

# PROFESSOR DEFEND THYSELF: THE FAILURE OF UNIVERSITIES TO DEFEND AND INDEMNIFY THEIR FACULTY

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## I. INTRODUCTION

University professors going about their daily activities of teaching, researching, and writing rarely consider the possibility of being sued. To the extent that the concept of potential liability does cross their minds, educational professionals undoubtedly comfort themselves in the realization that since their activities are job-related, the school<sup>1</sup> that employs them is obligated to provide a defense<sup>2</sup> and indemnity<sup>3</sup> in any suit stemming from those activities.

Given the ever-increasing litigious nature of American society, the instances of college faculty members being sued are likely to increase. The American Association of University Professors (AAUP) has recognized this trend:

There has been in recent years a steady growth in lawsuits filed against faculty members over the discharge of their professional responsibilities. Legal actions have been initiated by colleagues, by rejected applicants for faculty positions, by students, and by persons or entities outside the academic community. Litigation has concerned, among numerous issues, admissions standards, grading practices, denial of degrees, denial of reappointment, denial of tenure, dismissals, and allegations of defamation, slander, or personal injury flowing from a faculty member's participation in institutional decisions or from the substance of a faculty member's research and teaching.<sup>4</sup>

With an increase in suits against faculty members comes the corresponding question of who will ultimately bear the financial burden of attorneys' fees and monetary judgments? The belief that universities will gladly "step up to the plate" in defense of their employees in cases where the allegations against the employees arguably relate to their job duties is belied by the schools' conflicting interests. The interests served by denying a defense and indemnity to their faculty members include universities (1) insulating themselves from the cost and potential liability of university employees' actions and (2) avoiding involvement in controversial issues. The conflict between the interest of the faculty employee and the interest of the university employer highlights the need for clarification of the legal duties a university owes its faculty members. The difficulties faculty members often encounter when

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1. For the purpose of this Article, the terms "college," "university," and "school" are used generally and interchangeably to indicate post-secondary educational institutions.

2. The concept of an obligation or duty to provide a defense is often seen in liability insurance policies that obligate the insurer to retain counsel or "provide a defense" to the insured in a third-party suit against the insured. The part of the insurance policy containing the obligation to retain counsel to protect the insured is known as a "duty to defend clause," which is defined as "[a] liability-insurance provision obligating the insurer to take over the defense of any lawsuit brought by a third party against the insured on a claim that falls within the policy's coverage." BLACK'S LAW DICTIONARY 523 (7th ed. 1999).

3. Indemnity is defined as:

1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

BLACK'S LAW DICTIONARY 772 (7th ed. 1999).

4. AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 130 (9th ed. 2001).

requesting a defense and indemnity from their university employer raises the question: What factors affect whether a college or university has a duty to provide a defense and indemnity to its faculty members?

This Article, in Part II, reviews various sources that may create a duty of defense and indemnity running from colleges to their professors,<sup>5</sup> including contractual indemnity provisions, state indemnity laws, the indemnification policy suggested by the AAUP, and academic freedom. This Article, in Part II-C, also suggests the need, in documents governing the terms of a professor's employment, for a more detailed definition of the university professor's scope of employment. Such a definition could be examined by both faculty and university administrators in determining whether a defense and indemnity should be provided in individual cases, and if necessary, could be used by courts in deciding disputes over the existence and scope of defense and indemnity obligations to faculty members. Finally, in Part III, this Article suggests a fundamental change in the way universities handle defense and indemnity requests by university faculty members. Because defense and indemnity provisions in teaching contracts, collective bargaining agreements, university bylaws, or state indemnity laws all function in a manner similar to liability insurance<sup>6</sup> for faculty members, a presumption should exist, as with coverage provided under liability insurance policies,<sup>7</sup> in favor of colleges providing a defense and indemnity to professors in the event they are sued for words or deeds that arguably relate to their job obligations. The burden of demonstrating that an employee's actions fall outside the scope of employment also should rest with the university. In addition, each university should establish a committee, comprised of both faculty and administration officials, to conduct a hearing on a professor's defense and indemnity request and make a written recommendation as to whether the university should accept or deny such a request.

Without the safeguards of (1) a presumption in favor of providing a defense and indemnity to professors, (2) the burden of proof being placed on the university, (3) a committee empowered to issue a recommendation, and (4) a more detailed definition of the scope of employment of a university professor, faculty members who are sued for actions or omissions they believe are within the scope of their employment, and subsequently are denied a defense and indemnity by their university employers, are left with unappealing options. One option is to sue their university employers to either compel a defense or to recover monies they expended in their own defense; such suits can only lead to resentment and distrust between the faculty and administration, which can affect any future negotiations

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5. For the purpose of this Article, the term "professor" is used generally to indicate faculty members.

6. In some instances, the university may have obtained a liability insurance policy to fulfill its duty to defend and indemnify its faculty members. Liability insurance is "third party" indemnity insurance, meaning a contract to protect or indemnify the insured from liability in the form of an actual or potential monetary judgment to third parties. This is to be contrasted with "first party" insurance, such as homeowners' insurance, which is a contract to reimburse the insured for loss to his or her own property. 14 COUCH ON INSURANCE § 198:3 (3d ed. 1999). Liability insurance policies also generally obligate the insurer to defend any claims, even if groundless, against the insured that are not specifically excluded by the policy language. *Id.* § 200:1.

7. It is widely accepted that a liability insurer bears the burden of demonstrating the lack of coverage under an insurance policy. As a leading authority states:

When an exclusion clause is relied upon to deny liability coverage, or to avoid duty to defend, an insurer has the burden of demonstrating that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in total, are subject to no other interpretation. As a general rule, policy exclusions must be clear on the face of a complaint before an insurer may safely deny its duty to defend without seeking a declaratory judgment simultaneously, or after denying liability.

14 COUCH ON INSURANCE § 198:40 (3d ed. 1999) (footnotes omitted). Courts generally hold that "[e]xclusionary language in an insurance policy is to be construed most strongly against the insurer, and the burden is upon the insurer to prove that an exclusion applies." *Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, 475 S.E.2d 264, 266 (Va. 1996).

between the two groups.<sup>8</sup> Suits by professors against universities would also involve courts in university policies, an area in which courts are often reluctant to impose their views.<sup>9</sup> Another option would be to require that the professors bear the costs of defense and any judgment personally; this option imposes the financial burdens solely on the faculty members and could lead to feelings of hostility toward university employers.

An example of a university denying a faculty member's request for a defense and indemnity request in a lawsuit arguably arising out of the faculty member's job responsibilities is the dispute between Professor James J. Fyfe<sup>10</sup> and his employer Temple University.<sup>11</sup> Fyfe, a Criminal Justice Professor at Temple, was served with a libel complaint in April 2001. The suit, brought against Fyfe by the Philadelphia police officer's union, the Fraternal Order of Police (FOP), was based on an op-ed piece written by Fyfe and published in the *Philadelphia Inquirer* regarding the disciplinary procedures of the Philadelphia Police Department.<sup>12</sup>

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8. Commentators have argued that parties involved in collective bargaining are best served by establishing a relationship of trust rather than trying to manipulate each other.

A relationship of trust in collective bargaining allows negotiators and contract administrators more easily to share information, to explore ideas with each other and to enjoy positive interdependence. It takes less time to negotiate agreements when parties trust each other. In the absence of trust between negotiators and contract administrators, there exists an invisible wall of resistance. In distrust there is a tendency to ignore or misperceive facts and to be unconscious of or ignore feelings that might increase vulnerability. The level of trust achieved by the parties, on the other hand, provides a useful predictor of group accomplishment. Moreover, the level of trust attained by parties is a significant factor in predicting the degree of satisfaction an individual feels within an organization.

Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. L.J. 465, 491-92 (1997).

9. The United States Supreme Court has evaluated the propriety of the actions of public universities. In several cases, however, the Court has expressed a reluctance to substitute its views for those of a university if the university's decision was based on professional educational judgment.

If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making."

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (quoting Bishop v. Wood, 426 U.S. 341, 349 (1976); Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978)).

10. James J. Fyfe, Ph. D, is a tenured professor in Temple University's Department of Criminal Justice, part of the School of Liberal Arts. Fyfe is presently on leave from Temple and is working as a distinguished professor at John Jay College of the City University of New York. He is also a Deputy Commissioner, training for the New York City Police Department. On the Temple Criminal Justice Department website, Fyfe summarized his research interests as "the conduct of field police officers and methods for holding police officers and organizations accountable for behaving in manners that are both humane and efficient." James J. Fyfe, Temple University, Department of Criminal Justice, *Faculty, James Fyfe*, at <http://astro.temple.edu/~rbrecken/faculty/fyfe.html> (last visited Aug. 1, 2002). On the same website, Fyfe also notes that he has testified or consulted on numerous civil rights actions involving the police, including:

Tennessee v. Garner (in which the Supreme Court forbade officers from shooting to arrest non-violent fleeing suspects); Thurman v. Torrington (in which abused wives won the right to sue police in federal court for failing to arrest their abusers); as well as cases stemming from the Rodney King incident, the serial murders committed by Jeffrey Dahmer, and the Philadelphia police bombing of the residence of the radical group, MOVE.

*Id.*

11. Temple University is a private institution that receives state funding under the Temple University-Commonwealth Act, as a member of the Commonwealth of Pennsylvania System of Higher Education. 24 PA. CONSOL. STAT. § 2510-1, 2510-6 (1992). Temple's main campus is located in Philadelphia, Pennsylvania.

12. Professor Fyfe's op-ed piece read as follows:

Mar 28, 2001

#### **Timoney's hands tied**

Police Department Rules block the commissioner from taking tough cases of misconduct.

By James J. Fyfe

My friend Philadelphia Police Commissioner John F. Timoney believes that good people should not be condemned for one stupid act. I believe that cops who cover up misconduct should be fired.

Our disagreement is merely academic because neither of us runs the Philadelphia Police Department's disciplinary system. Instead, it is controlled by the Fraternal Order of Police, the department's union. Timoney has

The alleged libel was Fyfe's suggestion in the op-ed piece that a member of the FOP had the motivation to leak a confidential report to the press.<sup>13</sup> The op-ed piece concerned controversy regarding the punishment handed down by then-Philadelphia Police Commissioner, John Timoney, to two Philadelphia police officers for covering up a drunk-driving accident involving a third officer. The op-ed piece described the limitations on Commissioner Timoney's ability to discipline police officers under the grievance and arbitration system mandated by the collective bargaining agreement between the FOP and the

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generally done a great job but, where the disciplinary system is concerned, his hands have been tied by the FOP and by an arbitration system that is out of step with almost all other states.

Serious misconduct cases are tried before the Police Department's Board of Inquiry, which has a rotating membership of three Police Department officers. These vary in rank, but all the members of all the boards that have ever been convened have had one thing in common: They all belong to the same FOP as the officers whose cases they have heard.

Until Timoney intervened, the cases were prosecuted by a police captain with no legal training. The current prosecutor is a tough police officer and lawyer, but she, too, is a member of the same FOP. Accused officers are defended by expensive FOP lawyers who, everybody in the room knows, would also represent the board members and the prosecutor should they ever be charged with serious offenses. This biased process has predictable results: When I studied it as a police practices expert in connection with litigation against the Police Department, I found that the boards threw out more than half the cases they heard, and that they reduced charges in a good percentage of the rest. Timoney has not been able to change this.

He has required that boards write explanations of their dismissals—a Police Department first—but he can neither disband nor disregard the boards. That is up to city officials who, in their labor negotiations with the FOP, long ago bargained away the police commissioner's power to hold officers accountable.

Board findings against officers may be appealed to Pennsylvania's arbitration system. This operation involves the selection of an arbitrator who must be approved by both the Police Department and the appealing officer and his or her FOP representatives who, invariably, reject arbitrators who have previously ruled against accused officers. As a consequence, arbitrators answer only to the FOP, and revoke or reduce more than half the penalties they review.

Here's one: An off-duty officer killed a man outside a bar, shooting him nine times in the back, and apparently firing several shots point-blank into the man as he lay on the ground. The Police Department took no action and, a few months later, the officer fired 15 shots during a birthday party, killing another man and wounding a female bystander. He was then arrested for the first shooting, and somehow beat the criminal charges against him. The Police Department fired him. He went to arbitration and was reinstated. Last I heard, he was working on patrol, armed to protect and serve us all.

Arbitrators usually revoke penalties that are disproportionate to what has happened in earlier cases. Capt. James Brady and Capt. Joseph DiLacqua, who are at the heart of the current scandal, lost 20 days' vacation. DiLacqua also was passed over for promotion, finally being elevated only when he passed another promotional exam. These probably are the most severe penalties that would have survived arbitration because, compared to the those in the pre-Timoney era, they are draconian.

Would you believe a 10-day suspension for a drunken driving accident that caused the amputation of a citizen's leg? No penalty at all for detectives who covered up an incident in which two off-duty officers criminally assaulted two young men and then vandalized their victims' car? One session of alcohol abuse counseling for an officer who invaded his estranged wife's home, fired a shot through her television, terrorized her at gunpoint, and then engaged in an hours' long stand-off with responding officers? They and a lot more like them are in the files I have reviewed.

Timoney has inherited a system that benefits only wrongdoers. He has also made enemies: Who else but an FOP unhappy with Timoney's attempts to right the Police Department would—or could—have leaked the Brady file to the press? If citizens are unhappy with what happened in the Brady case, they should demand that city officials put an end to police management by the FOP and that the commonwealth abolish the arbitration system.

James J. Fyfe, a former New York City police lieutenant, is a professor of criminal justice at Temple University.

James J. Fyfe, *Timoney's Hands Tied* (op-ed), 301 PHILADELPHIA INQUIRER, Mar. 28, 2001, at A15.

13. The suit is captioned *Fraternal Order of Police Lodge No.5 v. James J. Fyfe* and was originally filed in the Philadelphia Court of Common Pleas (number 002365) on April 19, 2001 (copy on file with author). Since Fyfe is a New Jersey resident, the suit has since been removed to federal court based on diversity of citizenship. The complaint states that the FOP is the bargaining representative of the police officers employed by the City of Philadelphia, and alleges defamation based on the following language from Fyfe's op-ed piece: "Timoney has inherited a system that benefits only wrongdoers. He has also made enemies: Who else but an FOP unhappy with Timoney's attempts to right the Police Department would—or could—have leaked the Brady file to the press?" *Fraternal Order of Police Lodge No. 5 v. Fyfe*, No. 002365, at ¶ 18 (Phila. Ct. C.P. Apr. 19, 2001).

City of Philadelphia. Fyfe wrote the piece in response to the media's and public's perception that the twenty-day suspension given the officers was too lax.<sup>14</sup>

When served with the complaint, Fyfe believed that Temple University was obligated to defend and indemnify him in the libel suit. This belief was quickly dispelled when the University Counsel's office declined his request for a defense and indemnity because in writing the op-ed piece Fyfe had acted in his "private capacity," without Temple's authority or permission.<sup>15</sup>

Professor Fyfe's experience in seeking a defense and indemnity from Temple is used throughout this Article to exemplify the difficult issues involved in deciding when a university professor acts within the scope of employment for purposes of being provided a defense and indemnity by a university employer.

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14. The complaint filed by the FOP states that, according to published reports, a Philadelphia Police captain and lieutenant, both FOP members, were involved in an off-duty automobile accident in February 1998. Fraternal Order of Police Lodge No. 5 v. Fyfe, No. 002365, at ¶ 10 (Phila. Ct. C.P. Apr. 19, 2001). The reports stated that the captain was driving a vehicle that was involved in an accident and that when the lieutenant was called to the scene, he directed the vehicle be moved "to another location to make it appear the accident had occurred at that second location." *Id.* at ¶ 10. The complaint states that an investigation by the Philadelphia Police Department Internal Affairs Division revealed the facts of the incident, which, along with the recommendations of the investigating officers, were included in a confidential investigative file. *Id.* at ¶ 11. It was this confidential file, the "Brady file," that Fyfe referred to in his op-ed piece. The FOP complaint notes that the captain and lieutenant both received twenty-day suspensions for their roles in the incident. *Id.* at ¶ 12.

15. E-mail from Susan B. Smith, Esq., Associate University Counsel, Temple University, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (Apr. 26, 2001) [hereinafter Smith E-mail] (on file with author) (quoted *infra* note **Error! Bookmark not defined.**).