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## THE DILEMMA OF THE PROFESSORiate

MATTHEW W. FINKIN†

PROFESSOR DOWD'S invitation to attend this Symposium gave me the charge of addressing "the legal problems . . . involved in the relationship of faculty members and the university . . ." The request was so simply put that I quickly agreed. As I began to think about the topic, I concluded that the request was for an analysis of the interplay of both social and legal factors currently affecting the institutional status of faculty members in higher education. This realization was itself an educational experience — I have learned to be more suspicious of seemingly simple requests.

One of the significant issues in higher education is the degree to which institutions and faculties will be free to function without unwelcome legal direction or restraint, that is, the degree of autonomy allowed individual faculty members, individual institutions, and faculties within them. I realize that I have qualified some legal developments as not entirely lacking in felicity and that there will doubtless be dispute about them both within the academic community and outside it. I am reminded of the difference of opinion between President Perkins of Cornell University and Clark Byse of Harvard, concerning the advisability of the judicial extension of due process into cases of student discipline.<sup>1</sup> I proceed in the hope that my reservations concerning some developments treated here will be as happily resolved by subsequent events as were, I believe, many of the doubts expressed by President Perkins.

## I. THE LEGAL CONTEXT

Laws have played a relatively passive role with respect to the substance of educational decisions. To be sure, private institutions of higher education are chartered or incorporated by state law and bear scrutiny, usually of a minimal character, by some state agency. Their public counterparts are commonly created by state constitution or statute and bear a closer relationship to the state, particularly in matters of funding. In addition, state statutes or constitutional amendments may change the general educational mission of a public institution. So, for example, the New Jersey legislature could alter the state's

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1. Byse, *The University and Due Process: A Somewhat Different View*, 54 AAUP BULL. 143 (1968).

teacher colleges to institutions offering broad liberal arts programs. Indeed, the Pennsylvania legislature not long ago elevated the Indiana State College in Indiana, Pennsylvania to the Indiana University of Pennsylvania. Whether such legal alterations have a substantial short-run impact on the conduct of the educational mission remains to be seen.

In addition, through the funding of its research programs, the federal government has a profound impact on decisions involving the direction of research in universities. Unquestionably, the decision of many researchers to pursue particular interests are circumscribed by the availability of funds, and thus the priorities are set by the government.

Finally, laws can and have interfered with the substance of educational decisions by, for example, requiring loyalty oaths as a condition of employment for professors or by withholding certain funds from institutions which do not allow military recruitment on campus.

Broadly, then, laws have performed three tasks: (1) they have set the legal framework within which educational decisions are made; (2) they have encouraged certain kinds of decisions in accord with national, state, or local priorities, primarily through the funding process; and (3) in some instances, they have mandated a particular educational decision.

Occasionally, the faculty's role in institutional decision making is explicitly provided for by charter or statute. In the common case, however, the institution's board of trustees is vested with the right and power to govern the institution. The governing board usually adopts regulations delegating to the administration the general supervision and conduct of the institution's activities, a portion of which may, in turn, be expressly delegated to the faculty. Two examples, from the private and public sectors respectively, strike me as fairly typical. The Bylaws adopted by the trustees of New York University provide that the "educational conduct of each of the schools and colleges . . . is committed to the faculty of each of the schools" and that, subject to the approval of the governing board and general university policy, each faculty determines *inter alia* entrance requirements, courses of study, standards of academic achievement, and certifies qualified degree candidates.<sup>2</sup> The Bylaws define qualifications for faculty membership and establish a university senate, composed of faculty, administration, and student representatives, responsible for "discussion of University-wide policies and proposed changes in University practices and structure," including the academic program and personnel and budgetary policies. They also establish a faculty council, consisting of the elected faculty senators, which serves as the faculty personnel com-

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2. New York University, Bylaws (May 27, 1960).

mittee of the senate, and which may consider "any matters of educational and administrative policy" which it may bring to the attention of the senate or of the president.

The Rules and Regulations of the Minnesota State College Board provide for the establishment of a "principal agency for faculty participation in college governance" in the constitution of each institution.<sup>3</sup> They require that the faculty have "major responsibility" in consultation with students and administration for regulations relating to curriculum, evaluation of instruction, admissions, and academic standards and, without such required consultation, for all matters of faculty status. In addition, the faculty is to "participate" through such agencies in the preparation of long-range plans, priorities, and budgets. A far less explicit section provides for the designation of an organization to represent the faculty on matters of faculty interest coming before the system-wide board.

Presumably the right of the faculty to participate in institutional decision making provided by such bylaws and regulations could be judicially vindicated. Delegations of authority, however, can and have been selectively withdrawn by institutional governing bodies.<sup>4</sup> Moreover, much would depend on the sensitivity of the court to the realities of academic life. This is not to imply that a sound judicial understanding of faculty-institution relations cannot be achieved<sup>5</sup> but is to suggest that, perhaps due to inexperience with such institutions, courts are not always sensitive to the ways of the academic world.<sup>6</sup>

In any event, there is a paucity of litigation by faculty bodies seeking to vindicate their rights, although in this litigious age such a development may not be wholly unexpected. Thus, the profession's claim to participate in educational decisions, if asserted as a legal right, rests as yet on largely undeveloped ground.

The essential underpinning for the professor's claim to participate has not been in the character of his legal but of his professional status.

3. Minnesota State College Board, Rules and Regulations (1971).

4. See, e.g., *Academic Freedom and Tenure: The University of California at Los Angeles*, 57 AAUP BULL. 382 (1971), a report which concerns the failure of the Board of Regents of the University of California to renew the appointment of Acting Assistant Professor Angela Y. Davis. The Board had acted to "relieve the President of the University, the Chancellor of the Los Angeles campus, and all other administrative officers of any further authority or responsibility in connection with" Miss Davis' appointment and then proceeded to act itself on the matter. *Id.* at 390.

5. See, e.g., *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969).

6. Compare *Worzella v. Board of Regents*, 77 S.D. 447, 93 N.W.2d 411 (1958), with *Ironside v. Tead*, 228 App. Div. 940, 13 N.Y.S.2d 17 (Sup. Ct. 1939), modified, 259 App. Div. 704, 17 N.Y.S.2d 994 (Sup. Ct.), *aff'd*, 283 N.Y.2d 667, 28 N.E.2d 399 (1940). Fortunately the *Worzella* case has not been followed elsewhere. See Byse, *Academic Freedom, Tenure, and the Law: A Comment on Worzella v. Board of Regents*, 73 HARV. L. REV. 304 (1959).

It is by virtue of his particular expertise that the professor expects a predominant voice in curricular matters, expects to exercise a major responsibility for the selection and retention of his disciplinary colleagues in the institution, and expects generally to have an important say in the affairs of the institution.

## II. THE EROSION OF AUTONOMY

A variety of factors are now serving to reduce seriously the degree of autonomy heretofore enjoyed by the profession. In a thorough and regrettably unpublished paper entitled "The Twilight of Faculty Autonomy," Robert M. O'Neil discusses a number of these, some of which are intrinsic to institutional government in a time of much expanded higher education, but many of which constitute external threats: legislative interference in the wake of student disruption, particularly in the passage of laws governing faculty suspension and dismissal processes; legislative determination of faculty workload (and, more recently, the legislative suspension of sabbatical leaves); and that time honored device, the legislative investigation.<sup>7</sup> O'Neil goes on to discuss the implications of increasing resort to the judicial process: court orders opening schools closed by action of their administrations or governing boards; suits for reimbursement of tuition and damages by students and others for campus closings; suits by conservative students against institutional hiring policies; and a spate of lawsuits concerning the rights of nontenured faculty members. As if this were insufficient, O'Neil outlines the advent of surveillance and intelligence activities conducted on campus by agents of various federal and state authorities and the conduct of grand jury investigations, one of the more notable of which, at Kent State, resulted in criticism of the institution's administration for "fostering an attitude of over-indulgence and permissiveness with its students and faculty . . . ."<sup>8</sup>

Before returning to more of O'Neil's analysis, I would mention a new ingredient added to the stew — the intervention of the Department of Health, Education, and Welfare (HEW) to compel universities and colleges in receipt of federal contract funds to adopt affirmative action programs with respect to the hiring and promotion of females and minority group members. At the time of writing, the Department is in the process of drafting its guidelines, but in the interim, it appears to have proceeded on an ad hoc basis. In some

7. R. O'Neil, *The Twilight of Faculty Autonomy* (available through M. W. Finkin).

8. *Id.*

cases institutional adoption of something bordering on a "quota" system seems to be implied. The response of one affected institution, Columbia University, is instructive. In an interim agreement with HEW, all employment decisions, including those affecting faculty appointments, must be reviewed and approved by the central administration, a sharp departure from prior practice. Proposed appointments and promotion of non-minority males will be approved only if the affected deans and department chairmen can demonstrate unsuccessful attempts to recruit or promote women and minority group members.<sup>9</sup>

Another factor raised by O'Neil and, if anything, more urgent now is the financial picture of higher education. McGeorge Bundy once attributed the growth of faculty authority since the Second World War not only to the increased prestige attached to men of learning, but to the "massive authority of the law of supply and demand"<sup>10</sup> as well. Now, but a few years later, one cannot peruse an issue of the *Chronicle of Higher Education* without reading of reductions in faculty, freezes on hiring or tenure, and comment on whether the projected oversupply of Ph.D.'s is as severe as predicted. Related to the financial aspect are the rising criticisms leveled at the tenure system itself which has long been viewed as an essential defense for academic freedom and the calls for greater "accountability" on the part of institutions of higher learning. The recent remarks of a high state official from Maryland in a speech at a state college there seem fairly typical: "I'm not suggesting that the state government wants to get deeply enmeshed in the details of administering educational institutions, but I do warn you that both the legislative and executive branches will be demanding a careful accounting of where the money goes and what it buys. You'd better be prepared to give that accounting."<sup>11</sup>

The result of much of the foregoing — the demands of HEW, the financial pressures, and the calls for accountability — is a greater centralization of the university and the assertion of administrative controls not only on a single campus, but on a system and state-wide basis. Increasingly, one observes the establishment of educational consortia, the merger of educational systems, and the creation of state-wide super-boards and master planning agencies. In some instances regional commissions have been established to foster cooperation between the public and private sectors. However valuable some of these efforts may be, the net result is a significant erosion of the local faculty's voice in basic educational decisions.

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9. Once issued, the guidelines will probably be more rigid than the ad hoc agreements.

10. Bundy, *Faculty Power*, ATLANTIC MONTHLY Sept. 1968, at 42.

11. Undoubtedly, similar remarks have been made in every state.

### III. THE DILEMMA — LEGAL STATUS AND PROFESSIONAL STATUS

I had mentioned at the outset that not all of these developments may be entirely unwelcome. Few, I submit, would argue that the courts should not extend first amendment guarantees to college teachers in publicly operated institutions. The soundness of judicial review of alleged deprivations of constitutional rights is supported in some recent cases overturning nonrenewals of nontenured appointments for political expression and activity. One recent case, *Rozman v. Elliot*,<sup>12</sup> gives pause. The court found the grounds for a decision on nonrenewal of a nontenured appointment constitutionally permissible and within the proper discretion of the institution's governing board. The faculty member had participated in a sit-in following the Cambodian invasion and the shootings at Kent State. He had also introduced himself into the negotiations between the administration and student-selected spokesmen and he had attempted to shape a statement from the administration somewhat stronger than it was prepared to issue. This action, the court found, could be relied on by the institution's governing board as a basis for declining to renew the faculty member's appointment:

In no way am I suggesting that a faculty member must parrot on substantive issues the views of the administration. I do say, however, that a faculty member cannot assume, under the protective umbrella of the federal Constitution, the role of or intrude into another's rightful role of conducting the workings of a university. His cooperativeness to that extent, at least, was a matter of proper concern of the Board of Regents, who had to decide whether he was the kind of faculty member who should be employed by the university.<sup>13</sup>

The court appears to have suggested that, while a professor employed by a publicly operated institution has the constitutional protections afforded all public employees, his legal status confers no greater rights or freedoms than others in that broad category. He is under an obligation to cooperate with the employer and not "intrude" himself into the administration's conduct of the "workings of the university." If this is a fair reading of the implications of the court's approach, it is seriously erosive of the freedom claimed by the profession as an academic matter to criticize actively the administration and its policies and to engage in the workings of a university.<sup>14</sup> Indeed, most aca-

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12. 335 F. Supp. 1086 (D. Neb. 1971).

13. *Id.* at 1097.

14. *See* Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959).

demics would be hard pressed to discern the line between "cooperation" and "intrusion."

I note the court's remarks on the professor's status because the question has also been framed by the extension of the right to bargain collectively to the faculties of a number of publicly and independently operated institutions of higher education. The former were extended the right through the enactment of public employee bargaining laws which frequently have included the faculties of state colleges and universities, while the latter received the collective bargaining right as a result of the *Cornell University* case<sup>15</sup> and the subsequently issued jurisdictional guidelines, effectively extending statutory coverage to approximately 85 per cent of the private, nonprofit institutions of higher education in the nation.<sup>16</sup> Perhaps no other development places the professor's relationship to the institution in so sharp a light.

The National Labor Relations Board (NLRB) has held, in response to the contentions of three university administrations, that the collective exercise of academic peer judgment by a faculty on matters of academic status and educational policy does not yield to individual faculty members a managerial or supervisory status, thus exempting them from the coverage of the National Labor Relations Act.<sup>17</sup> In *Adelphi University*,<sup>18</sup> however, the issue was not framed so broadly as to raise the status of the faculty as a whole but only concerned the status of members of faculty personnel and grievance committees. As to the narrowed issue, two members of the Board confessed great difficulty:

[S]temming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, [it] does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world. The statutory concept of "supervisor" grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid.

Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory

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15. *Cornell Univ.*, 183 NLRB No. 41 (1970).

16. *See* 29 C.F.R. § 103.1 (1972).

17. *Manhattan College*, 195 NLRB No. 23, 79 L.R.R.M. 1253 (1972); *Fordham Univ.*, 193 NLRB No. 23, 78 L.R.R.M. 1177 (1971); *C.W. Post Center*, 189 NLRB No. 109, 77 L.R.R.M. 1001 (1971). *See* National Labor Relations Act §§ 1 *et seq.*, 29 U.S.C. §§ 151 *et seq.* (1970).

18. 195 NLRB No. 107, 79 L.R.R.M. 1545 (1972).



exclusion of our Act was designed, a genuine system of collegiality would tend to confound us. Indeed the more basic concepts of the organization and representation of employees in one group to deal with a "management" or authoritarian group would be equally hard to square with a true system of collegiality.<sup>19</sup>

The panel proceeded, however, over the dissent of the third member, to hold the members of these committees to be employees within the Act. The dissenting member argued that the authority of such relatively small committees was logically unlike the diffuse authority dispersed throughout the faculty and stressed "that individuals do not have the right . . . to sit on both sides of the bargaining table in the collective bargaining process"<sup>20</sup> — precisely the argument made earlier by the Fordham administration.<sup>21</sup>

From this auspicious beginning, the NLRB has proceeded to define bargaining units for faculties in higher education based on "well settled principles" which developed in the industrial sector, and which must perplex most academics: part-time faculty will be included with the full-time faculty, unless there is consent to the contrary;<sup>22</sup> non-teaching professional employees (such as athletic coaches) will be included;<sup>23</sup> department chairmen may be excluded as supervisors even if they are colleagues of the full-time faculty but have authority over part-time faculty (which would be included for unit purposes if any party to the proceeding desires their inclusion).<sup>24</sup>

My purpose has not been to castigate the NLRB but to use its brief experience, paralleled by actions of the various state boards concerned with similar issues of unit determination in public higher education, to point to what the labor laws are doing in the area of faculty representation. I feel it safe to conclude that, in defining bargaining units, little or no attention has been paid to educational implications. It should be stressed that the configuration of the bargaining unit defines a polity for a species of institutional government through collective bargaining. The NLRB, relying on its industrial experience, but not cheerfully so as I read the *Adelphi* decision (if that is any solace to the academics), and various state boards shape new polities

19. *Id.* at \_\_\_\_\_, 79 L.R.R.M. at 1555-56.

20. *Id.* at \_\_\_\_\_, 79 L.R.R.M. at 1557 (dissenting opinion).

21. 193 NLRB No. 23, at \_\_\_\_\_, 78 L.R.R.M. at 1184.

22. 193 NLRB No. 23 (1971); University of New Haven, Inc., 190 NLRB No. 102 (1972).

23. 195 NLRB No. 23 (1972).

24. 195 NLRB No. 107 (1972).

which may be wholly at variance with existing patterns of government which have been established in response to institutional needs.

Further, the implications of exclusive collective representation for traditional forms of university government are serious, and these same forms may not emerge untouched by the extension of the labor laws. There is, for example, a most ominous footnote to the discussion in *Adelphi* of the status of internal faculty governing bodies:

The delegation by the University to such elected groups of a combination of functions, some of which are, in the typical industrial situation, normally more clearly separated as managerial on the one hand and as representative of employee interests on the other, could raise questions both as to the validity and continued viability of such structures under our Act.<sup>25</sup>

Even in the absence of so unfortunate a conclusion, some observers have argued that traditional forms of faculty government must eventually be subsumed into the bargaining process, resulting in a vastly increased role for the administration and a much diminished one for the faculty.<sup>26</sup> Others have failed to find in this development a law of nature.<sup>27</sup> A recent report on the Canadian situation concluded:

It would be most unfortunate . . . if the traditional dispersion of decision-making power within the university were essentially ended by an all-encompassing system of two-party control. Such dispersion is an indispensable aspect of the pluralism of the Canadian university, and academic freedom cannot exist in the absence of pluralism. However, in spite of the monolithic tendencies inherent in North American collective bargaining, the stronger Canadian universities may indeed be so resolutely pluralistic that the entire collective bargaining mechanism would simply become another aspect of their pluralism.<sup>28</sup>

In any event, the traditional rights and privileges of faculties as organized bodies and of faculty members as individuals remain to be developed in the scheme of collective bargaining.

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25. 195 NLRB No. 107, at \_\_\_\_\_ n.31, 79 L.R.R.M. at 1556 n.31. For a more enlightened approach, see Michigan State Univ., No. C69I-123 (Mich. Emp. Rel. Comm'n Aug. 9, 1971); Michigan State Univ., Nos. C70D-52, C70D-53 (Mich. Emp. Rel. Comm'n Sept. 8, 1971).

26. Boyd, *The Impact of Collective Bargaining on University Governance*, 58 LIBERAL ED. 265 (1972); Hanley, *Issues and Models for Collective Bargaining in Higher Education*, 57 LIBERAL ED. 5 (1971); Lieberman, *Professors Unite!*, HARPER'S MAGAZINE, Oct. 1971, at 61.

27. Finkin, *Collective Bargaining and University Governance*, 1971 WIS. L. REV. 125, revised in 57 AAUP BULL. 149 (1971); Stevens, *The Professors and Collective Action: What Kind?*, May 18, 1971 (paper presented at the Univ. of Minn. Indus. Rel. Center).

28. B. ADELL & D. CARTER, *COLLECTIVE BARGAINING FOR UNIVERSITY FACULTY IN CANADA* 79 (1972).

#### IV. SUMMARY

I hope the foregoing has served to put the dilemma of the American professor in context. He sees the security of his position threatened, the market for his services sluggish, if not diminishing, and such professional authority as he may possess increasingly removed to administrative bodies over which he has little influence. Simultaneously, statutory and administrative developments make available a mechanism whereby he may be able to secure a degree of legal protection for his traditional prerogatives through a collective agreement. Indeed, absent greater protection of professional status afforded through statutory, charter, or internal regulatory guarantees and a sensitive judicial approach to such provisions, collective bargaining may afford the only legal protection of professional interests available to a deeply troubled professoriate. In seeking that *kind* of protection, however, the profession subjects itself to the ministrations of statutes and public agencies and to a process with a well developed history and mythology distinctly alien to the particular environment of higher education.

These are, to be sure, only some of the problems Professor Dowd asked me to address. The canvas he provided was far too large for my brush. I hope, however, I will have provided something of the context in which the emerging legal problems of the profession should be understood.