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IT is a basic principle of constitutional law that actions of public school governing bodies (school districts, school boards, boards of regents) are subject to the dictate of the Fourteenth Amendment to the United States Constitution which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[1]

The Fourteenth Amendment due process provision has both a procedural and a substantive connotation. The substantive connotation deals with questions of deprivation by the state of a substantive right such as freedom of speech, freedom of association, or freedom to wear a hair or dress style. This article will not be concerned with the substantive connotation of the Fourteenth Amendment, but will deal exclusively with the protection of procedural rights. As the name implies, the issue of procedural due process raises the question as to whether a state is following a fair procedure when it attempts to interfere with life, property or liberty. This discussion will concentrate on an analysis of the procedural due process rights which teachers may enjoy when the state takes certain actions which have an impact upon their current employment. The article will not touch upon the due process rights of students.

Before moving directly into the discussion suggested by the title of this article, however, it is appropriate to outline briefly the attitude of the United States Supreme Court with respect to the interpretation given to procedural due process under the Fourteenth Amendment.

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1. U.S. CONST. amend. XIV, § 1.

Basic Concept of Procedural Due Process

From the earliest times the United States Supreme Court, in giving contour to the procedural concept of the Fourteenth Amendment due process clause, has applied its judgment to the facts to determine if it felt that fundamental fairness was accorded.[2] There were efforts made to obtain judicial approval of the theory that the Fourteenth Amendment due process clause incorporates the provisions of the first eight amendments—those amendments known as the Bill of Rights and aimed directly at the federal government. One of the first such attempts was in a case challenging a California statute which provided for prosecution by information for certain criminal offenses.[3] The statute was attacked on the ground that the Fifth Amendment required indictment by grand jury and that this requirement was meant to be incorporated as an element of due process and made applicable to the states by the Fourteenth Amendment. The Court rejected the idea on the ground that indictment by grand jury was not so basic a right that due process could not be accorded without such a procedure. The Court felt that the states could use any procedure which respects and preserves fundamental principles of liberty and justice. It was the opinion of the Court that indictment by information met this test.

A forceful example of the dependency of procedural due process under the Fourteenth Amendment upon judicial evaluation of what constitutes fairness is seen in the cases involving the Fifth Amendment privilege against self-incrimination and the extent to which it is applicable to state procedures. In two cases, *Twining v. New Jersey*[4] in 1908 and *Adamson v. California*[5] in 1947, the Court refused to apply the Fifth Amendment to the states, expressing the view that the privilege against self-incrimination had never been universally accepted as a necessary concomitant of due process and hence was not within the scope of the Fourteenth Amendment guarantees.[6] A dramatic change in philosophy was announced by the Court in 1964 when it came to the conclusion that the Fifth Amendment protection against self-incrimination, although aimed directly at the federal government, embodies a fundamental right which should be incorporated into the

2. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963); Palko v. Connecticut, 302 U.S. 319 (1937).

2. Hurtado v. California, 110 U.S. 516 (1884).

4. 211 U.S. 78 (1908).

5. 332 U.S. 46 (1947).

6. *See* Twining v. New Jersey, 211 U.S. 78, 110 (1908).

due process clause of the Fourteenth Amendment.[7]

The fundamental fairness doctrine has also been applied where the question of incorporation was not involved. For example, as recently as 1970 in *Goldberg v. Kelly*,[8] the Court decreed that public assistance payments could not be terminated by New York State without according certain procedural due process protections.

Over the years, dissenting Justices have protested the use of the fundamental fairness doctrine relied upon by the majority. In *Adamson* the majority said that the Bill of Rights was incorporated only to the extent that the provision in question expressed a fundamental right.[9] In response, Justice Black protested:

> I . . . contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excresence on our Constitution . . . .
>
> . . . .
>
> I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights . . . .[10]

Justice Black's dissent was not confined to the issue of the incorporation of the Bill of Rights into the Fourteenth Amendment due process clause. In the *Goldberg*[11] case he complained that the decision rested upon "the collective judgment of the majority as to what would be a fair and humane procedure . . . ."[12] He felt that this was an unsatisfactory basis for holding unconstitutional the procedure outlined by the state legislature. A year earlier, in a case in which the Supreme Court invalidated Wisconsin's garnishment procedure,[13] Black also dissented, commenting:

> The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight.
>
> . . . .
>
> This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision.[14]

In spite of the dissenting philosophy of Justice Black, the concept of fundamental fairness has continued to play a role in cases involving

7. Malloy v. Hogan, 378 U.S. 1 (1964).
8. 397 U.S. 254 (1970).
9. 332 U.S. 46 (1947).
10. *Id.* at 75, 89 (Black, J., dissenting).
11. Goldberg v. Kelly, 397 U.S. 254 (1970).
12. *Id.* at 276 (Black, J., dissenting).
13. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
14. *Id.* at 345, 350 (Black, J., dissenting).

the adequacy of procedural due process. Although the principle will not produce decisions which will bring universal approval, it is submitted that it is hard to challenge the appropriateness of the technique. It seems unreasonable to deny to a court the opportunity to react to the adequacy of procedure on the basis of its fundamental fairness. This article will comment upon the concept of fundamental fairness as applied to cases involving due process for public school teachers in nonrenewal of contract or discharge situations.

Recent Supreme Court Cases Involving Teachers

In determining what constitutes procedural due process in teacher nonrenewal of contract and dismissal situations, it is necessary to deal directly with the issue of whether there is a property right or a liberty right as those terms are used in the Fourteenth Amendment. Two United States Supreme Court cases, *Board of Regents v. Roth*[15] and *Perry v. Sindermann*,[16] decided in the middle of 1972, turned on this issue. In *Roth* the Court emphasized that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[17] On the basis of finding no invasion of a property or liberty interest, the majority concluded that the teacher Roth had no right to a hearing before nonrenewal of his contract. *Roth* makes it very clear, however, that Justices can differ sharply on what constitutes a protected property or liberty interest under the Fourteenth Amendment, as the three dissenting opinions presented some very potent arguments.

It is necessary at this point to analyze some of the salient points made by the majority in *Roth*. Roth was not a tenured teacher. Under Wisconsin statutes he could attain tenure as a permanent employee only after four years of year-to-year employment. The Court held that in merely declining to re-employ him the Board of Regents had not abridged any property right. The Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[18]

In distinguishing the case from *Goldberg* the majority pointed

15. 408 U.S. 564 (1972).
16. 408 U.S. 593 (1972).
17. 408 U.S. 564, 569 (1972).
18. *Id.* at 577.

out that in the latter case the right to welfare payments "was grounded in the statute defining eligibility for them"[19] and the recipients had a right to a hearing at which they might attempt to prove eligibility, whereas in *Roth*,

> the respondent's "property" interest in employment at Wisconsin State University—Oshkosh was created and defined by the terms of his appointment . . . . [R]espondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.[20]

With respect to the question of whether there was a protected liberty interest, the Court remarked: "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[21]

In response to this point, Justice Douglas suggested in his dissent that the case was different from *Cafeteria & Restaurant Workers v. McElroy*,[22] upon which the majority relied, because in *McElroy* the government was prepared to offer to employ the worker at another nearby restaurant, while in *Roth* the nonrenewal of a teacher's contract "can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State."[23]

Justice Marshall, also dissenting, argued that

> the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [The Court] has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by government he may be "discharged at any time for any reason or for no reason."[24]

Marshall stressed the idea that employment is one of the greatest benefits that government has to offer, saying: "When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable."[25]

19. *Id.*
20. *Id.* at 578.
21. *Id.* at 575.
22. 367 U.S. 886 (1961).
23. Board of Regents v. Roth, 408 U.S. 564, 585 (1972) (Douglas, J., dissenting).
24. *Id.* at 588 (Marshall, J., dissenting), *quoting* Truax v. Raich, 239 U.S. 33, 38, 41 (1915).
25. *Id.* at 589.

Under the circumstances the dissenters felt that Roth was entitled to know the reasons for his nonrenewal and to have a chance to respond.

Evaluation of the Supreme Court Philosophy

If one agrees with the majority opinion in *Roth* relative to the property and liberty interests involved, it would be difficult to quarrel with the Court's position that Roth was not entitled to a hearing. Since fairness of procedure is the underlying issue, however, the Court's firm stand on the nonexistence of a property or liberty interest seems questionable in view of the forceful and logical argument of the dissenters. The dissenters at least raised the property and liberty issue to the position of a very close question. Thus it seems proper to suggest that if the Court could have protected the interest of the school board, while at the same time ordering a procedure which would have accorded fundamental fairness to a probationary teacher, it should have done so. It is submitted that the Court could have done this by declaring that probationary teachers who are not going to be offered a new contract be entitled to know the reasons for such determination and to have an opportunity for a hearing before the school board.

It is apparent that underlying the *Roth* decision was the feeling of the Court that the statute in question had a rational basis. That is, it was not unreasonable to provide for a trial period, during which a teacher could be evaluated, before granting tenured status with its attendant protection against arbitrary dismissal. It is equally apparent that the Court felt that if the trial period evaluation should lead to a decision not to renew the contract of a teacher, the school board should not be saddled with a burdensome hearing.

These considerations are not without merit. It is suggested, however, that if the teacher is given a right to know the reasons for the nonrenewal, and is permitted to appear before the school board to respond or to undertake the burden of proving arbitrary action or the invasion of First Amendment rights, no unfair burden has been placed upon the school board. Rather, the teacher has been accorded "fundamental fairness." The argument against implementing this type of procedure is that it will open the door to litigation, and thereby put an undue burden on the board. These effects are not the necessary consequences of such a procedure. In confining the due process rights of a probationary teacher to a statement of the reasons for nonrenewal of the contract and a chance to appear before the school

board, nothing more has been done than to permit the teacher to assess his chances of convincing the board of the arbitrariness of the evaluation or of a violation of First Amendment rights. Counsel should advise teachers in such situations that in most instances a court review would involve a fruitless expenditure of time and money because a review court will not overrule the judgment of a school board unless it finds that such action was arbitrary or unconstitutional. The chief judge of the United States District Court for the Eastern District of Wisconsin put this rationale accurately when he said:

> [T]he courts are not the proper agency to administer the school system. Judges simply lack the information and the expertise needed to sit in review of a school board's personnel decisions. A court's scope of review must, therefore, be so confined that only patently arbitrary or baseless dismissals are invalidated.[26]

Justice Douglas in his dissent in *Roth* outlined the minimal procedural due process rights that should be accorded a probationary teacher. He quoted approvingly the words of the District Court for the Western District of Wisconsin:

> [M]inimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.[27]

In a footnote in *Carpenter v. City of Greenfield School District No. 6*,[28] the court made clear that its scope of review would be greater if the dismissal is alleged to be in retaliation for the exercise of First Amendment rights.[29] In regard to First Amendment rights, a probationary teacher may obtain judicial review even under the present case law. It seems, however, that a strong argument in support of a teacher's right to reasons for dismissal is the need to know if such action was motivated by a spirit of retaliation for speech or association.

Limiting the rights of a probationary teacher to a statement of

26. Carpenter v. City of Greenfield School Dist. No. 6, 358 F. Supp. 220, 226 (E.D. Wis. 1973).

27. Board of Regents v. Roth, 408 U.S. 564, 585-86 (1972) (Douglas, J., dissenting).

28. 358 F. Supp. 220 (E.D. Wis. 1973).

29. *Id.* at 226 n.2.

reasons and an opportunity for a hearing before the school board would be in accord with the general doctrine that the power of the court in due process cases extends only to a determination of the particular form of due process required in a specific fact situation.[30] This limitation is justified on the ground that a greater extension of rights would ignore the fact that a school board should have great discretion in evaluating a teacher during the probationary years and that the court must refrain from conferring tenure by judicial decree.

It must be acknowledged, of course, that even these limited procedural requirements put some burden on the school board. But the burden is outweighed by the need to treat a teacher with fundamental fairness. It seems grossly unfair to erect a barrier which makes proof of arbitrary action all but impossible. Even where reasons for dismissal are given, the teacher will find it most difficult to establish arbitrary action. But the teacher at least should have the right to try.

Justice Marshall in his dissent in *Roth* makes several very thought provoking comments on the value of reasons and a hearing. On the subject of giving reasons he says:

> [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 truely burdensome. And that is precisely when it is most necessary.[31]

On the subject of a hearing before the school board, Marshall stated:

> It might also be argued that to require a hearing and statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error . . . . When government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful and correct.[32]

The suggestion that the Court need not have interpreted the concepts of liberty and property so narrowly, in view of the fact that the primary concern in procedural due process cases is the question of fundamental fairness, is especially applicable to the decision of the

30. Goldberg v. Kelly, 397 U.S. 254 (1970), is a leading recent case which enunciates the principle. *See also* Fuentes v. Shevin, 407 U.S. 67 (1972).

31. Board of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

32. *Id.* at 591-92.

Court in *Perry v. Sindermann*.[33] In *Sindermann* the Court was dealing with a situation in which there was no state legislation respecting tenure. The teacher involved had received four year-to-year contracts from the district. The Court rejected the "expectancy of continued employment" test as a basis for determining whether Fourteenth Amendment protections were applicable. In place of this test the Court insisted that there must be some proof showing that the school system had a de facto tenure program. The Court recognized that the absence of a formal understanding may not always foreclose the possibility of an implied right to contract renewal.

The pronouncement in *Sindermann* that "expectancy" of employment is not sufficient to establish the requisite interests protected by the Due Process provision of the Fourteenth Amendment is even more difficult to accept in light of the arguments made by the *Roth* dissenters. It is not unrealistic to argue that a teacher who has been employed in a district for four or more years has a significant interest in the renewal of his contract which entitles him to a statement of reasons for nonrenewal and a chance for a hearing before the board of education at which arbitrary action might be proved. The granting of such procedural protection does not contravene the intent of the legislature not to give tenure. For reasons discussed previously in this article, the burden upon the school board is not great when balanced against the consideration of fairness. The procedures outlined above do not constitute tenure by judicial decree, nor do they thrust upon the board the burden of proving a "for cause" reason for dismissal as in the case of a tenured teacher.

Some states have a tenure statute. In such states, a teacher who starts in a probationary status hopes that he will ultimately attain tenure. In other states no tenure statutes exist, and teachers are awarded year-to-year contracts. The latter was the case in *Sindermann*. Should the argument in favor of the giving of reasons and the opportunity to be heard before the school board be any weaker when no tenure statute exists than when a teacher starts work with the ultimate hope of attaining tenure? For all the reasons previously enunciated it would seem not. Of course, it should be possible for a school board to hire a teacher to fill a temporary vacancy under a contract for temporary employment.

Recognized Property and Liberty Rights

It now becomes necessary to return to an examination of *Roth*

33. 408 U.S. 593 (1972).

to determine those situations which would entitle a probationary teacher to procedural due process under the tests set forth by the majority opinion.

The following teachers were said to have a protected property interest: (1) the tenured teacher;[34] (2) the teacher with a contract for a specified term whom the board seeks to dismiss during such term;[35] and (3) the teacher who has a clearly implied promise of continued employment.[36]

The following teachers were said to have a protected liberty interest: (1) the teacher denied renewal for a stated reason (such as immorality or dishonesty) which would damage his standing in the community;[37] and (2) the teacher foreclosed from other employment opportunities because of a stigma or disability imposed upon him by the board.[38]

Unanswered Questions

The listing of the property and liberty interests which the Court indicated it would recognize leaves many questions unanswered. Indeed, one writer, who argued *Sindermann* before the United States Supreme Court, has commented that in the *Roth* and *Sindermann* cases the Court "took an area where the lower courts were confused, and in two brief decisions turned confusion into utter chaos."[39]

A great deal of litigation will undoubtedly be devoted to determining whether a teacher has a clearly implied promise of employment. *Sindermann* held that the teacher was entitled to a trial in which the court would determine whether in a particular fact situation the teacher had an objective, as opposed to a subjective, expectancy that he would be reemployed.

It seems predictable that much litigation will concern the issue of possible damage to reputation arising out of particular methods of announcing the reasons for dismissal. Suppose the reason is released only to the teacher and is otherwise known only to a few school administrators and members of the school board and there is no evidence of further dissemination. Would there be the requisite damage to

34. Board of Regents v. Roth, 408 U.S. 564, 576 (1972).
35. *Id.*
36. *Id.* at 577.
37. *Id.* at 573.
38. *Id.*
39. Gottesman, *Due Process For Untenured Teachers From the Teacher's Viewpoint*, FRONTIERS OF SCHOOL LAW 5 (1973).

standing in the community? Will litigation be required on the extent of dissemination?

The Court noted only two types of reasons which might result in damage to reputation, namely, immorality and dishonesty. What if the reason given was one of the following: incompetence, insubordination, irresponsibility or neglect of duty? If such reasons were known in the community, would the Court feel there was the requisite damage to reputation? The Court did say that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[40] The citations in support of this principle include a case in which a Wisconsin statute made it possible to publicly proclaim in bars that liquor was not to be served to a named alcoholic;[41] other cases involved loyalty to country.[42] In these cases, the damage to good name, reputation and honor was not difficult to establish. Will the Court be as willing to see the damage when the reasons are incompetence, irresponsibility, insubordination or neglect of duty on the part of a professional teacher? An affirmative answer would mitigate the lack of fundamental fairness implicit in the *Roth* decision. But will the answer be yes?

It certainly was not the answer given by the United States District Court in Pennsylvania. In *Berry v. Hamblin*[43] a teacher was told that her contract was not renewed because of "inadequate attention to students who do not excel at sports, hostility to colleagues, indifference to rules and regulations of the physical education department, and failure to evidence potential for professional growth."[44] In denying the teacher a right to a hearing the court said:

> [W]hile these charges may injure Plaintiff's professional reputation, they are not the type of charges which entitle her to a hearing. A discharge based upon a charge of immorality, debauchery or disloyalty to the nation may be a badge of infamy. Hence the dismissed employee who has been charged has a right to a hearing to controvert the charges. Discharge based on allegedly poor professional performance is not a badge of infamy.[45]

The reasoning of this court supports the thesis that when the ex-

40. Board of Regents v. Roth, 408 U.S. 564, 573 (1972), *quoting* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

41. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

42. Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Facist Committee v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303 (1946).

43. 356 F. Supp. 306 (M.D. Pa. 1973).

44. *Id.* at 308.

45. *Id.*

istence or nonexistence of a protected property or liberty interest is a close question, the concept of fundamental fairness could well have induced the Supreme Court to give minimal hearing rights (delineated previously in this article) to a nontenured teacher whose contract is not renewed.

Another question which is certain to be litigated in the future is whether a teacher has been foreclosed from other employment opportunities because of a stigma or disability imposed by the board. In *Roth* the Court made very clear that the mere decision by the board of regents not to renew the contract did not of itself establish that the teacher was foreclosed from taking other employment. Citing *Schware v. Board of Bar Examiners*,[46] a case which involved admission to the State of New Mexico Bar, the Court did say, however, that the "State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] . . . Due Process'."[47] This statement seems to indicate clearly that the Court at least is willing to consider whether there has been a foreclosing of opportunities in the *teaching profession.* It is clear, though, that the court will require evidence which demonstrates that the nonrenewed teacher had actually tried and was unable to find employment. The United States District Court in California[48] addressed itself to the question of the quantity and quality of evidence needed. The court said it wanted to know how widely the nonrenewed teacher had applied for employment. It did not specify, however, how many letters of application would have to be sent or how many potential employers would have to be contacted.

A question which was not answered in the *Roth* case is whether a teacher whose contract was not renewed could attempt to prove inability to obtain new employment on the ground that he was unable to give reasons for nonrenewal when asked to do so by prospective employers. In this connection if the prospective employer writes the former employer and secures the reasons from him, and the teacher is not employed, is he at that point entitled to a hearing?

The next matter requiring analysis and discussion is the extent of procedural due process to which a teacher is entitled if it can be demonstrated that a property or liberty interest exists under the tests outlined in the *Roth* and *Sindermann* decisions.

46. 353 U.S. 232 (1957).
47. Board of Regents v. Roth, 408 U.S. 564, 574 (1972).
48. Perkins v. Regents of the Univ. of Cal., 353 F. Supp. 618 (C.D. Cal. 1973).

Form of Hearing When Property or Liberty Interest Present

It is clear that even where a hearing is required by due process the kind or form of that hearing may vary according to circumstances. In *Fuentes v. Shevin*[49] the United States Supreme Court stated:

> [T]he Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any] . . . ."[50]

The *Goldberg*[51] case set forth the form of hearing which the Supreme Court felt was required in an administrative hearing held prior to the termination of public assistance payments to a particular individual. The Court stressed the right of the welfare recipient to appear personally and make an oral presentation, the right to confront and cross-examine witnesses relied upon by the government department, the right to have counsel if desired, and the right to have the decision rendered by an impartial person, that is, one who had not participated in the decision under review.

Since the property interest is clearly discernible in the case of a tenured teacher, or of a teacher who is dismissed during a contract term, or of a teacher who has a clearly implied promise of continued employment, it would seem that no valid reason could be presented for denying the form of due process specified in *Goldberg*. Of course, procedure is often specified in a tenure statute. If such procedure is not in accord with the dictates of due process, the legislation should be subject to attack on that ground.

In *McNeill v. Butz*[52] the Fourth Circuit Court of Appeals found that the United States Department of Agriculture had discharged a nontenured employee on the basis of charges of the type that the Supreme Court in *Roth* recognized as infringing upon a liberty interest. The court stressed the importance of confrontation and the right of cross-examination as a requirement of procedural due process. The court commented:

> [W]here untenured federal non-civil service employees are dismissed and permanently disqualified from future employment on the basis of secret charges which impugn their honesty and integrity, and where they have made timely and good faith requests to confront their nameless accusers, procedural due process requires that the government provide an opportunity to refute the

49. 407 U.S. 67 (1972).
50. *Id.* at 82 (ciations omitted).
51. Goldberg v. Kelly, 397 U.S. 254 (1970).
52. 480 F.2d 314 (4th Cir. 1973).

> charges by confronting and cross-examining such adverse witnesses . . . .[53]

Quoting Justice Frankfurter, the court went on to say:

> The heart of the matter is that democracy implies respect for the elementary rights of man, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.[54]

If the teacher can submit proof showing that employment opportunities have been foreclosed sufficient to meet the *Sindermann* test, there would seem to be no logical reason why he should not be entitled to the form of due process delineated in *Goldberg*.

There may be an argument that the *Goldberg* form of hearing right need not be given if provision is made for a de novo form of court review. It could then be asserted that all that was necessary at the school board level would be an opportunity to respond informally to charges. It could be argued that the insistence in *Goldberg* on a prior administrative hearing was due to the particular circumstances of the case. It is true that *Goldberg* can be distinguished on its facts.[55] There appears to be, however, another reason why teachers should be given the type of hearing described in *Goldberg*. As noted previously, the teacher who has property and liberty interests ought to have a more formal hearing before an administrative body which has some expertise in educational matters.

One of the *Goldberg* requirements—that the final decision should not be made by one who participated in the investigation or in the preliminary determinations on the question under review—requires special analysis. It has been contended that this requirement necessitates having the matter heard and decided by a neutral person who has no connection with the school district. To date this contention has not met with favorable response from the courts. The widely respected Second Circuit Court of Appeals has suggested that:

> The constitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe

53. *Id.* at 325.

54. *Id.*, quoting Joint Anti-Fascist Refugee Comm., 341 U.S. 123, 170 (Frankfurter, J., concurring).

55. In Goldberg, it can be argued that there were exigent circumstances, that is, the welfare payments were to be terminated immediately.

> that due process . . . requires so much . . . absent a showing of actual, rather than potential, bias.[56]

The court, of course, recognized that there would be a violation of due process if one who investigates and makes recommendations to dismiss was also entrusted with the rendering of the final decision. However, the Second Circuit was not willing to find a violation of due process merely because the minutes of a board meeting held three weeks prior to the hearing indicated that it "concurred" in the superintendent's initial nonrenewal decision. The court noted:

> [T]he district judge found that no actual Board vote was taken at that time, that the Superintendent was at all times the moving force in the matter of tenure denial, and that the clerk transcribing the minutes merely inferred, sua sponte, that all members agreed with the Superintendent's recommendation—a decision that would initially be communicated to the Board in the normal course of school administration, well before any hearing on its merits. *The very limited nature of the school board's prior involvement here is entirely consistent with due process.*[57]

Conclusion

This article has expressed the view that in *Roth* the United States Supreme Court would have been justified under the concept of fundamental fairness in recognizing a property or liberty interest sufficient to require at least minimal protection under the Fourteenth Amendment. This outcome would have been in full accord with the expressed feeling of the United States District Court for Northern Illinois that "liberty and property were never intended to be rigidly defined."[58] The *Roth* Court, however, did not do that, and there is no reason to believe that any changes will be made in this regard.

It is certain that many individual teachers and teacher associations are disturbed by the failure of the Court in *Roth* and *Sindermann* to give minimal procedural due process rights to probationary and nontenured teachers who cannot demonstrate the requisite liberty and property interest demanded by the Court. In light of the growing militancy of teacher association groups at the negotiating table, this disturbance will undoubtedly lead to effort to gain minimal due process rights at the bargaining table. The negotiations are very likely to be aimed at getting terms in the agreement which will clarify some of the "liberty" and "property" concepts left uncertain by the *Roth* and *Sindermann* decisions. These efforts are likely to succeed in

56. Simard v. Board of Educ., 473 F.2d 988, 993 (2d Cir. 1973).
57. *Id.* (emphasis added).
58. Miller v. School Dist., 354 F. Supp. 922, 925 (N.D. Ill. 1973).

many of those states having statutes which encourage good faith negotiations or in those states which recognize as valid a contract negotiated voluntarily. In some states statutes may stand in the way of obtaining such due process procedures through negotiation. Since it is only a procedure that is being negotiated, however, there would not be a direct invasion of school board management rights, and thus the statute would have to be very direct to preclude the negotiation.

In any event, the *Roth* and *Sindermann* holdings will not make life any easier for school boards. There is bound to be extensive litigation aimed at clarifying the loose definitions of "liberty" and "property" and at attempting to establish factually that the requisite interests do exist.

One matter which seems certain to be brought before the courts is the claim that, as far as service in the district is concerned, a time will be reached at which the nontenured teacher must be considered to have more than a mere subjective expectation of employment and, therefore, be entitled to the *Goldberg* type of procedural due process protections. The Fourth Circuit Court of Appeals has already reacted to such an assertion.[59] The teacher involved had 29 years of service in the district. The court held that a teacher might support her due process claim by showing de facto tenure amounting to a property interest, or by showing such injury to her professional reputation and livelihood, caused by the termination of her lengthy service, as to amount to an infringement of liberty. This reasoning appears very logical and the only question would seem to be the length of service necessary to warrant this result.

Although questions of demotion, transfer, and suspension of teachers are beyond the scope of the title of this article, it seems appropriate to conclude with a quotation from the attorney for the San Diego City Schools. Writing in *Frontiers of School Law* he asserted:

> The generality and vagueness of the majority's opinion in *Roth* and *Sindermann*, in concert with the strong views expressed by several dissenting opinions, leave considerable room for arguing forcefully and persuasively that the broad principles enunciated in the two cases apply also to the involuntary demotion, transfer, or suspension of a teacher . . . . These issues will be resolved in future lawsuits.[60]

59. Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

60. Shannon, *Due Process for Non-Tenured Teachers From the Board's Viewpoint*, FRONTIERS OF SCHOOL LAW 15, 24 (1973).