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Tenure in New York

Matthew W. Finkin
University of Illinois College of Law

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Tenure in New York

MATTHEW W. FINKIN†

EDITORS' NOTE

Fifty years ago, the *Buffalo Law Review* published a special collection on legal issues in education. At the suggestion of one of the contributors, the editors invited Matthew Finkin (then a student at Yale Law School) to contribute. He undertook a study of the litigation of issues of faculty status—appointment, tenure, and dismissal, and of academic freedom—of "freedom on the job." Until that time faculty had rarely resorted to the courts, but litigation was growing and the courts were sometimes flummoxed by the academic world. He argued that the courts could draw sustenance from those common understandings within the academic community that had developed and taken root in the absence of law.[1] Speaking of the constitutional law unfolding in public institutions and the law of contract unfolding in private ones, he concluded that

> The extension of constitutional protection from aprofessional to professional activity, in tandem with a developing contract theory

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† Professor of Law, the University of Illinois College of Law. The author served as an expert witness for the plaintiffs and helped to assemble the amici and their submission discussed below.

[1] Matthew Finkin, *Toward a Law of Academic Status*, 22 BUFF. L. REV. 575 (1973).

> incorporating the practice and custom of the profession, have the potential of shaping a body of law particularly sensitive to the needs of the academic milieu. They hold the promise of effecting a jointure of the common law with a body of practice developed by a profession heretofore chary of judicial redress. Interestingly, these developments come at a time when the profession is greatly troubled and, as the foregoing indicates, when resort to the courts is becoming increasingly commonplace.[2]

This observation proved prescient. The article was cited shortly thereafter in just such a contract case, *Browzin v. Catholic University*,[3] and the theory it embraced took on a texture of supportive decisions. Last March, now-Professor Finkin informed the editors that the legal theory we had published and the body of law that had grown up in support of it had recently been argued to the First Department of the Appellate Division in a novel case concerning professorial tenure, but that the court had rejected the theory outright and without taking any notice whatsoever of the supporting authority brought before it. He volunteered to address this development.

The editors of the *Buffalo Law Review* were pleased to accept. We thought it timely and useful to revisit the theory the *Review* had published a half century ago—to see how it had fared in jurisdictions other than New York, to explore the First Department's exceptionalism, and to consider the consequences of the decision.

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[2] *Id.* at 602 (reference omitted).

[3] 527 F.2d 843, n. 9 at 848 (D.C. Cir. 1975).

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INTRODUCTION

New York's Appellate Division, First Department has handed down a remarkable—nay, an astonishing—decision pregnant with consequences for the tenured professoriate in the state as well as for the institutions that employ them and fraught as well with implications in other jurisdictions should attention be drawn to it.[4] The court acknowledged the import of what was involved: "a novel issue," it said, "of what academic tenure means; in particular, whether 'economic security' guaranteed to tenured professors protects them from the imposition of a policy mandating a salary reduction if they fail to obtain sufficient grants to fulfill their extramural funding goals."[5] That was the core issue; but, it was not the issue before the court. The question presented was no less important, but it lacked the novelty of the one at the core; that is, what a court is directed to look to in order to decide what tenure means.

The nature and importance of that inquiry was brought home in two motions made to the court in advance of hearing. The first was by a group of thirteen active and retired professors in several schools of law in New York seeking leave to submit a brief as friends of the court.[6] The second

4. Monaco v. N.Y. Univ., 164 N.Y.S.3d 87 (App. Div. 2022).

5. *Id.* at 53.

6. They were: Mark Barenberg, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School; Helen Bender, Associate Professor of Law, Fordham University School of Law; Cynthia Grant Bowman, Dorothea S. Clarke Professor of Law, Cornell Law School; James Brudney, Joseph Crowley Chair in Labor and Employment Law, Fordham University School of Law; Matthew Dimick, Professor of Law, University at Buffalo School of Law; Cynthia Estlund, Catherine A. Rein Professor of Law, New York University School of Law; Philip Hamburger, Maurice & Hilda Friedman Professor of Law, Columbia Law School; Robert Hillman, Edwin H. Woodruff Professor of Law Emeritus, Cornell Law School; Arthur Leonard, Robert F. Wagner Professor of Labor and Employment Law, New York Law School; Carlin Meyer, Professor of Law Emerita, New York Law School; Liam Murphy, Herbert Peterfreund

was the university's motion in response asking the court not to accept the brief; in effect, urging the court not to read it.[7] The court's disposition was Solomonic: it admitted the brief and declined to read it.

The critical features of the decision cannot be understood from a reading of the bare text alone. Explication is necessary. Fortunately, the amici's brief, unconnected to any orientation to the result on the core issue, charts the law's directive course with clarity. Consequently, the First Department's decision is best understood by comparing the opinion in detail with the arguments it ostensibly resonated against.

In what follows the factual setting of the dispute will be laid on the page. The text of the amicus brief is next set out in full with the court's opinion following in full. Then the salient aspects of the opinion can be explored with some thoughts at the close on the domestic and foreign implications of the decision.

I. SETTING THE DISPUTE

The court's account of the facts in the dispute is terse, accurate, and partial. It recites that in November 2009 the

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Professor of Law, New York University School of Law; Norman S. Poser, Professor of Law Emeritus, Brooklyn Law School; and Samuel Weinstein, Associate Professor of Law, Cardozo School of Law.

7. The university argued that the brief was an effort to submit expert evidence in circumvention of the process for the admission of expert evidence *and* by persons with no expertise. Respondents' Affirmation in Opposition to Motion for a Leave to File Brief of Amici Legal Scholars, *Monaco*, 164 N.Y.S.3d 87 (No. 2021-00792) (on file with author). In reply, counsel for the amici pointed out that there is a difference between expert opinion on matters of fact and legal argument on matters of law. Reply Affirmation of Robert Levy in Support of Motion for Leave to File Brief of Amici Legal Scholars, *Monaco*, 164 N.Y.S.3d 87 (No. 2021-00792) (on file with author). He also pointed out that as the issue concerned the intersection of contract and employment law amici included noted scholars in both.

New York University Medical School (NYU) adopted a policy on "Required Extramural Funding" (REF) applicable to the school's basic science faculty.[8] Heretofore, each basic science faculty member was merely paid a stated salary, commonly spun off what was negotiated originally at the time of appointment or the award of tenure. The new policy set a base pay by rank determined by a formula that produced a number below which tenured basic science faculty were currently being paid. Going forward, affected faculty members were expected to secure sixty percent of their current salaries out of external funds (essentially from grants). Faculty who failed to do so were to have their pre-existing salaries reduced by twenty percent per year for each year of such failure until the newly set base was reached.

The two plaintiffs, tenured basic science professors of long standing, did not resign or retire, as had several of their colleagues, nor did they secure outside funds. As a result, they had their pre-existing salaries reduced over time—by about a hundred thousand dollars for one; by almost fifty thousand for the other. They sued for breach of their contracts of tenure, the terms of which were contained in the university's policy on academic freedom and tenure and which policy was held in an earlier part of the proceeding to be of a contractual nature.

That is as much as the First Department thought relevant to recite. But unnoticed are three other features that would have been relevant had the court's analysis been more finely-tuned. First, NYU's intramural consideration of the relationship of salary to tenure predated the 2009 policy by thirteen years. Second, during the course of the decade of policy consideration the School of Medicine Faculty Council—the medical faculty's official organ for the exercise of its governance functions in the school—consistently insisted that tenure assured incumbent tenured faculty of no

8. Clinical medical faculty (i.e., those who treat patients) were subject to a different compensation regime.

less than their established salaries: that salary could be reduced only as the result of a general financial retrenchment or as a sanction for misconduct after a disciplinary hearing. And, third, during much of that course of consideration assurances were consistently made by those formulating the policy that any change would not affect currently tenured faculty. That assurance was abandoned by NYU's administration in 2009 on the ground that such grandfathering would produce two classes of tenured faculty.

Such were the facts when the trial court took up the text of NYU's academic freedom and tenure policy, the basis of the contractual claim.[9] The policy was set out in the university's Faculty Handbook prefaced thusly:

> The Board of Trustees of New York University has authorized the following statement in regard to academic freedom and tenure at New York University. It reserves the right to amend this statement at its discretion, but no amendment shall take away a status of permanent or continuous tenure acquired before such amendment.[10]

The handbook then sets out a verbatim recitation of the text of the 1940 *Statement of Principles on Academic Freedom and Tenure*. The 1940 *Statement* was drafted jointly by the American Association of University Professors (AAUP) and what was then known as the Association of American Colleges (AAC), the predominant organization of

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9. Until 1960, the university's policy included a disclaimer of contractual status. *Bradley* v. *New York University*, 124 N.Y.S.2d 238, 241 (Sup. Ct. 1953), *aff'd* 127 N.Y.S.2d 845 (App. Div.), *aff'd* 120 N.E.2d 828 (N.Y. 1954). The disclaimer was removed by the trustees in order to secure removal of censure by the American Association of University Professors as a result of the *Bradley* case. Robert K. Carr, *Report of Committee A, 1958-59*, 45 AAUP BULL. 385, 393–94 (1959); David Fellman, *Report of Committee A, 1959-1960*, 46 AAUP BULL. 222, 227 (1960).

10. FACULTY HANDBOOK 29, New York University (2021), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nyu.edu/content/dam/nyu/provost/documents/facultyHandbook/October2021revision/10.1.21_FHCLEANcopyweb.pdf.

college and university faculty and the major organization of liberal arts colleges at the time. It provides:

I. *The Case for Academic Freedom*

> Academic freedom is essential to the free search for truth and its free expression. Freedom in research is fundamental to the advancement of truth. Freedom in teaching is fundamental for the protection of the rights of the teacher in teaching and of the student in learning. Academic freedom imposes distinct obligations on the teacher such as those mentioned hereinafter.

II. *The Case for Academic Tenure*

> Academic tenure is a means to certain ends, specifically: (1) freedom of teaching and research; and (2) a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability.[11]

The policy's ensuing sections set out the procedures for the acquisition of tenure and for dismissal for cause. No provision deals with the relationship of tenure to salary. As there was no written rule on salary the plaintiffs relied on academic custom and usage as supplying the connection as evidenced in the Faculty Council's consistent resolutions and in the report of an expert witness. The university did not contest the witness's expertise, but adduced an expert of its own. Neither would be heard at trial.

The university moved for summary judgment; the trial court granted the motion. It held that as "economic security" was "merely a general preamble" to the contractually-binding policy it lacked contractual status, relying on cases involving commercial contracts.[12] The trial court held in the

11. *American Association of University Professors and of the Association of American Colleges,* Statement of Principles on Academic Freedom and Tenure 1 (1940), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://humanresources.illinois.edu/assets/docs/AHR/1940.pdf.

12. Monaco v. N.Y. Univ., No. 100738/2014, 2020 N.Y. Misc. LEXIS 9622, at *31 (Sup. Ct. Nov. 12, 2020).

alternative that even if the "economic security" clause created a contractual obligation, as it contained no express provision prohibiting what the REF did, no extrinsic evidence could be considered.[13] The plaintiffs appealed.

II. THE ISSUE IS JOINED

A. *The Argument of Amici Professors of Law*

The relevant sections of the professors' amicus brief follows.[14]

I. The Trial Court Ignored Applicable Law

[T]his case concerns two issues: does academic tenure assure "economic security"; and, if it does, does "economic security" mean that, absent an exempting condition not applicable here, tenure obligates a university to maintain the salaries of its tenured faculty at no less than their previously established level? These are the basic issues; but, importantly, these are not presented here. The sole issue here is: what should a court look to in order to decide those questions.

The trial court drew on a body of law concerning sophisticated financial transactions in the commercial world involving experienced business people represented by counsel in which large sums were involved. Relying on these cases the court looked only to the bare text of the rules set out in the university's tenure policy exclusive of all else including the policy's expressed explanation of why tenure was provided for and of the functions it performs. Considering only these rules the court found them to contain no express prohibition against salary reductions. From this silence the court concluded that no more should be looked to,

13. *Id.* at *31–32.

14. The notes in the brief are placed in brackets at once to retain the sequence in the original and to separate it from the notes in this discussion.

that as "economic security" was not expressly defined in the Handbook it was too vague to give rise to an enforceable right.

The court's reasoning is captured in its reliance on the Court of Appeals decision in *Global Reins. Corp. of Am*. v. *Century Indemnity Co*., 30 N.Y.3d 508 (2017) . . . concerning a reinsurance policy of a million dollars per occurrence in which the Court opined,

> Particularly where an agreement is "negotiated between sophisticated, counseled business people negotiating at arm's length . . . courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include."

Amici do not suggest any infirmity in the legal analyses given to negotiations between sophisticated, legally counseled business people involved in complicated high-stakes financial transactions. The infirmity lies in the trial court's reliance on these cases.

The award of tenure to a faculty member by a university or college is not a legally counseled transaction between sophisticated business people in a high stakes venture. In fact, the rules governing tenure—and of academic freedom intimately connected to it—are not bargained with the applicant or incumbent at all. These are policies adopted by the institution, customarily in consultation with a faculty governing body, not discrete bargained-for individual exchanges. The words these policies use draw meaning from how they are understood by those accustomed to use them in the academic world and are to be interpreted in accordance with the purposes they serve.

This is explained in the leading case, *Greene* v. *Howard University*, 412 F.2d 1128 (D.C. Cir. 1969). The case concerned the university's rules providing for notice to probationary faculty members if they were not to be reappointed for the following academic year. Rules on notice of non-reappointment customarily accommodate the

calendar of appointments in higher education; they are fashioned to allow the non-reappointed faculty member to seek a suitable position elsewhere at a time when appointments were being made. Howard University's notice rules did just that save that the university disclaimed the rules' contractual status. When a group of faculty were given late notice and sued in contract the trial court gave effect to the disclaimer. The United States Court of Appeals for the District of Columbia Circuit reversed. Writing for a unanimous court, Judge Carl McGowan, formerly a professor of law at Northwestern University and a respected scholar of the law of contracts, opined:

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. *The readings of the market place are not invariably apt in this non- commercial context.*
>
> The employment contracts of appellants here comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs.

Id. at 1135 (italics added).

As Judge McGowan opined, the law of academic custom or usage has special salience when considering rules governing the terms and conditions of faculty employment. A body of decisional authority has grown up around that very principle specifically applied to rules governing academic freedom and tenure. These will be explored in Section II, *infra*; but, the point here is the trial court chose to ignore that body of authority in favor of an inapt analogy to bargained-for commercial transactions.

It bears emphasis that the role of custom and usage, which plays a pivotal role in the professoriate—and the professional context as well—draws upon a basic principle of contract law of long standing in New York. In 1843, New York's Supreme Court opined:

> Usage can never be set up in contravention of the contract; but when there is nothing in the agreement to exclude the inference, the

> parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. *The evidence often serves to explain or give the true meaning of some word or phrase* of doubtful import, or which may be understood in more than one sense according to the subject matter to which it is applied.

Hinton v. *Locke*, 5 Hill 437 (1843) (italics added).[4]

In *Hinton* v. *Locke*, supra, the contract, to alter and repair a house, provided for a set sum to be paid for each "day" of work. However, the contract did not define what a day's work was; it could mean twelve and a half hours or ten hours. The court held that proof of custom and usage, to which the defendant objected, was admissible to explain that term. That evidence did not vary a contractual term, it allowed the court to ascertain the contract's meaning "in relation to a matter *in which the contract was silent"* as to

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[4] The role of custom and usage continues to retain its vitality addressing the meaning of words used in a particular trade or profession as well as contractual silence. See e.g., *Beazley Ins. Co., Inc*. v. *ACE Am. Ins. Co*., 880 F.3d 64 (2d Cir. 2018), applying New York law concerning the meaning of "customer" and "professional services" in an exclusion clause in an insurance policy. The policy was silent on what these terms meant. In the face of silence the "courts ask whether . . . an established custom or usage provides a definition." Id. at 69. The question is "whether the parties shared a common language that would lead them to a mutual understanding of the meaning of an undefined term." Id. at 70. The trial court had, in that case, done just that and the Second Circuit agreed: the trial court's conclusion was supported by " 'customs, practices, usages and terminology as generally understood in the particular trade or business'." Id. at 71 (reference omitted). So, too, in *Last Time Beverage Corp*. v. *F&V Distribution Co*., 98 A.D.3d 947 (2d Dept. 2012), when, in the face of contractual silence, expert witness testimony established the custom and practice in the industry regarding the acquisition of exclusive distribution rights; and *Landmark Ventures, Inc*. v. *H5 Technologies, Inc*., 152 A. D. 3d 657 (2d Dept. 2017), addressing a contractual provision that sales fees would be realized "under generally accepted accounting principles" which the court treated thusly: "'[T]echnical words' . . . are to be 'interpreted as usually understood by the persons in the profession or business to which they relate'." Id. at 593.

the meaning of one of the words it used. Id. at 437 (emphasis added). Here, and to a diametrically opposite effect, the trial court relied on the absence of further treatment of what "economic security" meant to mean that no obligation whatsoever could be looked for. As a result, the court refused to consider evidence of the academic profession's understanding of what tenure means and why . . .

II. The Legal Meaning of Tenure Necessarily Draws on the Academic Profession's Common Understanding

The leading treatises on the law of higher education emphasize the importance of the role of academic custom and usage in giving content to institutional obligations. Steven Poskanzer explains that not only can "*unwritten* institutional custom and practice" define the legal rights and duties of faculty members, but "general custom and usage within the broader academic community [are looked to] to flesh out the terms of the institution-faculty contract." Steven Poskanzer, HIGHER EDUCATION AND THE LAW 20–21 (2002) (emphasis in original). William Kaplan and his co-authors concur:

> As a method of contractual interpretation, a court may look beyond the policies of the institution to the manner in which faculty employment terms are shaped in higher education generally . . . [T]he court may use "academic custom and usage" to determine what the parties would have agreed to had they addressed a particular issue.

1 William Kaplan, Barbara Lee, Neal Hutchens, & Jacob Rooksby, THE LAW OF HIGHER EDUCATION 599 (6th ed. 2019). As they explain, such resort is used where a "significant element of the contract is missing." *Id.* at 600. Both treatises rely on the cases to follow. These are of a few decades' vintage but, as these treatises references to them evidence, they are leading cases.

One source of academic custom and usage is found in the 1940 *Statement of Principles on Academic Freedom and Tenure*, issued jointly by the American Association of

University Professors (AAUP) and the Association of American Colleges (AAC), the then-leading organizations of faculty and of administrations of liberal arts colleges, and the further gloss of meaning placed on that document either in subsequent joint documents or issued by the AAUP alone. However, Amici stress that even as disputes in which resort to custom and usage has been had often involve AAUP documents, these are but one source in which evidence of academic norms and expectations play a role. In *Greene* v. *Howard University* itself, for example, the court was mindful of the critical role of academic practice in the academic appointment cycle in deciding how to read Howard University's notice rules. So, too, did a Colorado court in reading a university's rule that required the giving of "at least twelve months" notice before the expiration of the academic appointment. The administration argued that "twelve months" meant just what it said—12 months; thus, notice of non-reappointment given on February 1, pursuant to which the appointment would terminate on February 2 the following year, complied with the contract's plain language. The trial court disagreed. It held that the twelve-month period was geared to the cycle for academic appointment; that a literal reading would leave the incumbent bereft of his position in the midst of an academic year when no positions were to be had.[5] The appellate court affirmed. *Subryan* v. *Regents of the University of Colorado*, 698 P.2d 1383 (Colo.App. 1984). In both of these cases what was critical was the profession's expectation built upon an unstated common assumption and practice concerning when academic appointments are made.

Greene and *Subryan* concerned the interpretation of an express contractual term. The profession's common understanding can also address a policy's silence, which the

[5] The trial court decision is not reported. Amici understand the trial court rested its decision on expert testimony concerning the role of the appointment cycle in the scheduling of notice of non-reappointment.

trial court took to be so in this case. Actually, this case is better understood to concern the role of custom and usage to define a term used in but not further defined in the contract—"economic security"—which was so in *Hinton* v. *Locke*, *supra*. However, as custom and usage can serve either purpose, n. 4, supra, Amici will treat the categories interchangeably.

The leading case is *Krotkoff* v. *Goucher College*, 585 F.2d 675 (4th Cir. 1978). The plaintiff was a tenured professor at Goucher College, a private college in Maryland. Goucher's policy defined tenure as an indefinite appointment until retirement or dismissal for cause. However, tenure policies, following the 1940 Statement, commonly allow for termination of tenured appointments additionally for reason of a "*bona fide* financial exigency." Goucher's tenure policy made no mention of financial conditions, exigent or otherwise, as allowing it to terminate a tenured appointment; the contract was silent on that. The professor argued that as that condition, expressly included elsewhere, was not included in Goucher's policy, the silence meant that she could not be terminated on financial grounds.

Were the reasoning of the trial court in this case to have been applied, no resort to academic custom or usage could be admitted to address that silence and Professor Krotkoff would have been dismissed improperly, on grounds of a condition not provided for in her contract of tenure. Instead, relying on *Greene* v. *Howard University*, *supra*, and the history and meaning of "financial exigency," the United States Court of Appeals for the Fourth Circuit held the "contract must be interpreted consistently with the understanding of the national academic community about tenure and financial exigency." *Krotkoff*, *supra*, at 680. That understanding supplied the absent term.

Nor was this all. Understandably, Goucher College agreed that that common understanding did occupy the gap in the college's tenure policy; but, it argued that the further gloss placed on that condition, that termination be a

"genuine last resort" and that reasonable academic standards be applied to determine who should be terminated, did not represent such "a general academic understanding." The Goucher administration argued that its only legal obligation was one of subjective good faith.

This placed in issue, as here, the question of whether there was a controlling understanding as to what tenure meant that spoke to the matter. The Fourth Circuit held that:

> Neither the letter granting Krotkoff tenure nor the documents setting forth Goucher's policy concerning tenure mentions the procedural rights to which a faculty member is entitled when the college proposes to terminate her appointment for financial reasons. Therefore, we must examine again the academic community's understanding concerning tenure to determine the nature of this unique contractual relationship.
>
> [T]he 1940 Statement on Academic Freedom and Tenure sanctions termination of faculty appointments because of financial exigency. But it also stipulates: "Termination of a continuous appointment because of financial exigency should be demonstrably bona fide." The evidence discloses that the academic community commonly understands that inherent in the concept of a "demonstrably bona fide" termination is the requirement that the college use fair and reasonable standards to determine which tenured faculty members will not be reappointed. The college's obligation to deal fairly with its faculty when selecting those whose appointments will be terminated is an attribute of tenure. Consequently, it is an implicit element of the contract of appointments.

Id. at 682. Such being the meaning of the tenure obligation as gleaned from its purposes and history citing, *inter alia*, *Browzin* v. *Catholic Univ*., 527 F.3d 843 (D.C. Cir. 1975); *AAUP* v. *Bloomfield College*, 322 A.2d 846 (N.J. Ch. Div. 1974) *aff'd as mod*. 346 A.2d 615 (N.J. App. Div. 1975). Subsequent cases have followed that reasoning: *Jiminez* v. *Almodovar*, 650 F.2d 363, 368–369 (1st Cir. 1981) (reviewing authority comprehensively); and Saxe v. *Bd. of Trustees of Metro St. College*, 179 P.3d 67 (Colo. App. 2007) *on remand* 29 IER Cases 1496 (Colo. Dist. Ct. 2009).

Notably, in *Bloomfield College*, *supra*, on which the

Fourth Circuit relied, the college's policies incorporated the identical provision that NYU's policy sets out:

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

322 A.2d at 853 (emphasis added). In the instant case, the trial court disregarded this provision as of no legal effect. In contrast, the *Bloomfield College* court was guided by it. After a review of a body of scholarship on the history and function of tenure the court approached tenure as:

> the product of historical experience and long debate. Its adoption is not merely a reflection of solicitude for the staffs of academic institutions, but of concern for the general welfare by providing for the benefits of uninhibited scholarship and its free dissemination. *The security provided therefor* by the consensus of learned authority should not be indifferently regarded.

Id. at 853–54 (emphasis added).

In sum, by disregarding the economic security provision in NYU's policy as a mere "preamble" of no legal effect, the trial court denied itself access to a foundational element on which the profession's customs and usages in the matter of tenure rests. Nor is this all.

In *Drans* v. *Providence College*, 383 A.2d 1033 (R.I. 1978) *judgment vacated and remanded*, 410 A.2d 972 (R.I. 1980), the college had adopted the 1940 *Statement* in 1966 and confirmed an incumbent professor's tenure, previously accorded, as being governed by it. Lawful at the time, retirement for age was allowed to be a permissible ground for termination, but the 1940 *Statement* set no retirement age. Neither had Providence College. In 1969, the college set a mandatory retirement age, at 65, and applied it to Professor Drans. He sued for a declaratory judgment: that absence of a retirement age in the tenure policy when he was awarded tenure precluded the college from applying one to him. The trial court disagreed on the ground that as he had continued

to teach after the change he had agreed to it.

The Supreme Court of Rhode Island started from John F. Davis Co. v. Shepard Co., 47 A.3d 635, 638 (R.I. 1946), Rhode Island's counterpart to Hinton v. Locke, supra. As the tenure policy did not further address the age of retirement, "we must look to the custom or usage of the academic community to discern the common understanding of tenure." 383 A.2d at 853. "This principle is said to be especially true in the case of contracts in the academic community." Id. (citing Greene v. Howard University, supra). The Court then looked to the "primary function of tenure," quoting the provision in New York University's policy set out above, and by Bloomfield College as well, connecting tenure to the assurance of "economic security." The Rhode Island Supreme Court concluded that the college could adopt a retirement date but, guided by the norms and expectations on which tenure rests, the Court recognized "that there may be times when the college administration . . . must make some type of accommodation so that the economic security expectations of the tenured may be preserved." Id. at 859–60 (italics added). It rejected the idea that the College was free to redefine tenure unconnected to the obligations instinct in it and to which abrogation incumbent tenured faculty are presumed to consent by continuance. Consequently, the Court remanded the case for the consideration of evidence as to what "the reasonable expectations within the academic community" were.[6] Significantly, *Drans* was followed by a federal district court in New York applying New York law to New York University's reduction of its previous retirement age to a tenured professor of law: it held "that the university must make 'some type of accommodation so that the

[6] On remand, the trial judge disregarded evidence of national custom. In vacating that judgment and remanding again the Supreme Court of Rhode Island made plain that it meant its reference to the reasonable expectations within the academic community to refer to the "national academic community," citing the *Bloomfield College* and *Krotkoff* cases. *Drans* v. *Providence College*, 410 A.2d 992 (R.I. 1980).

economic security expectations of the tenured may be preserved'." Karlen v. New York University, 464 F.Supp. 704, 707 (S.D.N.Y. 1979) (emphasis added).

Resort to the "reasonable expectations within the academic community" applies as much to the meaning of academic freedom as to tenure which, in *dictum*, the trial court treated to the same effect, R. 18–19, and with equal error. What "freedom to teach," "to research," and "to publish," liberties that lie at the core of academic freedom, and the standards that govern their exercise mean in application are not subject to exhaustive rules. As with the responsibilities of other professions—law, for example—it would be "difficult, if not impossible, to anticipate and catalogue all such circumstances" warranting discipline for the failure to adhere to professional expectations. Association of the Bar of the City of New York, Formal Opinion 2003-02: Undisclosed Taping of Conversations by Lawyers at 1–2 (Feb. 2, 2003).

NYU's Faculty Handbook requires faculty members to meet their classes. NYU *Faculty Handbook* at p. 23 ("*Meeting Classes*") . . . But, no *Handbook* rule requires faculty members to personally read and to evaluate their examinations. By the reasoning below, as such silence could not be addressed by external evidence of academic norms and expectations, a faculty member could not be subject to sanction for transgressing an unwritten rule—a norm—to that effect.

The law has confronted this issue: where a faculty member was discharged for meeting his classes only "perfunctorily and superficially." Important for purposes here, that conduct transgressed no written rule. The court held that the absence of a rule did not vitiate the dismissal relying on the following testimony: "[S]tandards of professionals, professionalism . . . are not standards that are written, they are not empirically based, they are standards that are assumed and tested across time." *Riggin* v. *Bd. of Trustees of Ball State Univ.*, 489 N.E.2d 616, 628 (Ind.App.

1986).

In fine, some obligations—not only individual but institutional as well—may be so well understood, so much a matter of course, so much of second nature as to be commonly assumed with no more being or having to be said. To disallow consideration of these norms and expectations in the face of contractual silence out of hand, as the trial court did, would produce absurd results. Because the trial court considered the "economic security" clause of the tenure policy to be of no legal consequence the court emptied tenure of its meaning: it becomes nothing more than a title.[7] If the economic security function of academic tenure were of no legal effect a university could reduce a tenured professor's salary to zero whilst insisting all the while that tenure has been respected.[8]

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[7] In deposition testimony the former president of NYU, John Sexton, was asked that, if economic security were not a binding part of tenure, what meaning tenure has at NYU. Deposition of John Sexton, March 19, 2019. "It means," he said, "the right to hold yourself out as a tenured professor at NYU." R. 1527. His answer prompted the following colloquy with Petitioners' counsel:

> Q: . . . it's just a title, in other words?
>
> A: . . . it is a title that you have and which cannot be taken from you, except by virtue of the bylaws for removal of tenure.

R. 1528.

[8] Which is to say that the intense debate on the tenure system since it was demanded by the profession in the 1915 *Declaration of Principles on Academic Freedom and Tenure*, in ensuing studies and commentaries *e.g.* Clark Byse & Louis Joughin, TENURE IN AMERICAN HIGHER EDUCATION (1959), COMMISSION ON ACADEMIC TENURE, FACULTY TENURE (1973), THE QUESTIONS OF TENURE (Richard Chait, ed. 2002), in attacks on it, *e.g.* Richard Chait & Andrew Ford, BEYOND TRADITIONAL TENURE (1982), and in defense of it, *e.g.* Matthew Finkin, THE CASE FOR TENURE (1995)—and all the litigation about it have been over nothing more than a title. Absent the element of economic security, however, that is what tenure would be, just as former president Sexton testified. Note 7, *supra*.

B. *The First Department Answers*

The court's opinion on point in its entirety is this:

> The problem with the above arguments is that both the Professors and amici curiae improperly seek to give meaning to a term that is prefatory, rather than using a defined term to give meaning to clauses elsewhere in the Faculty Handbook (see Ellington v EMI Music, Inc., 24 NY3d 239 [2014] [relying on definitions contained in preamble]). The phrase "a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability" is a part of the "Case for Academic Tenure." It is mere prefatory language succinctly explaining why tenure is desirable. Importantly, the "Case for Academic Tenure" does not lay out how to obtain tenure. Rather, the tenure process is detailed elsewhere, and, critically, there is no meaningful discussion of compensation at all, except that set forth in the Faculty Handbook's salary grievance section.
>
> Thus, contrary to the Professors' contention, "economic security," standing alone, simply does not confer any contractual rights or obligations (see Andersen v Weinroth, 48 AD3d 121, 133 [1st Dept 2007]).
>
> We further find that the absence of any discussion of this term in the Faculty Handbook underscores its vagueness, which is buttressed by the Professors' own differing interpretations of the term throughout this litigation. While the petition alleges that "[t]he tenure guarantee of economic security protects tenured faculty from any diminution in their salaries," in their appellate arguments the Professors take the position that only retroactive, rather than prospective, reductions in salary are prohibited. Thus, as shown by the Professors' own changing interpretations, the term is too vague to be enforceable (see Joseph Martin, Jr., Delicatessen v Schumacher, 52 NY2d 105, 109 [1981]).
>
> Assuming that the term "economic security" gives rise to contractual rights, we reject the argument advanced by the Professors and amici curiae that "economic security" is an

ambiguous term of art and that custom and usage in academia define it as prohibiting retroactive salary reductions pursuant to such policies as the REF Policy.[6]

Regardless of the kind of transaction involved, New York contract law is well settled and clear: "Ambiguity exists when, looking within the four corners of the document, the terms are reasonably susceptible of more than one interpretation" (Ellington, 24 NY3d at 250). "A contract is unambiguous if 'on its face [it] is reasonably susceptible of only one meaning'" (Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48, 54 [1st Dept 2015], quoting Greenfield v Philles Records, Inc., 98 NY2d 562, 570 [2002]).

The language of the "economic security" provision is clear—it does not include salary considerations. We look no further than the faculty grievance procedures which provide that upon receiving an unfavorable decision concerning a salary grievance, the faculty member may appeal the decision only on two enumerated grounds:

"That the procedures used to reach the decision were improper, or that the case received inadequate consideration;

That the decisions violated the academic freedom of the person in question, in which case the burden of proof is on that person."

Thus, the only enumerated grounds for salary grievance review are violations of due process and academic freedom. An "[in]sufficient degree of economic security" is not a ground for resolving a salary grievance dispute. A fortiori, the term

[6] Their analogy to Article III judges' constitutionally guaranteed compensation to support their reasoning that "economic security" precludes salary reductions is misplaced. Unlike the disputed term herein, Article III, § 1, of the US Constitution unequivocally states that federal judges' compensation "shall not be diminished during their Continuance in Office." Thus, there can be no dispute that a federal judge's salary cannot be reduced. In stark contrast, the Faculty Handbook does not contain any language prohibiting tenured faculty's salaries from being diminished.

"economic security" does not involve salary issues.

Even if the term is ambiguous, we reject the argument that prohibiting the retroactive reduction of a faculty member's salary pursuant to the REF Policy safeguards academic freedom and tenure. The Professors and amici curiae acknowledge[d] that NYU could impose the REF Policy prospectively . . . Their acknowledgment reveals the weakness of their argument—that it would create two classes of tenured faculty, those purportedly influenced by extramural funders and those not so influenced. Because the guarantee of academic freedom applies equally to all tenured faculty, such a distinction would be wholly inexplicable.

III. The Opinion Considered

The text of the opinion has been set out in full to enable the reader to decide whether the following accurately states the propositions on which the holding rests; the holding being that no genuine issue of material fact remained to be decided. The holding rests on three propositions: first, as "economic security" is set out in a preamble to the policy and so is not a contractual commitment, the academic community's understanding of what economic security entails is irrelevant and so will not be heard; second, even if "economic security" were to be part of the contract, in the absence any provision expressly connecting it to salary no evidence of academic usage drawing such a connection could be heard; and, third, evidence of academic custom and usage will not be heard because the result of accepting it, the creation of two classes of tenured faculty, is "inexplicable," that is, it need not be heard because it is not to be believed.

Of the former two propositions, a reader of the opinion could not know and would get not so much as a hint of the existence of a body of decisional law dealing with the role of academic usage in construing institutional policies on academic freedom and tenure. By choosing to ignore this body of law the First Department obviates the need to explain why it thought all these decisions were wrong—if

they were. The third proposition is qualitatively different. The former two say that as the usage argued to is not relevant there is no reason to try its credibility. The third says that because the usage claimed is "inexplicable" there need be no trial as there could be nothing to credit. A bit more might be said of each.

A. *As the "Economic Security" Clause is Contained in a Preamble it Lacks Contractual Status*

As did the trial court, the First Department relied on cases arising out of business contracts negotiated with the benefit of counsel involving high stakes financial transactions. And as the amici pointed out, that is not what was involved. The First Department did not discuss the distinction; instead, it further recited three business cases as if they spoke definitively in rebuttal. But, two of these were not only factually inapt, they said nothing about disregarding a preamble.[15] The third did, however. It concerned whether a business partner's Supplemental Executive Retirement Plan (SERP) payments from another company had to be paid by that partner into the partnership.[16] Attention thus turned to the SERP. The testimony showed that the provision at issue was a "generic" clause to which the drafters had paid little attention. From this, "[a] recital paragraph in a document is not determinative of the rights and obligations of the parties," the First Department opined—"not determinative," but not

15. *Joseph Martin, Jr. Delicatessen Inc. v. Schumacher* restated the hornbook rule that an agreement to agree cannot be enforced; but, even then, it noted a "course of dealing from which it might be possible to give meaning to an otherwise uncertain term" had not been shown. 417 N.E.2d 541, 544 (N.Y. 1981). *Ellington v. EMI Music*, *Inc.* held a royalty provision in a contract for the work of Duke Ellington, "net revenue actually received," was to be given the meaning that was understood at the time the contract was negotiated despite a change in the structure of the business of music distribution. 21 N.E.3d 1000, 1005 (N.Y. 2014).

16. Anderson v. Weinroth, 840 N.Y.S.2d 210 (App. Div. 2007).

irrelevant—and then the court went on, "nor does it prevent the introduction of parol evidence to explain the parties' intent."[17] That passage passes without mention.

Many of the decisions the First Department ignored concerned the 1940 *Statement*, which NYU's policy reiterated verbatim. It ties tenure to economic security. The First Department's severing of the connection reveals a mindset lampooned by the eminent legal historian William Maitland a century and a half ago: "if you can think about a thing, inextricably attached to something else, without thinking of the thing it is attached to, then you have a legal mind,"[18] even as the court countenanced a risibly absurd result sub silentio.[19]

B. *As There was No Written Rule Connecting Tenure to Salary None May be Implied*

The court recites the rule that extrinsic evidence may be considered if a contract's terms are ambiguous but, as it found no ambiguity, nothing more was to be done. The rule is correct, but beside the point. Amici did not argue that the economic security of tenure was ambiguous. They argued that the law, in New York as elsewhere, has long been that when words bearing a meaning particular to a profession are used in a contract it is assumed that that meaning was intended and that such meaning, if asserted, should be admitted for trial, to test if it were so.[20] Whence *Hinton* v.

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17. *Id.* at 219.

18. Robert Livingston Shuyler, *Introduction* to FREDERIC WILLIAM MAITLAND, A HISTORICAL SKETCH OF LIBERTY AND EQUALITY (1875) (reprinted, unpaginated). Or, as apocrypha has it, Judge Breitel once castigated a lawyer in oral argument thusly: "Counsel, there's a black cat in a locked closet and you won't let me turn on the light."

19. *See* Amicus Curiae Brief by Legal Scholars in Support of Plaintiffs-Appellants at *23–24 nn.7, 8, Monaco v. N.Y. Univ., 164 N.Y.S.3d 87 (App. Div. 2022) (No. 100738/2014).

20. Such has long been the law in New York as elsewhere. J.H.

Locke and the modern authorities embracing that rule.[21]

The implications of the First Department's reasoning are arresting. If the cases amici relied on were to arise in a college in Manhattan today, what would be the outcome? Mr. Subryan's claim of wrongful notice would fail as he would have been given the express notice of nonrenewal his contract provided, i.e., "twelve months," which means twelve months with no ands, ifs, or buts about it.[22] Herta Krotkoff would have been wrongly dismissed, there being nothing in her contract of tenure that said anything about institutional finances.[23] Jean-Yves Drans would have been wrongly retired as his contract of tenure said not a word about retirement.[24] The First Department declined to apply its reasoning to them.

C. *Prospective Application's "Inexplicable" Result*

The court was incredulous about the claimed connection between tenure and economic security because the consequence of accepting it would be that the REF could only have prospective application. This would produce two classes of tenured faculty governed by different salary policies. Such inconsistency rendered the claim of usage so "inexplicable"

BALFOUR BROWNE, THE LAW OF USAGES AND CUSTOMS § 39 (1st Am. ed. 1881):

> The known and received usage of a particular trade or profession, and the established course of every mercantile or professional dealing, are considered to be tacitly annexed to the terms of every mercantile or professional contract, if there be no words therein expressly controlling or excluding the ordinary operation of the usage, and parol evidence thereof may consequently be brought in aid of the written instrument.

21. Amicus Curiae Brief, supra note 14, at *10–11 n.4.

22. Subryan v. Regents of the Univ. of Colo., 698 P.2d 1383 (Colo. App. 1984).

23. Krotkoff v. Goucher Coll., 585 F.2d 675 (4th Cir. 1978).

24. Drans v. Providence Coll., 383 A.2d 1033 (R.I. 1978).

as to warrant the exclusion of any evidence of it.

This point of decision was not raised below nor treated by the trial court. Thus it could not have been anticipated by amici. Suffice to say, the First Department takes no notice of the ubiquity of the prospective application of a change in policy or law when the change upsets a settled expectation. When Congress amended the Age Discrimination in Employment Act in 1978 to extend the age of retirement from 65 to 70, it suspended the application of the higher age to tenured professors for four years thereby creating for that period two classes of tenured faculty—those subject to mandatory retirement and those not[25]—in order not to upset the institutions' settled expectations.[26] The rules of Metropolitan State College of Denver provided that tenured faculty had the right to retain their positions over the non-tenured during a financial retrenchment; such is an element of the economic security tenure affords and is also a protection of academic freedom as it is a prophylactic against an administration's capacity to single outspoken tenured professors out for termination on ostensibly neutral grounds. The trustees of the university abrogated that priority. When the tenured faculty challenged the change as a deprivation of an important incident of tenure—on grounds of both economic security and academic freedom—the Colorado courts agreed with the tenured faculty that for those reasons priority was a vested incident of tenure. The legal result was that the new rule, which the board had the right to adopt but which attenuated what tenure meant, applied only to those faculty who had been awarded tenure after the rule was adopted. This resulted in two classes of tenured faculty, those who enjoyed a priority and those who did not.[27] So, too,

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25. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95–256, 92 Stat. 190 §§ 3(a), 12(d).

26. *See* S. REP. No. 96–193, 3 U.S. CODE CONG. & ADMIN. NEWS 504, 512 (1978).

27. Saxe v. Bd. of Trs. of Metro. State Coll., 179 P.3d 67(Colo. App.

NYU's tenure policy expressly reserves to the Board of Trustees the right to amend its tenure policy on the express condition that no amendment may "take away" the status of tenure "acquired before such amendment,"[28] which presumably would include important incidents of tenure such as priority in layoff. In other words, the university's policy assured currently tenured faculty members that they would be insulated from any such change even though two classes of tenured faculty would result. In point of fact, that a new salary policy at the School of Medicine would only have prospective effect was the administration's position as well as the Faculty Council's all the decade the salary policy was in gestation until the very moment of administrative adoption.

The court's reference to academic freedom relates to the plaintiffs' expert's opinion—glossing what the court held to be the legally nonbinding explanation of academic freedom—that rendering a faculty member significantly beholden to outside sources for her livelihood could compromise her freedom of research by channeling research away from her interest for personal reward and also erode the public's confidence in the disinterestedness of research results. The court opined that prospective application of the salary policy would produce an inexplicable inconsistency as those newly tenured under it would be subject to that repressive pressure whilst incumbents would not. Because no trial was to be held the court's thinking was never put to the test. Suffice to say, under the 1940 *Statement*, and under NYU's policy that embraces it, all faculty members—tenured, tenure-track probationers, full-time but non-tenure track, part-time or "adjunct" faculty—enjoy the protection of academic freedom; but, obviously, the pressures they labor under that could compromise its exercise differ. Inasmuch as the university was by its rules free to refashion what it deemed tenure to

2007) (discussed in amici's brief).

28. *Supra* text accompanying note 5.

be, by outright abrogation or by emptying it of some of its traditional meaning—so long as it did so only prospectively, an expansion of the zone of possible compromise which the REF worked required prospective application, just as the *Saxe* court held. The court's reasoning—that, as a matter of law, a policy that could compromise the freedom of some has to compromise the freedom of all—is perverse.

The First Department chose not to concern itself with any of this; *Saxe* is ignored. To the court, because prospective application was "inexplicable" the plaintiffs were not to be allowed to explain it.

IV. LARGER IMPLICATIONS

The First Department's opinion is Delphic. It cannot be comprehended without the explanation the foregoing provides. Nevertheless, it is likely to be referenced as disputes over the meaning of tenure and academic freedom proliferate. If mechanically applied—that is, without appreciation of its errors—the decision is likely to do mischief. Accordingly, it is well to consider what could be done, in New York and its sister states, to blunt that happening.

A. *In New York*

The norms and expectations that faculties and institutions have built on the concepts of academic freedom and tenure over the past hundred years have developed for a reason: universities are not prisons; the conduct of the academic profession cannot be governed by a catalogue of exacting written rules that try to anticipate every conceivable contingency. The practices that develop and that are relied on, that become part of the unwritten vernacular, are grounded in the self-interest of neither the faculty nor the administration, but are in the interest of the enterprise as a whole, else they could not long endure. For a court to blind itself to this, to insist on rules whilst ignoring norms,

invites disaster. That this is so has already been illustrated by running some of the cases the *Monaco* court ignored through the court's reasoning.[29] But another, even more pointed example is ready to hand.

In 2007, Professor Ward Churchill, a tenured professor of American Indian Studies at the University of Colorado, was heard before a faculty disciplinary body. He had been charged with misconduct: that several chapters in a book he had edited that appeared under the names of various authors had actually been written by him, which work he later referenced as independent authority. He agreed he'd done that, but defended his action on the very ground on which the First Department stood: that no written rule prohibited what he did. The hearing committee held him guilty of misconduct notwithstanding the absence of a rule based on the profession's understanding of professorial ethics. He was dismissed.[30]

Should Churchill have been dismissed by New York University and have sued for wrongful termination in violation of tenure, according to the First Department the absence of a rule would be dispositive and summary judgment for him should be granted. NYU would surely point to the faculty's judgment to buttress the argument to a common understanding of what conduct tenure does not shield in the absence of a written rule. But it would then have to explain why the Faculty Council's insistence on what it understood tenure to mean would not be equally weighty.[31]

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29. *See supra* text accompanying notes 14–16.

30. The case is explored in Matthew Finkin, *Academic Freedom and Professional Standards: A Case Study*, *in* ACADEMIC FREEDOM IN CONFLICT Ch. 3 (James Turk ed. 2014).

31. Although the imposition of significant discipline on a tenured faculty member requires a hearing before a faculty committee, when pursued as a breach of contract the matter of cause to discipline is heard de novo. McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1987); McAdams v. Marquette Univ., 914 N.W.2d 708 (Wis. 2018). Though the jury in such a case is not reviewing the faculty's decision, that decision is

Inasmuch as the court failed to apply the long established law of usage and custom to the contract of employment, a contractual corrective is available. It is within the power of faculties and administrations to agree on the inclusion of a directive in the institutions' rules to provide, in effect, that, "[i]n the event of a dispute concerning the meaning or application of these provisions [on academic freedom and tenure] evidence of generally recognized usage or custom in the academic profession may be considered."[32] As such a directive would merely require that the body of law the First Department ignored be restored, it is difficult to conceive of there being any objection to it. On the contrary, given the precedential status of the *Monaco* decision, adoption of such a provision may not only be a matter of institutional prudence, it may be a matter of legal necessity.

B. *In Foreign Jurisdictions*

The matter is of moment as contention on the campus is rising nationwide, some from the consequence of heightened consciousness surrounding sexual harassment, some arising out of suppressive efforts violative of academic freedom.[33] It

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before the jury – *McAdams*—and may be required in order for the issue to be tried. Crenshaw v. Erskine Coll., 850 S.E.2d 1 (S.C. 2020).

32. It would be open to a party to contest whether such a usage or custom exists, is sufficiently established, or relevant, just as it could were the *Monaco* court to have followed the law.

33. Pen America, *Legislation restrictions on the Freedom to Read, Learn, and Teach* (Nov. 2021). Timothy Jackson is a professor of musicology at the University of North Texas, a founder of a musicological journal. He responded to an accusation regarding the lack of black musicologists in classical music by questioning the exposure of black youth to classical music at home as affecting interest later in life. Some black students called his remarks "racist." Rather than using the accusation as a "teaching moment" on the distinction between bigotry and sociology, the administration relieved Jackson of his editorship. He has sued. The trial judge denied the university's motion to dismiss with these introductory words: "pressures from offended constituents can overshadow promises of academic freedom" which is suit seeks to enforce.

is possible, indeed likely, that the sound resolution of those disputes will depend on the courts' appreciative understanding of the profession's norms and expectations; and it is possible that in such cases the *Monaco* decision would be directed to a court's attention. The First Department's threadbare reasoning coupled to its purblind ignorance should be enough to cause a court so directed to steer clear of it lest they, too, stumble in the dark.[34]

Two cases now in progress make the point: one in Georgia, one in Illinois; the first about tenure, the second about academic freedom. The two are paired for the reason that academic usage—the community's common understanding of what tenure and academic freedom mean—speaks equally to both and plays a critical role in both.

First, to turn—or return—to tenure, not in the economic security it affords going forward, but to the manner of its termination. Under the 1940 *Statement* tenure confers a right to continue in office unless cause to dismiss is presented; when cause is claimed a hearing is required. But what that hearing entails is touched on only sparingly in the 1940 *Statement*: it should be before a faculty committee advisory to the institution's governing board, on written charges, in which hearing accused professor is entitled to be represented, and, in which a transcript of record should be made. No more is said.

Some institutions flesh out their dismissal procedures in some detail. Others do not. The Faculty Handbook of Piedmont University, Georgia, requires the dismissal of tenured faculty members to be decided in a hearing, not before a faculty body advisory to the institution's governing board, but before the board itself. The board is charged "to hear and decide . . . in a fair, impartial, and timely matter."[35]

Jackson v. Wright, No. 4:21-CV-00033, 2022 U.S. Dist. LEXIS 8684, AR *2 (E.D. Tex. Jan. 18, 2022).

34. *See supra* text accompanying note 10.

35. Faculty Handbook of Piedmont University set out in the amended

The Handbook is silent on any other significant element of the hearing procedure. Robert Wainberg, a tenured professor of biology of more than thirty years of service, was given the following notice of dismissal, "You have repeatedly made several comments in class directed to students. These comments were unwelcome, made students uncomfortable, and interfered with the effective delivery of educational services . . . " Nothing more was said; no specifics in regard to any of this were provided. Twenty-four hours before the hearing was to be held he was, for the first time, provided with copies of student statements the administration had secured concerning his classroom speech. The following day the hearing was held, but Wainberg was not allowed to question those or any other students, nor was he allowed to produce any witnesses on his behalf. The hearing consisted only of statements made by the administration and Wainberg's reply.

As the college's rules on the hearing are silent on procedure, no provision is made for a statement of specific facts alleged to constitute grounds for dismissal nor, consequently, that any such statement be supplied to the accused professor in a timely manner to inform him of what the words were that he uttered that the administration alleges to have been wrongful and for time to allow him to prepare his defense. No provision is made for him to question his accusers. No provision is made for him to produce witnesses on his behalf, possibly other students from the class at issue. In the absence of any rule specifically requiring any of these elements, was the college obligated to observe them?

According to the authorities relied on in the *Monaco* amicus brief, evidence of academic usage should be admitted if such there were that addresses the silence, that fills in the

complaint in Wainberg v. Piedmont College, U.S.D.C. Northern Dist. of Georgia, Case No. 2:19-cv-00251-MHC (Jan. 20, 2022). The author serves as an expert witness for the plaintiff.

gaps; and such there is. The lacunae in the 1940 *Statement* were taken up by the drafting organizations a decade later resulting in the adoption in 1958 of a *Statement on Procedural Standards in Faculty Dismissal Proceedings*. If this were to be allowed to be looked to as supplying specific elements of the general obligation of fairness the college's rule requires, the college could be held to have fallen afoul of that obligation by failing to have afforded these elements.

Absent that resort, it would fall to the court to define what the contractual obligation of fairness means measured by no lights other than its own. However, fairness does not live in the abstract; it is context specific.[36] In the academic context, it draws on the evolved notion of "academic due process"[37] that culminated in the 1958 codification and which accordingly serves as a guide to decision.

Under *Monaco*, the 1958 *Statement* could not be considered. If the "economic security" clause in a tenure contract taken in isolation cannot open the door to evidence of academic custom and usage explaining it, because the rules are otherwise silent, "fairness" taken in equal isolation can fare no better. Left accordingly to its own devices a *Monaco*-minded court would hold fast to the same mindless positivism: all the tenured faculty of Piedmont University would get in terms of the procedural components of a fair dismissal are what the rules say, which, in the face of silence means they get—nothing.

Second, to academic freedom. Jason Kilborn, a professor of law at the University of Illinois at Chicago's School of Law ("the University"), used a redacted racial epithet in an examination question involving employment discrimination. The examination scenario was one a lawyer in employment

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36. *See generally* Harry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1303–04 (1975).

37. CLARK BYSE & LOUIS JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION 52 (1959) ("The term 'academic due process' is now in common use.").

discrimination law might well encounter. Nevertheless some students protested that his use of the word was racist. The administration suspended him from teaching and required him to submit to educational retraining. He did not submit. He is suing for a violation of academic freedom under the University's rules.[38] The University's rules on academic freedom, following the 1940 *Statement*, assure freedom of teaching, but are silent on examinations. The academic profession does connect the two holding the latter, as an exercise of the freedom of teaching, to standards of professional care.[39] As the First Department would disallow consideration of that evidence, Professor Kilborn's framing of his examination would have no call on his freedom as a teacher: the University's commitment to academic freedom would have no legal bite.

From all that precedes, it follows that were the *Monaco* decision ever to be cited in a pleading or a brief the introductory signal should be neither *cf.*, nor *but cf.*, nor *but see*; it should be a categorical, *don't see*.

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38. Kilborn v. Amiridis, U.S. D.C. Northern District of Illinois, Case No. 1:22-cv-00475 (Feb. 17, 2022).

39. MATTHEW FINKIN & ROBERT POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 84–86 (2009).