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The issues involved in *Board of Education v Roth* concerning the property rights of non-tenured educators need to be rethought. A dual system of law does not serve the interests of equity.

A Virus in the Ivory Tower?

Steven Cann

A second order consequence is an unintended consequence of a prior event. It can be either good (e.g., the development of digital technology in space flights) or bad (e.g., a whole generation of children who cannot tell time from a clock). Court cases often spawn second order consequences, and that is the subject of this paper.

By limiting a plaintiff's ability to establish a property or liberty interest, the U.S. Supreme Court believed it was doing public employers in general and educational administration in particular a favor with its decision in *Board of Education v Roth* (1972). In this case the Court severely curtailed those situations where the government is required to provide a due process hearing. While to the practiced eye *Roth* and its progeny have results in what judges refer to as 'well settled law,' it is not well understood at all by those who must live by it, and it has created some bizarre second order consequences. The particular second order consequences are creation of a dual legal subsystem, bad personnel decisions, encouragement of disruption, and unnecessary litigation.

Dual Legal Subsystem

In order to appreciate the arguments that follow, the reader should understand the basic elements of the law of public employment as it relates to education. The law that is 'well settled' is that a teacher (at any level) has no right to a pre-termination due process hearing absent a property or liberty interest. The former is generally acquired by obtaining tenure, while the latter can be obtained by damage to reputation or ability to seek other employment in the field. One can also acquire a liberty interest where the decision to terminate employment was primarily motivated by the exercise of a constitutionally protected right. This jurisprudence has created two classes of professional teachers: those with tenure who cannot be terminated without a hearing (and consequently without a reason and supporting evidence) and those untenured teachers who can be terminated and never know why. Indeed, it is poor legal strategy to provide reasons for termination in this latter group. This is true because since they lack the requisite property interest, silence means they will have difficulty attempting to establish the only other legal criterion that might get them into court to force an explanation (a liberty interest). Hence, an almost cabalistic silence surrounds contract nonre-

newal and denial of tenure decisions in the academy.

Almost unnoticed, this dual citizenship has caused the courts to apply different kinds of law to teachers as litigants, depending on whether they possess tenure. Tenured litigants get administrative law while untenured litigants get constitutional law. For the tenured teachers this is the case because tenure is the property interest which requires a pre-termination hearing. By its nature that hearing is quasi-judicial in character. A court reviewing the decision of a government agency arrived at through a quasi-judicial hearing will: show deference to the agency's expertise, concentrate on questions of procedure, and apply the substantial evidence test as a standard of review (classic administrative law). Untenured litigants, on the other hand, have only two options if they are going to get a court to review their situation. Since they are presumed not to possess a property interest they could allege a property interest of some other sort (this is possible but unlikely—there is a concept called *de facto* tenure). The only other option available to them is to allege the primary reason behind the decision to terminate their employment was the exercise of a constitutionally protected right such as freedom of speech, press or association (e.g., union activity). That being the case, there should be no reason to expect court deference to agency expertise, no reason to expect a reviewing court to concentrate on procedural questions, and we should expect a broader standard of review other than whether there is substantial evidence in the record to sustain the decision (because there is no hearing, there is no record). Furthermore, we can expect the court to freely substitute its judgment for that of the decision maker (classic constitutional law).

A LEXIS search of teacher termination cases using key words of 'due process' and 'education' produced a universe of over 1,200 cases from which a random sample of 500 was drawn. The sample showed clear evidence that the above assumptions are correct. Table 1 displays the differences in the legal issues between tenured and non-tenured litigants.

TABLE 1

ISSUE	Legal Issues in Teacher Termination Litigation		N = 500
	TENURED LITIGANTS	UNTENURED LITIGANTS	
financial exigency	58 (21%)	5 (2%)	
termination for cause	195 (71%)	28 (12%)	
civil rights/liberties	11 (4%)	92 (41%)	
timely notice	1 (.3%)	37 (16%)	
no reason given	3 (1%)	40 (18%)	
whether plaintiff has tenure	0	20 (9%)	
other	6 (2%)	4 (2%)	
	274 (55%)	226 (45%)	

The data in Table 1 tends to support the notion that tenured litigants must deal with administrative law while untenured plaintiffs deal with constitutional law. Indeed, each hypothesis regarding tenured cases can be confirmed. In those cases involving winning tenured litigants, in over one-third (36%) of the cases the reviewing court simply looked at the procedure involved, found it lacking, and reversed or remanded. In the remaining two-thirds of the cases involving tenured winners, the court found a lack of substantial evidence to sustain the decision in 26 percent of the cases

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and an arbitrary in 21 percent. The latter may simply reflect choices in judicial terminology, since by definition a decision which lacks substantial evidence to support it is an arbitrary one.

These three types of dispositions account for 86 percent of all cases involving tenured winners. By contrast, cases involving tenured losers were disposed of by the court finding substantial evidence to support the termination decision in a little over one-half of the cases (see Table 2).

Those cases involving untenured litigants also fit the predicted pattern, although for untenured winners procedural dispositions were more common than predicted. Those cases involving untenured winners were disposed of primarily on the basis of insufficient procedure (42%). These are cases where there was no procedure and the court determined that there should have been. Substantive civil rights or civil liberties violations accounted for 32 percent, while arbitrary decisions to terminate constituted 12 percent. Untenured litigants who lost did so in well over one-half of the cases because the court found either no liberty or property interest or no substantive constitutional violation.

TABLE 2

Dispositions in Teacher Termination Cases

	TENURED		UNTENURED	
	winners	losers	winners	losers
Procedural grounds	42 (21%)	21 (14%)	40 (42%)	34 (26%)
Substantial evidence?	31 (26%)	79 (51%)	6 (6%)	3 (2%)
Arbitrary decision?	25 (21%)	41 (26%)	11 (12%)	19 (15%)
Const'l. violation?	7 (6%)	4 (3%)	31 (32%)	74 (57%)
Other	13 (11%)	13 (8%)	8 (8%)	0
	118	156 = 274	96	130 = 226

N = 500

In legal theory, the role of the due process hearing is to reduce the risk of making an arbitrary decision. However, in referring to the data above, it would appear as though the existence of the hearing serves another purpose. That function can be referred to as the "while the cat is away" syndrome and goes as follows: Where an administrator knows that he/she must produce a public reason and supporting evidence to terminate an employee, then normally employees will only be terminated for statutorily permissible reasons. However, absent that same threat of a hearing, that same administrator can (and has) terminated employees for their sexual preference (*Aumiller v University of Delaware*, 1973), teaching marxism (*Duke v North Texas State University*, 1973), criticizing the allocation of funds to athletics (*Pickering v Board of Education*, 1968), discriminatory policies of the school (*Givham v Western Line Consolidated School District*, 1979), scheduling and curriculum decisions (*Eichman v Indiana State University*, 1979), for engaging in union activity (*Simard v Board of Education*, 1973), and for urging fair treatment of minority students (*Bernasconi v Tempe Elementary School District*, 1977)—to mention only the most obvious examples. In point of fact, the existence of a due process hearing can never assure the absence of

arbitrariness in decisionmaking (see *Aumiller v University of Delaware*, 1973; also see *State Employees Retirement System v Industrial Accident Commission*, 1950), but it certainly does appear to have the effect of protecting (and fostering respect?) for employees' constitutional rights.

Bad Personnel Decisions

The case law that has developed around educational employment has caused a good deal of misunderstanding which has led to poor personnel decisions. One of the myths surrounding this jurisprudence is that it is nearly impossible to terminate a teacher once he/she has been granted tenure. However, once it is understood that litigation involving tenured teachers is simple administrative law, then it follows that so long as the procedure is fair on its face and there is enough evidence to support the charge, we can assume that reviewing courts will defer to agency expertise. As Table 3 shows, that is precisely what courts do.

The evidence in Table 3 indicates that once the court is satisfied with the procedure and review moves to the merits, the plaintiff/teacher loses 70 percent of the time. This is probably not a widely known fact because there is much paranoia about termination of tenured faculty among educational administrators.

Bad personnel decisions fall into two categories. The first, discussed above, are those decisions not to terminate tenured faculty who should be terminated. These faculty keep their jobs solely because the administration fears a lawsuit. The second category of poor personnel decisions involves the nonretention of untenured teachers for reasons (usually petty) that have nothing to do with their ability to teach (again refer to Table 1).

TABLE 3

Cases Involving For-Cause Termination of Tenured Faculty

DISPOSITIONS	WINNER		
	plaintiff (teacher)	defendant (administration)	
substantial evidence	43 (30%)	98 (70%)	141
Procedural	41 (76%)	13 (24%)	54

The Encouragement of Disruption

While there is a good deal of misunderstanding about the case law, we are after all dealing with one of the best educated subpopulations in the country. It is not lost upon teachers that during probationary employment, one can quietly and competently perform all employment requirements but nonetheless be terminated without a reason and without legal recourse. At the same time they observe similarly situated colleagues who also get terminated during their probationary period but because of public criticism of the administration or union activity, they can (and do) challenge their termination in a court of law (and they win nearly half of their suits).

Most faculty could not articulate it quite so succinctly as Justice Rehnquist did:

A rule of causation which focuses solely on whether protected conduct played a part, substantial or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of

constitutionally protected conduct than he would have occupied had he done nothing (*Mt. Healthy City School District Board of Education v Doyle*, 1977).

However, they do understand that without tenure if you lose your job and raise hell, you get court review of the decision; while if you do not raise hell, you get no court review and no explanation—you only get silence and unemployment.

So that the reader can better appreciate the irony that the (C)ourt has created with this line of cases, what follows is a not-so-hypothetical example. Professor X was an untenured teacher at a state university. He suspected a student of plagiarism on a term paper, did a little research, and was able to document the plagiarism. He failed the student (who had a teaching job arranged pending the completion of the degree at the end of the term), but the student happened to be the son-in-law of a friend of the Academic Vice President. The VP put pressure on the dean to put pressure on Professor X, who resisted it. Finally Professor X was told that he would never be granted tenure if he did not pass the student. He refused. At this point had Professor X done nothing, the administration would have quietly changed the grade (which they did regardless) and issued the professor a terminal contract (which they did). The professor would still have had his integrity and the satisfaction of being right but nothing else. He would be out of a job and his protests would be met with silence and denial and he would be unable to establish either the property or liberty interest necessary for court review. Fortunately for justice, Professor X had observed this jurisprudence at work before, so he knew what must be done. Though never particularly pro-union before, he got involved in union politics. After achieving elected office in the union, he made a speech critical of the administration on the steps of the administration building (the press was invited). He was indeed given a terminal contract, but because of his union activity he won a sizeable jury award and recently the state's appellate court awarded him reinstatement (*Hale v Walsh*, 1987).

There is no way to get around the fact that throughout probationary employment the only protection a public employee has against an arbitrary administrator is to publicly attack that administration. This is surely not a sound state of affairs for government generally and education in particular.

Unnecessary Litigation

There are three kinds of cases that probably would not get litigated if probationary public employees were entitled to a pre-termination due process hearing. The first category already discussed above involves those untenured teachers who are not retained primarily because they engaged in constitutionally protected behavior that upset an administrator. Whether it was ever utilized or not, the mere existence of a due process hearing would nearly eliminate these situations (refer again to Table 1). It appears as though the mere existence of the hearing modifies administrative behavior in a more constitutional direction.

The second category of unnecessary litigation is closely related to the first. These cases result from reasonable decisions not to retain untenured personnel and the corollary refusal to provide an explanation. In these situations the plaintiff believes that the primary motive for the decision not to retain was the exercise of a constitutionally protected right, but in court the administration raises a successful 'same decision anyway' defense. The case of *Cook County Community College v Byrd* (1972) is a good example. The plaintiffs were two untenured teachers whose contracts were not renewed and they were not told why. Both

had been active in the teachers' union, both had opposed the reappointment of the individual who was eventually reappointed as the department chairperson. Both had publicly criticized racism and the use of city police on campus. At trial the defendant administration produced five objective criteria upon which retention decisions are made and indicated how the plaintiffs did not measure up. Basically, one of the plaintiffs did not possess the appropriate degree and the other had not published in the fifteen years since obtaining his doctorate. Not only is this a classic example of 'same decision anyway' defense, but it is also a classic example of how not to administer personnel. It is also ludicrous that at no time were the plaintiffs apprised of dissatisfaction with their performance on the criteria. This kind of personnel administration is fostered and encouraged by the court's jurisprudence in this area of the law.

In any case, it is not unreasonable to assume that had there been some type of pre-termination hearing, this case would never have gone all the way to trial. Indeed, no complaint would have been filed. Finally, there are a sizeable number of frivolous cases, usually dismissed at an early stage, where the plaintiff is unable to establish either a liberty or property interest (38 cases (17%) of all untenured suits in this random sample). Indeed, these 38 cases, plus the 31 cases where untenured plaintiffs prevailed in their First Amendment claims plus the 11 successful 'same decision anyway' cases, constitute 35 percent of all the untenured lawsuits. Most of those would never have been litigated had there been a due process requirement.

Conclusion

Even though this discussion has focused on educational employment, it should be noted that the problems discussed above apply to the law of public employment generally. Almost all public employees serve for a specific period of time as probationary employees during which they are considered not to have a continuing expectation of employment. Consequently there is no property interest. Hence, absent the ability to assert a liberty interest, they can be treated unfairly and/or fired and have no right to know why. There is no legal recourse to force an explanation.

In most public employment situations, probationary employment is a matter of months, but in educational employment it is years. The average probationary employment in primary and secondary education is three years. At the college level it averages five or six years, but can approach ten years. To create a doctrine of law that says a person who has taught for over five years has no expectation of continuing employment and consequently no right to a pre-termination hearing is to convolute the spirit of the due process clause so that only a lawyer could justify it. There is a virus loose in the academy. But it could be cured by a reversal of *Roth* and the establishment of due process rights for public employees.

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- Cook County Community College v Byrd*, 456 F.2d 882 (7th Cir. 1972).
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- Eichman v Indiana State University*, 497 F.2d 1104 (7th Cir. 1979).

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Endnote

Justice Rehnquist at the time was lamenting the legal proposition that an untenured teacher whom the administration had intended to terminate for apparently good rea-

son should not be able to 'save' himself simply because he had exercised a constitutionally protected right which played a part in the decision. This caused the Court to create the 'same decision anyway' defense (even if the exercise of a constitutionally protected right was a substantial factor in a decision to terminate an untenured faculty if the administration can demonstrate that it would have reached the same decision anyway, allowing the termination to be upheld). Of course, what one finds depends on how one looks, so the quote by Justice Rehnquist is as apropos today as it was before he discovered the 'same decision anyway' defense. The fact remains that if one can raise a constitutional allegation one gets a court review, whereas if one quietly does one's job and gets terminated, there is no court review (and no explanation either).