be read in either manner. If it is, the Supreme Court should correct that course.

IV. ADEQUATE CAUSE FOR DISMISSAL

With the constitutional and contractual bases for academic freedom established, it is now possible to define adequate cause for dismissal. The preceding discussion was necessary, however, because a proper definition of adequate cause is dependent on a proper understanding of academic freedom. As previously stated, adequate cause for dismissal, like tenure, is a necessary element of academic freedom.

Adequate cause for dismissal, as an element of academic freedom, consists of several parts. First, a tenured professor must exhibit an inability or unwillingness to contribute to the advancement of truth and knowledge through effective teaching, research, scholarship and contributions to the community. Second, this inability or unwillingness must either be exhibited for such a period of time that improvement is unlikely, or be so egregious that rehabilitation is improbable or impractical. This factor presumes that, where possible, remedial measures short of dismissal have been undertaken and have clearly failed. Third, these findings must be made by the professor's academic peers. Finally, each of these factors should be examined in light of the general understandings and customs of the particular university and the academic community as a whole.

The first element is directed at the heart of adequate cause as an element of academic freedom. This element is motivated by the idea that academic freedom presupposes that a professor is actively pursuing the advancement of truth and knowledge through her professional efforts in and out of the classroom. [FN114] This pursuit, in turn, requires inquiry, testing, hypothesis and questioning of the accepted norm. [FN115] Moreover, the results of this activity must be communicated by way of the classroom or the scholarship so that society may benefit from the process. It is this activity which requires the protection of tenure. [FN116]

Thus, when a professor fails to engage, or because of circumstances is unable to engage, in this pursuit of truth, she falls short of the ***348** requirements of her profession. Such a failure may justify dismissal. [FN117] At a minimum, it requires some action on the part of the faculty to remedy the situation. [FN118] Dismissal is justified because the professor has fallen below the minimum standards required to merit the protection afforded by academic freedom. [FN119] Action on the part of the faculty is required because the rights acquired under academic freedom impose upon the academy the responsibility of ensuring the integrity of the profession.

Identifying the behavior that meets this standard, [FN120] and the evidence necessary to establish the existence of the behavior, is the final step in describing this portion of the definition. Clearly, incompetent or unsatisfactory teaching is one type of behavior which violates the standard. Teaching, after all,

is one of the primary justifications for academic freedom and tenure. [FN121] Likewise, incompetent or unsatisfactory scholarship would violate the standard. [FN122] However, it must be emphasized once again that the same degree of proficiency in each area is not required for all professors. Some professors will be prolific writers and researchers, actively advancing their field through publication, but will be merely adequate as classroom teachers. Others will be excellent teachers, able to communicate in a classroom with great skill, but merely be current on the recent developments in their field. This professor might publish rarely, if at all. Moreover, the ability and willingness of different professors to contribute to the community will vary. Each, however, is both active and competent. Therefore, adequate cause for dismissal does not exist. Only when there is complete failure in one or more of the three areas of activity will competence become an issue.

The sort of evidence necessary to support a charge of incompetence is shown in King v. University of Minnesota. [FN123] In King, the university dismissed a tenured professor because his "unsatisfactory teaching performance seriously interfered with his usefulness to the University ...." [FN124] The findings of the faculty panel which substantiate this ***349** charge serve as a model for the factors which should be examined in such a case.

The panel examined the professor's dependability and punctuality for showing up to class. [FN125] It found that he was absent from class 35% of the time, opting to have a teaching assistant substitute in one class "much of the time." [FN126] When he did show up, he was often "tardy." [FN127] Clearly, this behavior violates the established standard. It is impossible to "guide and train our youth" [FN128] when the teacher is not in the classroom.

Similarly, the panel found the professor's testing practices to be unacceptable. [FN129] For example, the professor allowed a secretary to conduct examinations and in one class only six of twenty-two students received a grade. This behavior clearly violates the standard because testing the proficiency of students is necessary for ascertaining whether the material disseminated was adequately comprehended. If not, society does not benefit from the endeavor and academic freedom has failed in one of its essential purposes. [FN130]

The panel also examined the professor's classroom performance and found that his "teaching was of poor quality." [FN131] This finding was supported by evidence that King was "ill-prepared" for his lectures. [FN132] Additionally, his lectures "were disorganized and often irrelevant to the designated topic." [FN133] Finally, the panel found that "he frequently failed to make course requirements clear to students." [FN134] Once again, this behavior is inexcusable and unacceptable. It indicates that the professor is unable to communicate the results of his academic endeavors to those who need them. As previously stated, such communication is a prerequisite to claiming the protection of academic freedom. [FN135] Additionally, such a performance is a strong indicator that a professor may not understand the material that he is charged with communicating. In other words, it is a strong indication that the professor is incompetent in the discipline.

The same sort of inquiry should be undertaken when examining a tenured professor's outside scholarship or research and contributions to the community. The initial determination should be whether the ***350** professor participates at all. [FN136] Participation, quite naturally, will be evidenced by publication or laboratory activity, in the case of scholarship or research, and by serving on committees, attending meetings and community service. As in the classroom, the professor cannot claim the protections available through academic freedom unless he actively participates in the areas where truth and knowledge are advanced.

The next inquiry involves the quality of the participation. [FN137] The question at this stage is whether the professional participation is competent. [FN138] Inquiry into the substantive position taken by the professor is absolutely prohibited. [FN139] In the case of scholarship or research, the focus must be on the adequacy of the communication and the soundness of the methodology used to reach the substantive conclusions. [FN140] In the case of contributions to the community, the

focus should be on professional honesty and the sincerity of the efforts. [FN141]

Two other types of behavior which are generally considered to provide adequate cause for dismissal of a tenured faculty member are moral turpitude and insubordination. [FN142] Moral turpitude is commonly exemplified by the professor who makes improper sexual advances toward a student. [FN143] Insubordination is best described as the failure to follow reasonable requests of administrative personnel. [FN144]

***351** Certainly, such behavior provides adequate cause for dismissal.

However, whether this determination has anything to do with academic freedom is questionable. Academic freedom only protects the ability of a faculty member to teach, research and publish without fear of being attacked because of the substantive view taken. As stated above, when a faculty member fails to comply with the responsibilities imposed by that freedom, adequate cause for dismissal exists.

This concept is arguably irrelevant when a professor engages in conduct which amounts to moral turpitude or insubordination. These two behaviors provide cause for dismissal wholly unrelated to academic freedom. It is reasonable to expect faculty members to refrain from making sexual advances toward, or from having sexual relations with, their students. [FN145] The degree of control that a professor has over a student's future success, especially in a professional program, such as the study of law or medicine, makes this behavior inappropriate regardless of the status of academic freedom and tenure. Likewise, faculty members should be required to comply with reasonable requests of those who administer colleges and universities. No more is required of any professional person and such requests do not in any way hamper the freedoms protected by tenure.

Support for this position is found in Stastny v. Board of Trustees of Central Washington. [FN146] In Stastny, a tenured professor was dismissed ***352** when he failed to return from a lecture he was giving in Jerusalem in time for the beginning of the semester. [FN147] Permission to return late specifically had been denied by the administration. [FN148] In upholding the dismissal, the Washington Court of Appeals noted that although academic freedom is "inextricably related" to education and is constitutionally protected, it is not necessarily "implicated in every employment decision of an educational institution." [FN149] Nor does academic freedom allow activity which is "at variance with job related procedures and requirements." [FN150]

Thus, one could conclude that termination based on these sorts of actions does not relate to the academic freedom calculus at all. Nevertheless, if academic freedom is implicated, adequate cause for dismissal exists when these behaviors are measured by the proposed definition. Moral turpitude, especially when involving inappropriate sexual activity, is destructive of the learning environment. When the focus of the relationship between the student and the teacher is sex, or the avoidance of a sexual relationship, the student's ability to learn and the teacher's willingness to teach will be adversely affected. Additionally, a professor who engages in this type of activity will have a difficult time being accepted as a serious scholar by his students and possibly his peers. Such an attitude works to the detriment of the ideals of academic freedom.

Likewise, insubordination among faculty members can disrupt the academic environment. When professors fail to comply with reasonable requests, the atmosphere quickly can become hostile. The focus of the administrator and the professor will quickly shift from advancing academic goals to determining who will win this battle. Moreover, reasonable requests usually (perhaps by definition) benefit either the ***353** students, the faculty or the efficient operation of the university. [FN151] When that is the case, the goals of academic freedom are clearly hampered when the requests are not carried out.

The second part of the definition is motivated by the idea that dismissal should be a last resort. When a person who once proved himself to be competent is eventually judged to be incompetent, there is no winner. The university has lost a

valuable asset in the form of an active, competent professor (remember, he was once judged competent) and the professor has lost his livelihood.

Therefore, whenever possible, action should be taken to restore the faculty member to his former position of competence. Such action may take many forms. If the professor is simply not "participating," informing him of the eventual result of that course of action may remedy the problem. [FN152] The teacher may suddenly teach and the scholar may suddenly publish.

When the problem involves the quality of the teaching or scholarship, then the remedial actions will need to be more aggressive. Specific weaknesses and areas for improvement should be identified. The professor should be given a timetable for compliance. Assistance might also be provided in the form of leave, a sabbatical or a decreased class load so that the professor can devote his time to the recommended improvements. [FN153] The essential point is that the focus should be on rehabilitation, not on dismissal.

However, once an adequate period of time has been provided and the professor has not complied, dismissal is required. What constitutes an adequate period of time will be determined by the circumstances. If a professor makes no attempt to comply with the recommendations, then very little time is needed. Certainly, one academic year would be more than sufficient.

On the other hand, if the professor is obviously attempting to improve and is showing progress, then the period of time should be extended to see if the goals are eventually met. This approach is logical when it is placed in the proper context. Academic freedom and tenure, as noted, assume activity and competence. Where there is renewed activity from one who once was competent, additional time for rehabilitation is fair and reasonable.

Where the inability or unwillingness to advance the goals of academic freedom is so egregious that rehabilitation is improbable or impractical, immediate dismissal is required. An example of this situation would be if a tenured faculty member had become mentally incompetent in a ***354** general sense. [FN154] Obviously, any attempt to rehabilitate would not only be futile, but also would be harmful to those exposed to the professor's teaching or scholarship. [FN155] Likewise, if one considers sexual misbehavior or insubordination to be violative of academic freedom, then those situations present such an immediate and long-lasting harm that dismissal should occur instantaneously.

The third element requires that these findings should be made by the dismissed faculty member's academic peers. This element is necessary in order to preserve the protections of academic freedom. The cornerstone of academic freedom is that in order to ensure that professors are judged by their competence rather than by their substantive viewpoints, the academic peer group will make the determination. Any deviation from this standard would subject the substance of teaching and scholarship to the control of outsiders. Moreover, the inquiry required by the first element in this definition requires the expertise of the academic peer group. In other words, the determination of competent activity can only be made by those who are also competent in the area.

The final element requires that each of the above determinations be made in light of the general understandings and customs of the particular university and the academic community as a whole. This factor is exemplified by McConnell v. Howard University. [FN156] In McConnell, a student referred to a tenured professor as a "condescending, patronizing racist" [FN157] during a class session. Subsequently, the professor refused to continue teaching the class until the student either apologized or was removed from the class. [FN158] The university brought dismissal proceedings against the professor for "neglect of his professional responsibilities" [FN159] stemming from his failure to continue the class. A faculty committee found that the professor did not neglect his duties; the university, however, dismissed him anyway. [FN160] When the professor challenged the action in federal court, the university was granted summary judgment. [FN161] However, the district court did not consider the professor's argument that "neglect" should be read in light of

professional standards. [FN162] The District of Columbia Circuit Court of Appeals reversed, stating that the ***355** contract between the parties required "an evaluation of a professor's actions according to the standards of the profession . . . . " [FN163]

The facts of McConnell demonstrate the first reason why these determinations must be made in light of professional standards. McConnell, in a technical sense, violated his contract for tenure and provided the university with adequate cause for dismissal; he refused to teach an assigned class. [FN164] However, the standards of the teaching profession, as reflected by the faculty committee, allow a faculty member to take steps to "restore . . . standard teacher-student relationships." [FN165] Surely a faculty member has the right to conduct his class without an accusation hovering over his head. Therefore, examined in light of general customs of the profession, McConnell did not provide cause for dismissal.

In addition, a second reason exists for examining these factors in light of general customs and understandings. Individual universities place varying degrees of importance on teaching, scholarship and community service. [FN166] Therefore, the weight given to each in faculty evaluations must vary accordingly. In thissense, the customs and practices of the particular university color the definition.

V. CATALYSTS

The definition set forth above is only useful if catalysts are in place which will begin the inquiry. These catalysts must recognize two essential principles noted earlier in this article: removing a tenured professor for cause should be difficult, and the academy assumed certain responsibilities when it won the freedom bestowed by academic freedom.

Once again, tenured professors have carried the initial burden of proving competence by surviving the probationary period. By doing so, they have gained tenure. No longer is, nor should, the burden be on the professor to continue to prove this competence. Rather, the burden is on the institution, through the peer-review process, to show that the professor is not competent. In addition to shifting this burden to the institution, tenure imposes on the institution the obligation to have a legitimate and substantial reason for beginning the inquiry. Without this protection, tenure would be hollow protection indeed.

These catalysts must recognize the responsibility assumed by the academy when granted the right of academic freedom. A primary protection afforded by academic freedom is that outsiders are barred from passing judgment on faculty members. However, someone must perform the function of policing the ranks of the academy to ensure competence. By removing that function from laymen, the academy ***356** assumed it. [FN167] Monitoring faculty members during the probationary period prior to granting tenure is one method of performing that function. Adequate cause for dismissal is the other. It naturally follows, then, that certain catalysts must be in place which will mandate an inquiry into whether adequate cause for dismissal exists.

In some situations, these catalysts are obvious and easy. For example, student complaints of inappropriate sexual advances or activity should trigger an inquiry into their legitimacy. [FN168] Likewise, accusations by an administrator that a faculty member refused to comply with reasonable requests should trigger an inquiry into both their legitimacy and whether they provide adequate cause for dismissal. [FN169] Accusations that a professor is unwilling to contribute to the university by performing committee duties should, likewise, begin the inquiry. [FN170]

However, when the accusation is that the faculty member is incompetent, the catalysts are more problematic. In this situation, the catalysts used must be mindful of the considerations described above. The dangers fall in two extremes. If peer-review committees are moved too quickly to inquire, usually by the overzealous administrator, [FN171] tenure affords less protection. On the other hand, if a catalyst does not require inquiry when warranted, whether adequate cause for

dismissal exists will never be determined and incompetent faculty members will be sheltered.

Two routine matters involving the students of a professor together can serve as a catalyst to the inquiry. The first is the evaluation of faculty members by their students. [FN172] A correctly constructed student-evaluation process will solicit the students' opinions regarding the ability of the professor to communicate the subject matter and expectations of the course, to organize the course, and to stimulate student interest in the subject matter. An effective student-evaluation process will solicit student comments regarding the manner in which the professor treats his students, both inside and outside of class. Consistently poor evaluations, solicited over a period of time, strongly indicate that a professor is not performing his classroom duties competently. Thus, an inquiry into his competence is required.

***357** Second, class enrollment may indicate whether the professor is perceived as one who is fair and competent. [FN173] Low enrollment can indicate that a professor is disfavored because of abusive treatment of students or because of his inability to competently teach the subject. [FN174] However, this statistic is only useful over a significant period of time. Moreover, in fairness to teachers who teach unpopular subjects, who are difficult graders or who are demanding in class, enrollment statistics must be compared to those of professors who teach the same or similar subjects.

The more controversial set of catalysts require faculty involvement. The first is complaints and accusations from faculty members themselves. This catalyst is controversial because it requires the members of the faculty to come forward with a complaint against one of their own. Such action, naturally, is difficult. The complaining faculty member has some legitimate fears. If the charges turn out to be unfounded or insufficient, the collegial atmosphere of his department may be destroyed. Also, he might fear that his complaints about a fellow academic could motivate his peers to scrutinize his own actions more closely. In other words, he might be next.

However legitimate these fears are, they must give way to the requirements of academic freedom. Each tenured professor must recognize the responsibility imposed by academic freedom to guarantee the integrity of the academic community. This recognition requires that professors take the difficult step of speaking out when they legitimately feel that a colleague is inadequately performing his academic duties.

Second, and truly the most controversial of these catalysts, is the periodic evaluation of tenured faculty members. Those who advocate periodic review often condition their support on the requirement that evaluations not be used to dismiss tenured faculty. [FN175] To the extent that the purpose of faculty evaluations should not be to determine the competence of tenured professors, they are correct. [FN176] However, when the evaluation indicates that adequate cause for dismissal may exist, there should be no hesitation in proceeding with that inquiry. [FN177] This indication may be in the form of a specific problem located in the current evaluation, or from a failure to make improvements suggested by previous evaluations.

One final comment on catalysts now will be made. This article is somewhat hostile toward administrative catalysts [FN178] for two reasons. First, academic freedom itself requires the peer group to engage in the ***358** determination of whether adequate cause for dismissal exists. Administrators are not among the peer group for these purposes. Their opinions and attitudes are too easily colored by budgets, recruiting and internal university politics, rather than the requirements of academic freedom.

Additionally, a survey of the cases indicates that when an administrator acts, the likelihood of a court battle increases. [FN179] Administrators are generally the people about whom faculty members complain. Therefore, when a faculty member, especially a vocal faculty member, is dismissed, challenges based on the First

Amendment freedom to speak out are far more likely. [FN180] As a result, faculty and student catalysts are favored.

VII. CONCLUSION

Active, competent members of the academic community enjoy broad freedoms in their professional lives. However, these freedoms impose a duty on those members to guarantee the integrity of the academic community. Adequate cause for dismissal is the tool the academic community uses to guarantee that integrity. Adequate cause for dismissal, therefore, is a necessary element of academic freedom.

There exists great danger to the academic community in refusing to enforce adequate cause. Critics of the tenure system argue, quite convincingly, that the tenure system is nothing but a haven for incompetent and inefficient faculty members. Many would do away with tenure altogether in favor of a system of terminal contracts.

As a result, the academic community must step forward and fulfill its policing function. The definition proposed by this article, along with the proposed catalysts, provide the academy with a standard for fulfilling that function. Considering the alternative, outside interference with academic decisions, it seems a small price to pay.

[FNa1]. Law Clerk for the Honorable Richard Sheppard Arnold, Chief Judge of the Eighth Circuit Court of Appeals; J.D. with High Honors, University of Arkansas School of Law, 1994. The author wishes to express special thanks to Professor Mark Killenbeck of the University of Arkansas School of Law for the invaluable advice, editing and guidance that made this article possible.
The views expressed in this article are solely those of the author. This article should not be construed as reflecting the views of Judge Arnold or the Eighth Circuit Court of Appeals.

[FN1]. Doug Smith, How Dare She Believe That?, ARK. TIMES, Dec. 30, 1994, at 9.

[FN2]. The terms "universities," "colleges," and "academies" are used interchangeably to denote all institutions of higher education.

[FN3]. 1940 Statement of Principles on Academic Freedom and Tenure, reprinted in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 3-4 (1984) [hereinafter 1940 Statement].

[FN4]. See J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment" 99 Yale L.J. 251, 279 (1989); Walter P. Metzger, Academic Freedom in the Age of the University (1995).

[FN5]. 1940 Statement, supra note 3, at 4.

[FN6]. Byrne, supra note 4, at 266.

[FN7]. Id.

[FN8]. See Ralph S. Brown & Jordan E. Kurland, Academic Tenure and Academic Freedom, 53 LAW & CONTEMP. PROBS. 325 (Summer 1990); Ralph F. Fuchs, Academic Freedom-Its

Basic Philosophy, Function, and History, 28 LAW & CONTEMP. PROBS. 431 (1963).

[FN9]. This phrase summarizes the areas in which members of university faculties will be judged for competence and activity. See John B. Bennett & Shirley S. Chater, Evaluating the Performance of Tenured Faculty Members, 38 EDUC. REC. 38 (Spring 1984). The degree of activity in each of these areas may, however, vary depending on the skills of the individual professor and the needs and priorities of the particular university. This variance is explored further, infra part II.

[FN10]. See, e.g., Robert W. McGee & Walter E. Block, Academic Tenure: An Economic Critique, 14 HARV. J.L. & PUB. POL'Y 545 (1991).

[FN11]. See Byrne, supra note 4; Bennett & Chater, supra note 9; 1940 Statement, supra note 3.

[FN12]. 1940 Statement, supra note 3.

[FN13]. See infra note 21 and accompanying text.

[FN14]. See Mueller v. Regents of Univ. of Minn., 855 F.2d 555, 559 (8th Cir. 1988) ("It is not for the district court or this court to determine de novo whether we would terminate Mueller based on the evidence presented during the termination hearings."); Johnson v. Lincoln Univ., 776 F.2d 443, 447 (3d Cir. 1985) (noting the "inappropriateness" of the court as a "forum for resolving issues of academic policy and academic freedom . . . ."); Gross v. University of Tenn., 448 F. Supp. 245, 248 (W.D. Tenn. 1978) ("federal courts are to play an extremely limited role in reviewing the merits of personnel decisions made by public agencies, ..."); Cf. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225, 106 S. Ct. 507, 513 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."); Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6, 98 S. Ct. 948, 958 n.6 (1978) (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students . . . ."); Susan Stefan, Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard, 102 YALE L.J. 639, 700-03 (1992). But see McConnell v. Howard Univ., 818 F.2d 58, 69 (D.C. Cir. 1987) ("It would make no sense for a court blindly to defer to a [private] university's interpretation of a tenure contract to which it is an interested party.").

[FN15]. See McGee & Block, supra note 10.

[FN16]. See, e.g., Johnson 776 F.2d 443 (3d Cir. 1985); Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976); Garrett v. Mathews, 474 F. Supp. 594 (N.D. Ala. 1979), aff'd, 625 F.2d 658 (5th Cir. 1980); Lyman v. Swartley, 385 F. Supp. 661 (D. Idaho 1974); Harris v. Board of Trustees of State Colleges, 542 N.E.2d 261 (Mass. 1989).

[FN17]. See Bennett & Chater, supra note 9.

[FN18]. See McGee & Block, supra note 10.

[FN19]. The articles and commentaries supporting this statement are too numerous to list. However, the arguments are well summarized in Brown & Kurland, supra note 8.

See generally Symposium, Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles, 53 LAW & CONTEMP. PROBS. 1 (Summer 1990); Symposium On Academic Freedom, 66 TEX. L. REV. 1247 (1988). See also METZGER, supra note 4.

[FN20]. See Robert M. Hendrickson, Removing Tenured Faculty For Cause, 44 EDUC. L. REP. 483 (1988), and Timothy B. Lovain, Grounds for Dismissing Tenured Postsecondary Faculty For Cause, Comment, 10 J.C. & U.L. 419 (1983- 84), for discussions of what courts will accept as "adequate cause" for dismissal.

[FN21]. The process due is notice of the charges presenting grounds for dismissal in a manner sufficient to enable a response, notice of the names of those making allegations and the nature and factual basis of those allegations, a reasonable amount of time to present a defense, and a hearing before an actually impartial and unbiased tribunal, committee or board. See Agarwal v. Regents of the Univ. of Minn., 788 F.2d 504 (8th Cir. 1986); Levitt v. Monroe, 590 F. Supp. 902 (W.D. Tex. 1984), aff'd, Levitt v. University of Tex., 759 F.2d 1224 (5th Cir.), cert. denied, 474 U.S. 1034, 106 S. Ct. 599 (1985); Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976); Lyman v. Swartley, 385 F. Supp. 661 (D. Idaho 1974).

[FN22]. This will generally be the finding provided the First Amendment or some other public policy outweighing the interest in academic freedom is not offended. See, e.g., Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 77 S. Ct. 1203 (1956); cf. University of Pa. v. E.E.O.C., 493 U.S. 182, 110 S. Ct. 577 (1990).

[FN23]. See, e.g., Garrett v. Mathews, 474 F. Supp. 594 (N.D. Ala. 1979), aff'd, 625 F.2d 658 (5th Cir. 1980) (failure of teacher to post office hours, open mail from the dean, and supply a list of publications deemed adequate grounds for dismissal).

[FN24]. Byrne, supra note 4, at 283; 1940 Statement, supra note 3, at 3.

[FN25]. See, e.g., Hendrickson, supra note 20, at 491 (dividing cause into "insubordination, neglect of duty, incompetence, and moral turpitude"); Lovain, supra note 20, at 422 (stating that incompetence, immorality, neglect of duty, and insubordination are grounds for dismissal); Kent M. Weeks, Dismissal For Cause, 21 A.G.B. REPORTS 18 (No. 3 May-June 1979) (defining immoral conduct, insubordination, incompetency, and inefficiency as cause for dismissal).

[FN26]. 1940 Statement, supra note 3, at 4.

[FN27]. Also note that tenure is not a right. Academic freedom is the right at issue; tenure, in theory, protects that right. See 1940 Statement, supra note 3, at 3 ("Freedom and economic security, hence tenure, are indispensable . . . ."). Tenure creates a property interest in the position held so that the professor may not be deprived of her position absent due process of law. Moreover, if the professor is a member of a state institution, she has a liberty interest in her job, which stems from the First Amendment. See infra part III.C. These due process protections, if the academic freedom cases are to be taken at their word, are very powerful protections indeed. Of course, all members of the university, tenured or not, enjoy the First Amendment protections, while non-tenured faculty have no contractual protection outside the term of the contract.

[FN28]. This article examines the concept of academic freedom in the United States only. Academic-freedom rights vary in other countries. One obvious reason for the difference in freedom in the United States is the importance the First Amendment plays in the analysis. See infra part III.C. For an overview of academic freedom in virtually every other part of the world, see International Higher Education: An Encyclopedia (Philip G. Altbach ed., 1991). See also INTERNATIONAL HANDBOOK OF EDUCATION SYSTEMS (Brian Holmes et al. eds., 1983).

[FN29]. This discussion will summarize the historical development of academic freedom in the United States. For a more detailed history, see METZGER, supra note 4; Byrne, supra note 4. This article leans heavily on these two sources. While other sources exist that discuss the historical development of academic freedom, e.g. the symposium issues, supra note 19, Metzger and Byrne alone are more than adequate for present, if not any, purposes.

[FN30]. METZGER, supra note 4, at 4 (arguing denominational institutions were successful in their primary missions of training clergy and providing general education and religious instruction to American frontier societies).

[FN31]. METZGER, supra note 4, at 20.

[FN32]. METZGER, supra note 4, at 5.

[FN33]. METZGER, supra note 4, at 29; Byrne, supra note 4, at 272.

[FN34]. Byrne, supra note 4, at 269; METZGER, supra note 4, at 19-29.

[FN35]. METZGER, supra note 4, at 26, 27.

[FN36]. Byrne, supra note 4, at 269.

[FN37]. Byrne, supra note 4, at 269.

[FN38]. METZGER, supra note 4, at 29-36.

[FN39]. METZGER, supra note 4, at 38.

[FN40]. METZGER, supra note 4, at 39-41.

[FN41]. Byrne, supra note 4, at 270.

[FN42]. Byrne, supra note 4, at 272.

[FN43]. Byrne, supra note 4, at 272.

[FN44]. Byrne, supra note 4, at 273; METZGER, supra note 4, at 44, 45.

[FN45]. Byrne, supra note 4, at 275.

[FN46]. Byrne, supra note 4, at 275.

[FN47]. METZGER, supra note 4, ch. IV.

[FN48]. Byrne, supra note 4, at 273.

[FN49]. Byrne, supra note 4, at 276.

[FN50]. Byrne, supra note 4, at 276.

[FN51]. Byrne, supra note 4, at 276.

[FN52]. Byrne, supra note 4, at 276. This notion was advanced early on, when those who passed judgment on higher education were the church and, later, the outside trustees through the university president. It could be argued that with the more sophisticated administration in place in most universities today, this concept of peer review is no longer needed. Moreover, judges could also usurp this position now that the bench is highly trained and educated. See McConnell v. Howard Univ., 818 F.2d 58, 69 (D.C. Cir. 1987) (opining that judicial review of a university's decisions is no different than any other question of fact where expert testimony is used to explain the complexities of the case).

[FN53]. Byrne, supra note 4, at 273.

[FN54]. Byrne, supra note 4, at 273.

[FN55]. General Report of the Committee on Academic Freedom and Academic Tenure, reprinted in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860 (R. Hofstadter & W. Smith eds., 1961) [hereinafter 1915 Declaration].

[FN56]. Byrne, supra note 4, at 276.

[FN57]. 1915 Declaration, supra note 55, at 27-28.

[FN58]. 1915 Declaration, supra note 55, at 27-28.

[FN59]. 1915 Declaration, supra note 55, at 27-28.

[FN60]. 1915 Declaration, supra note 55, at 38.

[FN61]. 1915 Declaration, supra note 55, at 38.

[FN62]. Byrne, supra note 4, at 278-79.

[FN63]. 1940 Statement, supra note 3, at 3-4, defines "academic freedom" as follows:

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.
Interestingly, the statement defines "academic freedom" to include "the investigator who is attached to an academic institution without teaching duties." Id. at 3 (revised in 1989 and 1990 to remove gender-specific pronouns).

[FN64]. Byrne, supra note 4, at 279.

[FN65]. Byrne, supra note 4, at 279.

[FN66]. See 1970 Interpretive Comments, discussed in 1940 Statement, supra note 3, at 5. See also Wilbert R. Whitaker, Jr., Definition of Tenure (Feb. 9, 1995) (remarks presented at the University of Michigan's Forum on Tenure), reprinted in U. REC., Mar. 6, 1995, at 6A ("[I]ntellectual or academic freedom is in danger because of the perceived failure of the academy in accountability.").

[FN67]. 1940 Statement, supra note 3, at 4 (defining the length of this probationary period and the procedures relevant to reviewing tenure).

[FN68]. Such a basis would constitute a First Amendment violation.

[FN69]. In a traditional-tenure setting, this analysis should hold. However, in a non-traditional setting, a professor might have to prove competence again, at the end of a terminal contract, for example. In any event, this statement applies to what should be required of the parties in the university-hearing setting, not in the courtroom. If these procedures are followed, moreover, it seems that courts would be far more willing to show them deference. That notion is consistent with the historic approach of the courts. See supra note 18 and accompanying text.

[FN70]. See supra notes 55-62 and accompanying text.

[FN71]. The term "employment agreement" is used rather than "contract" to specifically include provisions implied from a course of conduct or provisions

contained in a faculty manual.

[FN72]. See generally Ralph D. Mawdsley, Comparison of Employment Issues in Public and Private Higher Education Institutions, 65 EDUC. L. REP. 669 (1991).

[FN73]. U.S. CONST. amend. I.

[FN74]. 354 U.S. 234, 77 S. Ct. 1203 (1957) (plurality opinion). In Sweezy, the Attorney General of the State of New Hampshire, under the direction of the State Legislature, conducted a broad investigation to determine whether subversive persons were in the state and to recommend further action. Included in this further action was exclusion from employment in state government. Sweezy, a university professor, was cited for contempt for refusing to answer questions posed by the Attorney General regarding one of his class lectures, his affiliation with the Progressive Party, and his general opinions and beliefs. The Supreme Court of the United States held that New Hampshire's actions impermissibly deprived Sweezy of his constitutional rights to academic speech and political association found in the First Amendment.

[FN75]. See generally Pickering v. Board of Educ., 391 U.S. 563, 573, 88 S. Ct. 1731, 1737 (1968) (defining political speech as speech which addresses an issue of public concern).

[FN76]. Sweezy, 354 U.S. at 250, 77 S. Ct. at 1211.

[FN77]. Id. at 251, 77 S. Ct. at 1212.

[FN78]. Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967).

[FN79]. Sweezy, 354 U.S. at 250, 77 S. Ct. at 1212.

[FN80]. Id. at 261-62, 77 S. Ct. at 1217 (Frankfurter, J., concurring) (citation omitted).

[FN81]. Id. at 263, 77 S. Ct. at 1218.

[FN82]. Id. at 262, 77 S. Ct. at 1218 (citation omitted).

[FN83]. See supra notes 55-61 and accompanying text.

[FN84]. Sweezy, 354 U.S. at 250, 77 S. Ct. at 1211.

[FN85]. Id., 77 S. Ct. at 1212.

[FN86]. See also Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675 (1967). Keyishian is another of the "so-called academic freedom cases." See, e.g., University of Pa. v. E.E.O.C., 493 U.S. 182, 197, 110 S. Ct. 577, 586 (1990)

(arguing Keyishian & Sweezy decisions discuss "academic freedom" only as reaction to "context-based regulation"). In Keyishian, faculty members of the State University of New York system challenged the constitutionality of the state's teacher loyalty laws and regulations. Justice Brennan, writing for the Court, provided an eloquent justification for academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

Keyishian, 385 U.S. at 603, 87 S. Ct. at 683 (citation omitted). For the Court, this justification outweighed any interest that the state may have had in protecting the education system from subversion. Therefore, the legislation was declared unconstitutional.

[FN87]. Byrne, supra note 4, part V.

[FN88]. Sweezy, 354 U.S. at 263, 77 S. Ct. at 1218 (Frankfurter, J., concurring) (citation omitted).

[FN89]. Byrne, supra note 4, part V (describing the institution's rights as the constitutionally protected activity).

[FN90]. See, e.g., Alexa Ross & Joan Curcio, Supreme Court Strikes the Balance in Favor of Peer Review Materials Disclosure, 63 EDUC. L. REP. 689 (1991); Lynda E. Frost, Comment, Shifting Meanings of Academic Freedom: An Analysis of University of Pennsylvania v. E.E.O.C., 17 J.C. & U.L. 329 (1991); Clisby Louise Hall Barrow, Note, Academic Freedom and the University Title VII Suit after University of Pennsylvania v. E.E.O.C. and Brown v. Trustees of Boston University, 43 VAND. L. REV. 1571 (1990).

[FN91]. 493 U.S. 182, 110 S. Ct. 577 (1990).

[FN92]. Id. at 197, 110 S. Ct. at 586. Justice Blackmun's choice of language is alarming. It seems to call into question whether Sweezy and Keyishian actually established a constitutionally protected right to academic freedom. Conversely, other language in the opinion seems to recognize just that proposition. See id. at 198, 110 S. Ct. at 586 (referring to the absenceof a need to define the "precise contours" of academic freedom).

[FN93]. The cases relied on by the University of Pennsylvania were Sweezy and Keyishian. Id. at 195-96, 110 S. Ct. at 585-86.

[FN94]. Id. at 198, 110 S. Ct. at 586.

[FN95]. Id., 110 S. Ct. at 587.

[FN96]. Id. at 199, 110 S. Ct. at 587.

[FN97]. 408 U.S. 665, 92 S. Ct. 2646 (1972).

[FN98]. Id. at 682, 92 S. Ct. at 2657, construed in University of Pennsylvania, 493 U.S. at 201, 110 S. Ct. at 588.

[FN99]. Id. at 200, 110 S. Ct. at 588.

[FN100]. Id. at 201, 110 S. Ct. at 588 (quoting Branzburg, 408 U.S. at 682, 92 S. Ct. at 2657).

[FN101]. Id. at 199, 110 S. Ct. at 587 ("Nothing we say today should be understood as a retreat from this principle of respect for legitimate academic decisionmaking.").

[FN102]. 52 F.3d 9 (2d Cir.), cert. denied, 116 S. Ct. 173 (1995). The original circuit court opinion in Jeffries may be found at 21 F.3d 1238 (2d Cir.), cert. granted and remanded, 115 S. Ct. 502, 503 (1994). The Supreme Court remanded the case in light of its recent opinion in Waters v. Churchill, 114 S. Ct. 1878 (1994), which held that "a public employer who reasonably believes a third-party report that an employee engaged in constitutionally unprotected speech may punish the employee in reliance on that report ...." Id. at 1891 (Souter, J., concurring).
Clearly, much will be written about Jeffries in the months to come. In fact, the better part of a symposium was written on the initial decision. See Academic Freedom and Tenure Symposium, 15 PACE L. REV. 1 (1994). The treatment given here is merely a summary of that decision.

[FN103]. Jeffries, 52 F.3d at 11.

[FN104]. Id. at 14-15.

[FN105]. Id. at 12.

[FN106]. 461 U.S. 138, 103 S. Ct. 1684 (1983).

[FN107]. 391 U.S. 563, 88 S. Ct. 1731 (1968). This standard provides less protection for government employees:
To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' Waters v. Churchill, 114 S. Ct. 1878, 1884 (1994) (citation omitted).

[FN108]. Jeffries, 52 F.3d at 13.

[FN109]. Id.

[FN110]. Id. at 11.

[FN111]. Cf. Bose v. Consumers Union of United States, Inc., 466 U.S. 485, 503-11, 104 S. Ct. 1949, 1961-66 (1984) (holding that an appellate court must make an independent judgment about the existence of actual malice).

[FN112]. Jeffries, 52 F.3d at 14.

[FN113]. Id.

[FN114]. See supra notes 55-61 and accompanying text.

[FN115]. See supra notes 55-61 and accompanying text.

[FN116]. See 1940 Statement, supra note 3, at 3, stating:
Tenure is a means to a 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. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

[FN117]. See infra notes 152-55 and accompanying text (noting the need for rehabilitation when possible).

[FN118]. See supra notes 152-55 and accompanying text.

[FN119]. This approach is consistent with Sweezy and Keyishian. See supra part III.C.

[FN120]. It may be more appropriate to state that the behavior fails to meet the standards which justify academic freedom. That is truly the violation at issue. However, the converse statement is necessary because of the method of articulation chosen in the 1940 Statement: "[t]heir service should be terminated only for adequate cause." Supra note 3, at 4.

[FN121]. See Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1956); Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1966); Byrne, supra note 2, at 270 (citing A. NEVINS, THE STATE UNIVERSITIES AND DEMOCRACY 2-22 (1962)); 1940 Statement, supra note 3, at 3.

[FN122]. 1940 Statement, supra note 3, at 3.

[FN123]. 587 F. Supp. 902 (D. Minn. 1984), aff'd, 774 F.2d 224 (8th Cir. 1985), cert. denied, 475 U.S. 1095, 106 S. Ct. 1491 (1986).

[FN124]. Id. at 904.

[FN125]. Id.

[FN126]. Id.

[FN127]. Id.

[FN128]. Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1956).

[FN129]. King, 587 F. Supp. at 904.

[FN130]. As previously stated, it is the benefit which society gains from an academy free to teach and learn, question and hypothesize, experiment and fail, which justifies the existence of academic freedom. See supra part III.

[FN131]. King, 587 F. Supp. at 904.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id.

[FN135]. See supra notes 115-19 and accompanying text.

[FN136]. This determination is analogous to absenteeism and tardiness. However, the "participation" may be limited to remaining current on the developments within the discipline, in the case of research and scholarship.

[FN137]. This inquiry is analogous to the quality of teaching in the classroom.

[FN138]. Just as in King, the inquiry should focus on whether relevant information is being conveyed in an organized and coherent fashion. See King v. University of Minn., 587 F. Supp. 902 (D. Minn. 1984).

[FN139]. The substance of the professor's views may, in fact, be reprehensible. For example, Sweezy may have been an atheist and a communist. He may have advocated the superiority of the socialist economic system. For many people today, not to mention the prevailing attitudes in 1955, such views would be intolerable. Nevertheless, academic freedom and the First Amendment will not allow those views to justify any punishment of Sweezy, including dismissal from his teaching position. See Sweezy v. New Hampshire, 354 U.S. 234, 77 S. Ct. 1203 (1957).

[FN140]. The difficulty of separating the substantive inquiry from the competence inquiry is addressed by Professor Byrne. Indeed, Byrne acknowledges, as he must, that "[t]he integrity of academic freedom depends on the good faith of the professorate and on its collective ability to distinguish between scholars who disagree with accepted findings and those who do not understand them." Byrne, supra note 4, at 284. Perhaps it is this difficulty which is the best justification for the protection of academic freedom. As between the court or administrator and the

academic, it would seem that the academic is best able to walk this tightrope. After all, it is the academic who may find herself in the same predicament in the future.

[FN141]. Bennett & Chater, supra note 9, at 40. The authors note that the typical modes of participation are "membership on committees, participation in faculty governance activities, and relevant community and national projects." Id. Evidence of the quality of participation may be found in "attendance at meetings, presentation of papers, enrollment in special courses or programs, and efforts to improve teaching and research skills." Id.

[FN142]. See Hendrickson, supra note 20; Lorain, supra note 20.

[FN143]. Moral turpitude is not limited to improper sexual advances. It includes dishonesty and extreme vulgarity. See Lovain, supra note 20, at 423. It also includes fraud. See Hendrickson, supra note 20, at 492.

[FN144]. Garrett v. Mathews, 474 F. Supp. 594 (N.D. Ala. 1979), aff'd, 625 F.2d 658 (1980); Stastny v. Board of Trustees of Central Washington Univ., 647 P.2d 496 (Wash. Ct. App. 1981), cert. denied, 460 U.S. 1071, 103 S. Ct. 1528 (1983).

[FN145]. An interesting question is who will be included in the definition of "student" for the purposes of dismissal? The answer may vary depending on the circumstances. For instance, if the charge is that a professor has made unwanted sexual advances toward a student, then the broadest definition will be appropriate. The professor is violating federal law and subjecting the institution to liability, not to mention the damage done to the student and the educational process. See Walter B. Connelly, Jr. & Alison B. Marshall, Sexual Harassment of University or College Students by Faculty Members, 15 J.C. & U.L. 381 (1989); Elaine D. Ingulli, Sexual Harassment in Education, 18 RUTGERS L.J. 281 (1987). In such a case, harassment of any university student should subject a professor to disciplinary proceedings.

On the other hand, if the conduct falls short of being sexual harassment, then the group of students included might be narrower. In this case, the student and the professor, presumably, are in a relationship as consenting adults. The definition of "student" might then be limited to those whom the professor teaches, or may teach in the future.

A separate and very complex issue is when the professor is charged with creating a hostile sexual environment through his "teaching methods" and remarks, as opposed to making sexual advances or engaging in a relationship with a student. See Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994); Kenneth Jost, Questionable Conduct, A.B.A. J. 71 (Nov. 1994).

[FN146]. 647 P.2d 496, 504 (Wash. Ct. App. 1982). See also Garrett, 474 F. Supp. at 599, where the court states:

> Though, as plaintiff alleges, supplying a list of publications and opening mail may be nowhere written as job requirements, the court notes that not showing up for class naked is not a written job requirement either. Some things go without saying. Complying with reasonable requests from superiors and opening mail from superiors are among them.

The court in Garrett seems willing to assume that the dispute is limited to the professor's unwillingness to submit to reasonable requests. A close reading of the case, however, gives one the impression that friction between department head and a professor was the true reason for the dismissal. The original charges against the professor, brought by the administrator, were far more egregious. However, the committee appointed to investigate these charges found them to be without merit. The committee went on to recommend discipline short of dismissal for the insubordination charges. The failure to follow this recommendation eventually led to the

reinstatement of the professor without tenure.

[FN147]. Statsny, 647 P.2d at 500-01.

[FN148]. Id. at 500.

[FN149]. Id. at 504.

[FN150]. Id. Professor Stastny's dismissal is far more justifiable than the dismissal in Garrett. The dean specifically refused Stastny's request to be absent from classes because Stastny had to be present to advise students during the winter quarter registration. Id. at 500. His absences in the past had also hampered the attempt to upgrade the courses in the department. Id. at 501. In other words, the administrators had legitimate reasons for their requests. Such reasons appear to be absent from Garrett.

[FN151]. Professor Stastny's dismissal exemplifies how the goals of academic freedom may be frustrated by refusals to comply with reasonable requests.

[FN152]. See Bennet & Chater, supra note 9, at 39 (emphasizing the usefulness and necessity of frequent "feedback" in effectuating "faculty renewal"). Though the authors' reference is to evaluations and not dismissal for cause, the application carries over.

[FN153]. Id. at 40.

[FN154]. For example, a professor may become affected with a mental disease or may be incapacitated by senility or alzheimer's disease. In each of these cases, it is hoped that some retirement provisions may be made. In any event, the professor cannot remain in the classroom or the lab.

[FN155]. Moreover, there is also a potential danger to the professor in some laboratory-type settings.

[FN156]. 818 F.2d 58 (D.C. Cir. 1987).

[FN157]. Id. at 60.

[FN158]. Id.

[FN159]. Id.

[FN160]. Id. at 62.

[FN161]. Id.

[FN162]. Id.

[FN163]. Id. at 65.

[FN164]. For the purpose of this article, he refused to "participate."

[FN165]. McConnell, 818 F.2d at 61.

[FN166]. Bennett & Chater, supra note 9, at 40

[FN167]. See supra notes 65-67 and accompanying text. It must be remembered that the academy assumed certain responsibilities along with the rights acquired under academic freedom.

[FN168]. See Levitt v. Monroe, 590 F. Supp. 902, 904 (W.D. Tex. 1984), aff'd, Levitt v. University of Tex., 759 F.2d 1224 (5th Cir.), cert. denied, 474 U.S. 1034, 106 S. Ct. 599 (1985) (investigation of professor began after receiving a complaint from a student in the professor's chemistry class).

[FN169]. See, e.g., Garrett v. Mathews, 474 F. Supp. 594 (N.D. Ala. 1979); Stastny v. Board of Trustees of Centr. Wash. Univ., 647 P.2d 496 (Wash. Ct. App. 1982).

[FN170]. Such accusations were present in both Stastny, 647 P.2d at 501 and King v. University of Minn., 587 F. Supp. 902, 904 (D. Minn. 1984).

[FN171]. See Garrett, 474 F. Supp. at 597; Johnson v. Lincoln Univ., 776 F.2d 443, 453 (3d Cir. 1985).

[FN172]. See King, 587 F. Supp at 904; Cotter v. District Bd. of Trustees; 548 So. 2d 731, 732 (Fla. 1989).

[FN173]. See, e.g., King, 587 F. Supp. at 904; Cotter, 548 So. 2d at 732.

[FN174]. See, e.g., King, 587 F. Supp. at 904; Cotter, 548 So. 2d at 732.

[FN175]. See Bennett & Chater, supra note 9, at 39.

[FN176]. The purpose should be to evaluate the performance of faculty members so that they can improve that performance. Id. (citing RICHARD P. CHAIT & ANDREW T. FORD, BEYOND TRADITIONAL TENURE (1982)).

[FN177]. Id.

[FN178]. The only administrative catalyst advocated is failure to comply with reasonable requests.

[FN179]. Virtually all of the cases cited in this article involve administrators holding at least the rank of department head instigating the charges. The one exception is that set of cases dealing with sexual misconduct where the challenge is not to the substance of the decision but to the procedure. If the peer-review process were to take the lead, perhaps these court challenges would dissipate.

[FN180]. See, e.g., McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1987); Russ v. White, 541 F. Supp 888 (W.D. Ark. 1981), aff'd, 680 F.2d 47 (8th Cir. 1982); Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976); Lyman v. Swartley, 385 F. Supp. 661 (D. Idaho 1974).

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