Professor Defend Thyself: The Failure of Universities to Defend and Indemnify Their Faculty

Kevin Oates
PROFESSOR DEFEND THYSELF: THE FAILURE OF UNIVERSITY 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\(^1\) that employs them is obligated to provide a defense\(^2\) and indemnity\(^3\) 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)

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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).
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.4

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 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,5 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


5. For the purpose of this Article, the term "professor" is used generally to indicate faculty members.
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 by-laws, or state indemnity laws all function in a manner similar to liability insurance for faculty members, a presumption should exist, as with coverage provided under liability insurance policies, 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 provid-

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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.

ing 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 between the two groups. 8 Suits by professors against universities would also involve courts in university policies, an area in which courts are often reluctant to impose their views. 9 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.

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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.


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)).
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\(^{10}\) and his employer Temple University.\(^{11}\) 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.\(^{12}\)

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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.*


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 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?
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. 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 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.

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

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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.


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).

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.
in writing the op-ed piece Fyfe had acted in his "private capacity," without Temple's authority or permission.  

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.

II. SOURCES OF A RIGHT TO DEFENSE AND INDEMNITY

A. Contract

For many considering the issue of the scope of a university's obligation to defend and indemnify a faculty member, the issue would seem to be a simple matter of contract interpretation, with the basic question being whether the professor's contract or collective bargaining agreement with the university provides for defense and indemnity protection. Unfortunately, the fact that a contract includes a defense and indemnity provision is only the beginning of the debate. Questions often arise about the exact meaning and application of contractual indemnity provisions.  

Using Professor Fyfe's case as an example exposes the pitfalls created when professors assume that the existence of a defense and indemnity clause in the document governing the terms of employment means that their university will easily come to their defense if a complaint is served. Despite the indemnity provision in Fyfe's collective bargaining agreement, the University denied his demand for a defense and indemnity.  

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 35).


17. Smith E-mail, supra note 15 (quoted infra note 35).
sionals (TAUP), which entered into a collective bargaining agreement with Temple University.\(^{18}\) The Temple-TAUP Collective Bargaining Agreement contains the following provision:

N. Liability Protection\(^{19}\)

Temple shall maintain coverage to insure bargaining unit members against liability claims or suits (including coverage against libel and slander claims) in connection with their responsibilities to Temple or at Temple. All such liability coverage shall be in an amount no less than $1,000,000 per incident.\(^{20}\)

Article 2 of the Collective Bargaining Agreement defines “Members of the Bargaining Unit” as “[f]aculty, librarians, and academic professionals represented by the TAUP for purposes of collective bargaining.”\(^{21}\)

Application of the “Liability Protection” provision of the Collective Bargaining Agreement to Professor Fyfe’s situation—a defamation suit\(^ {22}\) brought by a police union against a Criminal Justice Professor arising from his authorship of an op-ed piece about local police disciplinary procedures—begs the question of whether Fyfe’s actions arose from his “responsibilities to Temple or at Temple.”\(^ {23}\)

Also, the language of the Collective Bargaining Agreement fails to specify any procedure or standard for determining when an alleged action or omission by faculty members is “in connection with their responsibilities”\(^ {24}\) at the University. In addition, the liability protection provision does not require the University to provide a direct defense, indemnify the faculty member from its own funds, or even report to the University’s liability carrier a faculty request for a defense indemnity.\(^ {25}\) The provision merely requires Temple to main-


\(^{19}\) Article 26 of the Collective Bargaining Agreement states: “The Article or paragraph titles throughout this Agreement are merely editorial identifications of their related text and do not limit or control that text.” Id. at 47.

\(^{20}\) Id. at 41 (Article 20(N)).

\(^{21}\) Id. at 2.

\(^{22}\) The liability protection provision of the Collective Bargaining Agreement specifically mentions that Temple shall provide coverage to bargaining unit members for libel and slander claims. Id. at 41 (Article 20(N)).

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Temple University Counsel did not forward Fyfe’s request for a defense and indemnity to the University’s liability insurance carrier. See Letter from George E. Moore,
tain liability insurance in the specified amount.

Questions regarding the exact parameters of the scope of a college professor’s work, the procedure used to decide close questions, and the role of liability insurance are likely to arise in conflicts between faculty and university administration over providing a defense and indemnity to professors.

If the question of a right to a defense and indemnity hinges on a faculty member’s job description, surely a review of the university documents regarding the granting of promotion and tenure to faculty members would provide some guidance. This inquiry, however, often creates more questions than it answers. Again, the Fyfe case provides a good example. Appendix “A” to the Collective Bargaining Agreement between Temple and TAUP sets forth the “Bases for Promotion” and states in part:

Promotion is based on excellence in teaching, in scholarship and creative work, and in various administrative, professional or academic services.

. . . .

3. Services Within and Outside the University

Since the faculty plays an important role in the formation of University policies and in the administration of the University, recognition is given to faculty members who prove themselves to be able administrators and who participate effectively and imaginatively in faculty government and the formulation of departmental, college, and University policies. Services by members of the faculty to the community, the state, and the nation are likewise valued. Services leading to the advancement of a profession, as for example, participation in professional organizations and editorial work on professional publications, are also considered worthy of recognition.26

Temple’s tenure requirements,27 set forth in the Collective Bar-
gaining Agreement, also contain similar language providing that to be granted tenure, 28 an individual must show outstanding performance in meeting the accepted standards for: "(1) teaching; (2) scholarship, research or creative work; and (3) service 29 within and outside the University appropriate to rank."

When served with the FOP's complaint, Professor Fyfe wrote a memorandum to Temple University Counsel's office requesting "a determination as soon as possible about whether and to what extent Temple University will assist me in defending against this frivolous and harassing complaint." 31 Fyfe's memorandum contained the following statement regarding the motivation for writing the op-ed piece: "This suit involves actions that I took in the course of my obligations to fulfill Temple's 'urban mission' 32 and to improve the quality of life of the community served by Temple."

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28. Being conferred tenure is one of the most important considerations for academic personnel. Many commentators have used the tenure decision "as the model for the exploration of ethical considerations in personnel decisions in the academy." MORALITY, RESPONSIBILITY, AND THE UNIVERSITY: STUDIES IN ACADEMIC ETHICS 80 (Steven M. Cahn, ed. Temple University Press, 1990).

29. The granting of tenure to faculty members is widely recognized as linked to a university's obligation to serve its community.

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.


31. Memorandum from James J. Fyfe, Professor, Criminal Justice Department, to Susan B. Smith, Associate University Counsel (Apr. 24, 2001) (on file with author).

32. Temple University's main campus is located in an urban area, the City of Philadelphia. The phrase "urban mission" appears in different Temple publications. Erin McNamara Horvat, Director of Temple's Urban Education Program, stated that "Temple has always had an urban mission. . . . It was founded for people who wouldn't otherwise have received an education." Barbara Baals, NEW CERTIFICATE PROGRAM SET FOR URBAN EDUCATION, TEMPLE TIMES ONLINE EDITION (Nov. 8, 2001), at http://www.temple.edu/temple_times/11-8-01/urban-ed.html.

33. Memorandum from James J. Fyfe, Professor, Criminal Justice Department, to Susan B. Smith, Associate University Counsel (Apr. 24, 2001) [hereinafter Fyfe Memorandum] (on file with author). The full text of Professor Fyfe's Memorandum is as follows:

Memo to: Susan B. Smith, Associate University Counsel
From: James J. Fyfe, Professor of Criminal Justice  
Date: 4/24/01  
SUBJECT: Libel Suit  

As I indicated in the messages I have left, I have been sued for libel by the Philadelphia Lodge of the Fraternal Order of Police. The complaint and exhibit are attached, and were served on me at my Temple University office on Friday, 4/20. I have 20 days from that date to respond to them, so I am now requesting a determination as soon as possible about whether and to what extent Temple University will assist me in defending against this frivolous and harassing complaint. If I am to mount a reasonable defense, I must know that by the end of this week.

The allegedly offensive statement (which was actually a question) appears in a March 28, 2001 Philadelphia Inquirer op-ed article I wrote on the recent police scandal involving a police captain (James Brady) whose drunk-driving accident was covered up by other Philadelphia police. The article is attached as an exhibit to the FOP’s complaint, and the alleged libel in it is:

Who else but an FOP unhappy with [Police Commissioner] Timoney’s attempts to right the Police Department would—or could—have leaked the Brady file to the press?

I think you will agree with the Inquirer and me that this is not a libel. As I read libel law, a libel against a public figure must meet three criteria.

- It must be an accusation, but my alleged libel is a question rather than an accusation.
- It must be demonstrably false, but my alleged libel is not. In fact, virtually the only people who had the opportunity to leak this file are Philadelphia police officers, and virtually all Philadelphia police also are FOPs. Thus, the question I posed is completely reasonable, because there is virtually no chance that anybody but an FOP member leaked this file.
- It must have been done with malice. My alleged libel was not done for this purpose. It was done on the basis of my studies and experience and in my capacity as a Temple University professor and scholar of the police to share with the readership of the Philadelphia Inquirer some of the knowledge I have gained in more than 20 years of studying the Philadelphia police. It was my judgment that informing the public of my analysis of this situation would avoid a hasty and wrongheaded public judgment that Timoney, the best and most effective Philadelphia police leader in my memory, had taken willing part in a cover-up and was therefore unfit for office. That would have been a tragedy for all Philadelphians, except the FOP, which greatly resents Timoney. I think my article had the desired effect, and note that “the scandal” died quickly after this article helped to focus the public and political leaders on the general inadequacy of discipline in the Philadelphia Police Department.

This suit involves actions that I took in the course of my obligation to fulfill Temple’s “urban mission” and to improve the quality of life of the community served by Temple. It also involves a direct challenge to the right of free speech and, especially, of the right of academics to pose reasonable questions based on their work and special expertise. On its face, this suit does not define libel. Instead, I believe it is designed to harass and silence me.
Within two days of receiving Fyfe’s request for a defense, Temple University Counsel’s office responded with an E-mail declining the request. The E-mail summarized University Counsel’s position as follows: “Your commentary in the *Philadelphia Inquirer* was written in your private capacity. It was not written on Temple’s behalf or with Temple’s permission or endorsement. Also, the statements in your letter represent your own, personal thoughts and do not necessarily reflect the views of Temple.” Fyfe responded to University Counsel’s denial of his request for a defense with an E-mail expressing surprise that Temple did not “want to stand up for its faculty when they were harassed for expressing their views that are the reasonable results of their scholarship.”

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Thank you for your promptest attention to this matter. Please do not hesitate to contact me at any time, on campus . . . , at home . . . , or via e-mail.

Fyfe Memorandum, *supra* (telephone numbers, E-mail address, and carbon copy list omitted).

34. Smith E-mail, *supra* note 15 (quoted *infra* note 35).

35. *Id.* The full text of the E-mail is as follows:

April 26, 2001

Dear Professor Fyfe:

This responds to your April 24, 2001 request that Temple university provide you with representation in the lawsuit captioned Fraternal Order of Police v. James Fyfe. The lawsuit contains a single count – Defamation. The alleged defamatory statement is contained in a commentary piece you wrote that was published by the *Philadelphia Inquirer* on March 28, 2001.

Your commentary in the *Philadelphia Inquirer* was written in your private capacity. It was not written on Temple’s behalf or with Temple’s permission or endorsement. Also, the statements in your letter represent your own, personal thoughts and do not necessarily reflect the views of Temple. Consequently, Temple will not be able to assist you in defending against this lawsuit.

Please feel free to contact me if you have any additional questions or comments.

Sincerely,

Susan Smith

*Id.*

36. E-mail from James J. Fyfe, Professor, Criminal Justice Department, Temple University, to Susan B. Smith, Associate University Counsel Temple University (Apr. 26, 2001) [hereinafter Fyfe E-mail] (on file with author). The full text of the E-mail reads as follows:

April 26, 2001

Dear Ms. Smith:

Thank you for your response to my request.

Actually, I did not realize that Temple had “views,” or that scholars had to clear their views with Temple. Instead, I thought Temple might want to stand up for its faculty when they were harassed for expressing views that are the reasonable results of their scholarship and which deal with issues of critical concern to the community that is at the heart of Temple’s “urban mission.”

Now I know better.
Temple University Counsel’s response to Fyfe’s request highlights the problems professors can face in relying on the good faith of the university in interpreting a contractual indemnity provision in their contracts or collective bargaining agreements or in dealings with university insurers who ultimately may pay the defense and indemnity costs. When the decision whether to defend and indemnify a faculty member is left solely to the university or its counsel, the faculty perspective on what actions are within the professional capacity of faculty members may be overlooked or ignored. Can the university or its counsel properly weigh the interests of the faculty member against the university’s own interest in avoiding liability and controlling costs? Is a university’s decision regarding whether to provide a defense and indemnity to a faculty member best left, as it was in Fyfe’s case, to university counsel without any established criteria on how such a decision should be made? Because the answer to both of these questions is “no,” universities, instead of leaving the decision in the hands of university counsel, should have a written procedure for determining when a professor’s alleged actions or omissions relate to his or her job duties for the purpose of deciding whether the professor is entitled to a defense or indemnity.

Although not involving a professor’s request for a defense and indemnity but instead one by a university administrator, a federal district court’s decision in the case of Harris v. Howard University demonstrates the difficult factual determinations that the court must

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Jim Fyfe

*Id.*

37. Temple University Counsel George Moore, Esq., did not respond to the author’s request to discuss the Fyfe situation.

38. The April 2002 issue of the TAUP Bulletin contained an article by the TAUP President, Bill Cutler, based on an interview he conducted with Temple’s University Counsel George Moore, Esq. Cutler, *supra* note 25, at 1. The article states that Moore indicated that Temple is insured for general liability under a policy issued by the National Union Fire Insurance Company of Pittsburgh, an American International Group, Inc. company, and that every Temple employee and administrator is covered up to $20,000,000 per occurrence. *Id.* Moore also indicated that the policy carries a $250,000 deductible. *Id.* The article concludes that the existence of the deductible “means that the university has a financial stake in any decision about liability coverage that it makes.” *Id.*

39. The article in the April 2002 TAUP Bulletin also states that Moore indicated he intends to “put together some ‘procedures’ for determining what is covered under the university’s insurance policy” and set forth “the steps that the university will take to reach decisions and the criteria by which such decisions [regarding the defense and indemnity of faculty members] will be made.” *Id.* He expected to have the procedures written by the middle of April 2002. *Id.*

make when university bylaws require an employee be acting in the scope of employment in order to receive a defense and indemnity in a suit brought against the employee.

Caspal L. Harris, Jr. was, at varying times, the Vice President for Business and Fiscal Affairs, Treasurer and managing agent at Howard University, and member of the Board of Directors of United National Bank (UNB).\textsuperscript{41} Harris claimed he served on UNB’s Board at the request of the President of the University to represent the University’s interests\textsuperscript{42} and to further Howard’s policy of supporting banks in the minority community.\textsuperscript{43}

After initially being appointed to the UNB Board in 1971,\textsuperscript{44} Harris resigned in 1974 because of concerns regarding a conflict of interest from the relationship between UNB and Howard.\textsuperscript{45} In 1975, Harris rejoined UNB’s Board after the University President signed a letter describing Harris being offered a director’s seat and after the Howard Board of Trustees approved a recommendation from the Budget and Finance Committee of the Howard Board of Trustees "that Harris be permitted to accept the appointment with UNB."\textsuperscript{46}

In 1991, the Office of Comptroller of Currency (OCC) declared UNB insolvent, and the Federal Deposit Insurance Company (FDIC) was appointed as receiver of UNB.\textsuperscript{47} In 1993, the OCC advised Harris that it was considering fining him for regulatory violations by UNB.\textsuperscript{48} However, after considering Harris’ response, the OCC de-

\textsuperscript{41} Id. at 3-4.
\textsuperscript{42} Id. at 4.
\textsuperscript{43} Id. at 5. The court explained the University’s interest in UNB:
In 1971, James Cheek, President of Howard University during most of the period relevant to this case, was contacted by officials of the Nixon Administration, who indicated that as part of President Nixon’s policy of assisting minority-controlled banks, Howard University should seek one or more local financial institutions in which to deposit funds. On September 17, 1971, Howard’s Board of Trustees authorized the use of United National Bank (UNB), one of the District of Columbia’s two minority-controlled banks, as a depository bank for Howard University funds, and approved the location of a UNB branch on the Howard campus.
\textsuperscript{44} Id.
\textsuperscript{45} Id. In 1971, Harris and Howard University President James Cheek were elected to the UNB Board. Id. Cheek subsequently withdrew from the Board because he was already a director of another bank. Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. (emphasis in original).
\textsuperscript{48} Id.
cided not to pursue the fines. In 1994, the FDIC also threatened to bring claims against Harris that stemmed from losses UNB incurred while Harris was a Board member. Although Harris made no contemporaneous request for indemnification for legal fees he incurred in the OCC matter, he requested that Howard agree to indemnify him for the claims threatened by the FDIC.

Harris based his claim to indemnity partly on a section of the Howard University bylaws, which stated:

To the extent permitted by law:

This corporation shall provide counsel and indemnify any . . . Vice President . . . [or] other managing agents . . . acting consequent to University duties . . . made or threatened to be made a party to an action or proceeding . . . including an action by or in the right of any other corporation of any type of kind, domestic or foreign, which any of the above named persons served in any capacity at the request of this corporation, by reason of the fact that such person . . . was a director or officer, or managing employee, of this corporation, or served such other corporation in any capacity, against judgment, fines, amounts paid in settlement and reasonable expenses, if such person acted in good faith for a purpose which such person reasonably believed to be in the best interest of this corporation.

Howard declined Harris’ request based on its contentions that Harris had not served on the UNB Board at Howard’s request, and that Harris had not been an officer, employee, or managing agent of the University after 1987. Therefore, he was not entitled to indemnification for events after that date. Finally, Howard asserted that “Harris did not act as a UNB director in ‘good faith’ for a ‘purpose’ that he ‘reasonably’ believed to be in the University’s ‘best interest.’”

After the University’s denial of his request for indemnification, Harris settled with the FDIC, paying $80,000 but admitting no wrongdoing. Harris then commenced an action against Howard in

49. Id. The claims dealt with losses involving a loan participation program and an indirect automobile loan program. Id.
50. Id.
51. Id.
52. Id. at 6 (parenthetical and citation omitted).
53. Id. The quoted provisions are from Howard University’s bylaws, which contained an indemnity provision. Id.
54. Id. Harris and the FDIC also agreed to toll the statute of limitations on the FDIC’s remaining claims that involved an indirect automobile loan program. Id.
the United States District Court for the District of Columbia, seeking reimbursement for the legal costs he incurred in defending himself against both OCC and FDIC investigations, as well as compensatory and punitive damages for the University’s alleged tortious breach of good faith and fair dealing in denying his indemnification request.

A bench trial was held before District Judge Lamberth in May 1998. In issuing his decision after the bench trial, Judge Lamberth recognized that, based on its bylaws, the University’s duty to defend and indemnify Harris hinged on the issue of whether he was granted permission to serve on the UNB Board in his capacity as an individual or in his capacity as Treasurer/CFO at Howard. Without permission to serve in his official capacity, Harris could not claim that he reasonably believed he was acting in the University’s best interest. In support of his claim, at trial Harris offered the testimony of several Howard University Board members to show a recognized understanding that he was serving on the UNB Board to protect the University’s interests and not for personal or public service reasons. Harris also testified that the University President had asked him to rejoin the UNB Board in his official capacity.

In defense of its position, Howard University claimed that Howard’s Board’s use of the word “permission” indicated that “the University was allowing one of its officers to engage in an outside activity” and “[h]ad the service been ‘at the request’ of the University, the board minutes would have used those words or similar language.” The University also pointed out there was no writing memorializing any request by the University President for Harris to serve on the UNB Board in his official capacity. Howard also argued that Harris personally retained most of the director’s fees he received from UNB, and that the trial testimony did not support a conclusion that Harris was serving on the UNB Board in his official

55. Id. Harris also sought a declaration that Howard was obligated to indemnify him for any costs incurred defending claims arising from the automobile loan program. Id.
56. Id. at 4-5.
57. Id. at 1.
58. Id. at 6.
59. Id. at 8.
60. Id.
61. Id. The parties stipulated, however, that no Howard trustee ever heard the University President ask Harris to serve on the UNB Board. Id
62. Id. at 9.
63. Id.
capacity.\textsuperscript{64}

In finding for Harris on one of his three counts and concluding that he served on the UNB Board as a trustee and officer of Howard University, Judge Lamberth found that although it was a “close question,”\textsuperscript{65}

the University was unable to point to one piece of evidence that definitively proves that the service was personal. The court ultimately concludes that, based upon the evidence presented, Harris was serving at the request of the University, in his official capacity as Vice President and Treasurer.

The court reaches this conclusion first and foremost because it found the live testimony of Harris to be both credible and convincing. Harris’s contention that he did not wish to serve on the Board at all, and would not have done so but for Cheek’s insistence, was compelling. Based on Harris’s testimony, the court has no doubt that Cheek requested that Harris serve on the UNB Board in 1975, despite the absence of a writing. . . . There appears to have been enough of a general feeling that Caspa Harris was at UNB to safeguard the University interest that his service should be considered “official.”

Finally, to whatever extent the Board members were uncertain of the nature of Harris’s service at the time they approved his service on the UNB Board, that uncertainty should be resolved in favor of Harris. Having received the benefits of a University presence on the UNB Board, it would be unfair to seize upon the passage of twenty-three years and faded memories to now disclaim any knowledge that he was serving at the request of the University.\textsuperscript{66}

As to Harris’ continued service on the UNB Board after his retirement from Howard, the court found that, in retirement, he was no longer an officer nor managing agent and hence was not entitled to indemnification for claims based on actions after the date of his retirement.\textsuperscript{67}

\textsuperscript{64}. Id. at 9-11. The University claimed that the absence of a writing from the University President requesting that Harris serve on the UNB Board in his official capacity was significant because Harris testified that he “always put things in writing.” Id. at 9.

\textsuperscript{65}. Id. at 11.

\textsuperscript{66}. Id. at 11 (emphasis added).

\textsuperscript{67}. Id. at 12. The court also held that Howard University was not required to indemnify Harris for claims of gross negligence, and found him grossly negligent with respect to the indirect automobile loan program and one of four other loans under specific consideration by the court. Id. at 15, 19, 22. The Harris court also rejected the claim that Harris could assert a cause of action against Howard for tortious bad-faith refusal to indemnify him.
As the above-quoted language indicates, the court, in considering whether Harris had acted on behalf of the University, resolved the uncertainty in Harris' favor. The court also noted that the University could not point to one piece of evidence definitively proving that Harris' service on the UNB Board was personal rather than professional. Had Howard applied the same criteria that the court used in responding to Harris' demand for a defense and indemnity--resolving uncertainty in Harris' favor and requiring definitive evidence that he was acting in his personal capacity--the whole dispute could have been avoided. If this had occurred, other Howard employees, including faculty members, would have known that the University was willing to protect its employees from suits against them by providing a defense and indemnity.

Similarly, if Temple had resolved in Fyfe's favor the uncertainty regarding whether Fyfe wrote the op-ed piece in the scope of his employment and had required, as a prerequisite to denying a defense and indemnity, definitive evidence that Fyfe acted in his personal rather than professional capacity, the Temple University faculty would have known that the University likely would protect them in the unfortunate event of a suit arguably related to their job duties as faculty members. In addition, Temple would have forestalled the possibility of being sued by one of its own faculty members and involving a court in the University's decision-making process. Because of the concern that the denial of a defense and indemnity to Fyfe caused other Temple faculty members, the University's decision has potential negative ramifications beyond Fyfe. The concern among Temple faculty members regarding the University's position in the Fyfe case is evidenced by the coverage the decision received.

_Id._ at 23. The _Harris_ court reasoned that even if such a cause of action existed, which the court termed "suspect," it would require a lack of a reasonable basis to deny the indemnification claim, which Harris could not demonstrate. _Id._

In evaluating Harris' indemnification claim, the court also rejected the claim that the University had "admitted" that Harris was entitled to indemnity. _Id._ at 6. The alleged admission was claimed on the basis of a statement by the Howard University President that a University trustee and member of the executive committee had told the President that the University would have covered Harris' claim if it had not previously dropped its directors' and officers' insurance coverage. _Id._ The court rejected this argument in part because the University President was "also facing an FDIC action subject to possible University indemnification and consequently he is hardly disinterested in relaying this statement" and because the statement, if made, was not an admission of the University. _Id._
in faculty publications.\textsuperscript{68}

The \textit{Harris} court also specifically noted that Howard had carefully considered Harris’ claim and that the University had conducted an extensive investigation, including interviews with trustees.\textsuperscript{69} The extent of Howard’s investigation is contrasted with Temple University Counsel’s actions in response to Fyfe’s request for a defense and indemnity. In the approximately forty-eight hours that elapsed between Fyfe’s request for a defense and indemnity and University Counsel’s denial of the request,\textsuperscript{70} University Counsel’s actions were apparently limited to reviewing the complaint, the op-ed piece, and Fyfe’s memorandum.\textsuperscript{71} University Counsel’s actions did not include contacting the University’s liability insurance carrier.\textsuperscript{72}

Harris’ final claim against Howard was that he acted at all times within the course of his employment and was entitled to common-law indemnity from Howard University as his employer.\textsuperscript{73} The court rejected this claim because, “far from imposing an expansive

\begin{itemize}
  \item \textsuperscript{68} The April 2002 edition of the \textit{TAUP Bulletin} contained an article by the Association’s President regarding a conversation with the University Counsel, George Moore, Esq., regarding the University’s failure to defend and indemnify Fyfe. Cutler, \textit{supra} note 25, at 1. The \textit{Temple University Faculty Herald} also published an article about the Fyfe case in March 2002. Daniel T. O’Hara, \textit{Temple Professor Sued by Philadelphia FOP, University Counsel Office Denies Assistance}, \textit{TEMPLE UNIVERSITY FACULTY HERALD}, Mar. 18, 2002, at 1 (on file with author).
  \item \textsuperscript{69} \textit{Harris}, 28 F. Supp. 2d at 12.
  \item \textsuperscript{70} Fyfe sent a copy of the FOP complaint and a request for a defense and indemnity in the libel suit to University Counsel’s office on April 24, 2001, and received an E-mail response denying his request on April 26, 2001. \textit{See} Fyfe Memorandum, \textit{supra} note 33; Smith E-mail, \textit{supra} note 15 (quoted \textit{supra} note 35).
  \item \textsuperscript{71} \textit{See} Letter from George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (May 10, 2002) \textit{[hereinafter Moore letter]} (on file with author). The letter states in part:
    As University Counsel, I made the determination that the alleged defamation did not occur within the course and scope of your employment for the University. I did not consult the University’s insurance carriers before making the determination.
    Among other things, I considered the complaint, the op-ed piece you authored, and your April 24, 2001 [sic] memorandum to Susan Smith, in making the determination that the allegedly libelous statement was made in your individual capacity, and not in the course and scope of your employment to further or promote the University’s interests.
\end{itemize}

\textit{Id.}

\begin{itemize}
  \item \textsuperscript{72} \textit{Id.} Some courts have recognized that an employer’s failure to provide notice to the employer’s insurer of a covered claim against an employee estops the employer from disclaiming liability and its obligation to hold the employee harmless and to indemnify him. \textit{See} Wausau Ins. Cos. v. Feldman, 623 N.Y.S.2d 242, 244 (App. Div. 1995).
  \item \textsuperscript{73} \textit{Harris}, 28 F. Supp. 2d at 24.
\end{itemize}
duty on employers [to provide indemnity], the common law generally holds agents responsible for their own wrongs; the oft-repeated rule is that a principal is ordinarily not obliged to indemnify an agent for the agent’s own tortious conduct” 74 and to maintain a claim for common-law indemnity, Harris would have to prove that Howard ordered him to take the challenged actions. 75 Similarly, to prevail on a common-law rather than contractual claim for indemnity, Fyfe would have to demonstrate that he wrote the op-ed piece at Temple’s direction, a claim Fyfe has not asserted. A common-law claim for indemnity by Fyfe likely would meet the same fate as did Harris’ common-law claim: rejection.

In the end, based on its holding regarding the various amounts for which indemnity was requested, the *Harris* court awarded Harris $5,525.00 toward the settlement amount of $80,000, 76 and $21,465 in attorneys’ fees that were attributable to the loan participation claims or that were not segregated. 77 The court denied Harris’ request for punitive damages, finding that Howard University’s conduct was not outrageous. 78 Following the judgment, Howard submitted a bill of costs, and Harris moved for the award of attorneys’ fees and expenses. 79 The court awarded Howard $7,394.01 in costs. 80 The court, having found entirely in Howard’s favor on two of Harris’ three counts and having rejected the claim for punitive damages, held that Howard was the prevailing party at trial and was

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74. *Id.* (quoting Gaines v. Walker, 986 F.2d 1438, 1442 (D.C. Cir. 1993)).

75. *Id.*

76. *Id.* Since the settlement amount was not allocated among the various loans, the court awarded damages pro rata based on the percentage of the loan amount for which Harris was entitled to indemnification compared to the overall settlement amount (6.9% of $80,000 = $5,525.00). *Id.*

77. *Id.* At one point Harris had entered into a joint representation agreement with Howard University President James Cheek, which made each individual jointly and severally liable for attorneys’ fees. The court noted that Harris routinely paid his fees but that Cheek did not, and that Harris paid $14,735.48 of legal fees allocated to Cheek. The court denied Harris’ request for indemnification of the fees allocated to Cheek. *Id.* at 25 n.10.

78. *Id.* at 25. Following the issuance of the court’s judgment, Harris filed a motion to amend the judgment, which the court rejected based on the fact that it raised no arguments other than those previously rejected by the court. Harris v. Howard Univ., 48 F. Supp. 2d 43, 44 (D.D.C. 1999).

79. *Harris*, 48 F. Supp. 2d at 44. Harris claimed that Howard’s failure to provide a defense and indemnity was analogous to an insurer’s breach of a duty to defend and that the District of Columbia Court of Appeals recognized an exception to the American rule requiring all parties to shoulder their own attorneys’ fees in situations were insurers breach their duty to defend. *Id.* at 45-46.

80. *Id.* at 45.
entitled to costs. The court denied Harris’ motion for fees and costs.

The Harris court’s detailed examination of the actions of the Howard Board and the University President with respect to Harris’ service on the UNB demonstrates the need for clearer procedures for determining when university employees act within the scope of their employment. In the end, on the issue of whether Harris served on the UNB Board in his personal or professional capacity, the court determined the “close question” in Harris’ favor, based on two primary factors: first, the benefit received by Howard; and second, the lack of definitive evidence that Harris’ service on the UNB Board was personal, rather than professional. The court did not have the benefit of consulting a well-defined job description articulating Harris’ scope of employment. Without a system in place to determine questions of a university employee’s right to a defense and indemnity, both administration officials and faculty members are left to wonder where employment ends and personal acts begin.

Temple University Counsel, George E. Moore, Esq., has offered some insight into his thinking on the issue of the scope of employment of a university professor. In a conversation with TAUP President Bill Cutler regarding the Fyfe case, which was recounted in an article in a TAUP publication, Moore offered examples of actions he considered to be within the scope of employment of a university professor and those he considered to be outside the scope of employment. The article indicates that Moore believes a “distinction should be drawn between public statements that serve the ‘university’s interests’ and those that serve only the interests of the individual faculty member,” and that most “scholarly” research would be covered by the liability protection provision in the Temple/TAUP Collective Bargaining Agreement because such research serves the University’s interests.

The TAUP article cites two different examples: (1) a faculty member sued for plagiarism; and (2) “one sued for making state-

81. Id.
82. Id. The court rejected Harris’ claim that the District of Columbia courts had recognized an exception to the American rule regarding the awarding of attorneys’ fees based on an insurer’s breach of a duty to defend. Id.
83. Harris, 28 F. Supp. 2d at 11.
84. Cutler, supra note 25, at 1.
85. Id. at 5. The article does not indicate whether Moore provided a definition of what he meant by “scholarly” research.
ments in a peer-reviewed article or book with which someone else disagreed.\textsuperscript{86} Under Moore’s reasoning, the alleged plagiarist would not be entitled to a defense or indemnity because acts like plagiarism do not serve the university’s interests.\textsuperscript{87} However, the faculty member sued for statements in a peer-reviewed article or book would be entitled to a defense or indemnity because the publication served the university’s interests.\textsuperscript{88} The flaw in this line of reasoning is that it judges a right to a defense and indemnity on a university counsels’ assumption as to the validity of the claim against the faculty member. For example, the alleged plagiarist would potentially be denied a defense—regardless of the legitimacy of the allegation—based on a blanket assumption that any publication containing alleged plagiarized material could not have been written with the intent to serve the university’s interests. In addition, this line of reasoning allows the decision maker—in this scenario university counsel—to draw arbitrary lines based on an estimation of the value of the public statement or the method of publication. In \textit{Fyfe}, Temple University Counsel’s office determined that the op-ed piece did not serve the University’s interest and that publication of such a piece was not “scholarly.”\textsuperscript{89} The article in the TAUP publication argued that any question of scholarship would not apply if the Temple News Bureau had acted as the broker for Fyfe’s op-ed piece.\textsuperscript{90} Yet another flaw in the line of reasoning endorsed by Temple University Counsel in the TAUP article is that it adds a requirement for providing a defense or indemnity to a faculty member in a suit against them: the action giving rise to the claim must serve or promote the University’s interests. This requirement is not contained in the liability protection provision of the Temple/TAUP Collective Bargaining Agreement, which requires only that the University carry insurance covering faculty members\textsuperscript{91} for claims or suits “in connection with their responsibilities” to or at Temple.\textsuperscript{92}

\textsuperscript{86.} \textit{Id.}
\textsuperscript{87.} \textit{Id.}
\textsuperscript{88.} \textit{Id.}
\textsuperscript{89.} \textit{See} Moore Letter, \textit{supra} note 71; Smith E-mail, \textit{supra} note 15 (quoted \textit{supra} note 35).
\textsuperscript{90.} Cutler, \textit{supra} note 25, at 1.
\textsuperscript{91.} The provision covers “bargaining unit members,” which includes faculty members. \textit{See} Collective Bargaining Agreement, \textit{supra} note 18, at 2.
\textsuperscript{92.} \textit{Id.} at 41 (Article 20, N).
B. State Statutes

State statutes are a resource that faculty members at some public institutions may utilize to determine their right to a defense and indemnity in actions against them. Some states have enacted laws requiring faculty members at state institutions to be provided a defense by the state attorney general or indemnity by the state.93 For example, New York Public Officers Law section 17 requires that a defense and indemnity be provided to state employees by the State Attorney General or private counsel at the state's expense in appropriate situations.94 The law provides:

[T]he state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties; or which is brought to enforce a provision of section nineteen hundred eighty-one or nineteen hundred eighty-three of title forty-two of the United States code and the act or omission underlying the action occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties.95

New York courts examined the scope of Public Officers Law section 17 in terms of its application to medical malpractice actions against practicing physicians who were also on the faculty of state medical schools. For example, in Frontier Insurance Co. v. State,96 the Attorney General declined defending or indemnifying a physician who was sued for malpractice as a result of the surgery she performed—in part to teach residents—based on the fact that the physician had received payment for the surgery through her private practice and hence was not acting within the scope of her state employment.97 The physician's malpractice insurance carrier defended her and the

94. N.Y. Pub. Off. Law § 17 (McKinney 2001). Employees are entitled to independent representation where representation by the Attorney General would be inappropriate, or if a court determines a conflict of interest exists between the employee and the Attorney General. Id. § 17(2)(b).
95. Id. § 17(2)(a).
97. Id. at 623-24.
The malpractice carrier in turn sued the State of New York for reimbursement of the cost of defense, and a New York appeals court ruled that the physician was acting within the scope of her state employment because she performed surgery in part to teach the procedure to residents. The fact the surgery was performed on a private patient who paid the surgeon did not affect the court's ruling as to the physician's scope of employment.

In the year following the Frontier court's decision, the New York Legislature amended Public Officers Law section 17 so that it no longer provided coverage to medical personnel employed in clinical settings.

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98. *Id.* at 624. * Frontier Insurance Co. v. State* came to the appellate division on appeal from the Court of Claims of New York, the court in which claims against the state must be made. The court of claims rejected the State's argument that the physician's medical malpractice carrier had provided an *ex gratia*, or voluntary, defense. 550 N.Y.S. 2d 243 (Ct. Cl. 1989). As the court noted, the State's argument was that insurance policy only required the carrier to defend and indemnify the physician if the "insurance carrier for the State University of New York . . . declines to provide insurance and or indemnity under Public Officers Law Section 17," and that since the State and not an insurance carrier for the State had refused to provide a defense and indemnity, the malpractice carrier had no obligation to provide a defense. *Id.* at 245. The court held the State's reading of the policy to be "hyper technical" and the voluntary defense argument "specious." *Id.* The court of claims also rejected the argument that Public Officers Law section 17 prevented subrogation claims like that brought by the malpractice carrier. *Id.* at 242.

99. 576 N.Y.S.2d at 624.

100. *Id.*. See also *Munabi v. Abrams*, 606 N.Y.S. 2d 119, 120 (1994) (holding that an assistant professor at a state-run school of medicine who was engaged in both teaching and patient-care duties was entitled to a defense and indemnity pursuant to New York Public Officers Law section 17 in a medical malpractice suit by patient).

101. N.Y. PUB. OFF. LAW 17 (11) McKinney 2001. The State of Connecticut, pursuant to statute, provides indemnity, but not necessarily a defense, to "any member of the faculty or staff or any student employed by The University of Connecticut Health Center or health services." CONN. GEN. STAT. ANN. § 10-235(a)(6) (West 1996). In *Vibert v. Board of Education of Regional School District No. 10*, 793 A.2d 1076 (Conn. 2002), the Connecticut Supreme Court held that Connecticut General Statutes Annotated section 10-235(b) did not obligate a local school board to provide counsel to defend a middle school teacher against claims arising from alleged sexual abuse of a student. *Vibert*, 793 A.2d at 1078. The court noted that the language of the statute required the school board to protect and save harmless . . . any teacher . . . from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand or suit instituted against such . . . teacher . . . by reason of alleged malicious, wanton or willful act or ultra vires act . . . while acting in the discharge of his duties. *Id.* at 1080-81 (citing CONN. GEN. STAT. ANN. § 10-235 (b) (West 1996)). The court found this language to require an indemnity if the teacher's actions fell within the statute's provisions, but not to require that a defense be provided. *Id.* at 1081-82.

102. N.Y. PUB. OFF. LAW § 17(11) (McKinney 2001). The amendment to the statute provides:
In public employment situations where a state statute may govern a professor's right to a defense and indemnity, the decision whether to provide such liability protection often rests with the state attorney general. As with university administration, a state attorney general may have competing interests with a state university faculty member and disputes can arise over a state university professor's obligation to follow the legal advice of the state attorney general. For example, an attorney general may be motivated by a desire for the courts to enforce an interpretation of a state statute he or she favors. This motivation could lead to the attorney general refusing to provide a defense or indemnity to a faculty member when the defense requires advocating a competing statutory interpretation.

New York courts recognized the need to set forth guidelines by which State Attorneys General determine whether to provide a defense and indemnity to faculty members at state universities. In interpreting the state indemnity statute, Public Officers Law section 17 discussed _supra_, the New York Supreme Court for Albany

The provisions of this section shall not apply to physicians who are subject to the provisions of the plan for the management of clinical practice income as set forth in the policies of the board of trustees, title 8, New York codes rules and regulations, regarding any civil action or proceeding alleging some professional malpractice in any state or federal court arising out of the physician's involvement in clinical practice as defined in that plan.

_Id._ (footnote omitted). New York has also enacted a statute requiring that a defense and indemnity be provided to faculty members at community colleges. _N.Y. EDUC. LAW_ § 6308(3)(a) (McKinney 2001). The statute provides in part:

- The local sponsor shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, or shall pay such judgment or settlement; provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

_Id._ The term "local sponsor" in the statute refers to the city, county, or school district that, with state approval, sponsored the establishment of the community college. _Id._. § 6301(3)(a).

This is so, even though such schools are not state institutions. _See_ Brown v. N. Country Cmty. Coll., 311 N.Y.S.2d 517, 520 (N.Y. Sup. 1970) (holding that the defendant community college was not part of the State University of New York corporation).


105. _N.Y. PUB. OFF. LAW_ § 17 (McKinney 2001).

106. In New York, the Supreme Court is the trial level court.
County held, in *Spitz v. Abrams*,

that the legislature, in enacting the statute, had “not invested the Attorney General with broad discretion to determine the ultimate facts and base his determinations as to whether to provide a defense,”

but instead had imposed a three-part test on the Attorney General in making determinations as to whether to provide a defense and indemnity to state employees,

including faculty members at state universities. The *Spitz* court stated that in making defense and indemnity determinations under Public Officers Law section 17, the Attorney General must: (1) review the complaint for allegations that the state employee committed a wrongful act within the scope of his public employment,

(2) determine whether the complaint alleges a federal civil rights violation;

and (3) “investigate the ‘alleged act or omission’ to ascertain whether it in fact occur ‘while the employee was acting within the scope of his public employment or duties.’”

The *Spitz* court noted that even if the complaint fails to specifically allege that the state employee acted within the scope of his employment, if the Attorney General’s investigation reveals that the employee was, in fact, acting within the scope of his employment when committing the wrongful act, Public Officers Law section 17 requires that a defense

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107. 473 N.Y.S.2d 931 (N.Y. Sup. 1984). The action underlying *Spitz* involved a claim in federal court by an inmate at a state correctional facility against, *inter alia*, individual corrections officers pursuant to 42 U.S.C. § 1983 for depriving him of his constitutional rights by assaulting him while acting under color of state law. *Spitz*, 473 N.Y.S.2d at 933. After being served with the complaint, the corrections officers requested a defense from the New York Attorney General, which was denied based on the Attorney General’s determination that the officers were not acting in the course of their state employment at the time of the alleged assault. *Id.* After the denial of their request for a defense, the corrections officers commenced an action seeking declarations that the Attorney General was obligated to provide them with a defense and indemnity in the federal action commenced by the inmate and to reimburse the officers for the cost of seeking a declaration of defense and indemnity. *Id.* at 932.


109. *Id.*

110. *Id.* If such an allegation is present, the Attorney General must provide a defense regardless of whether the allegations ultimately are determined to be truthful. *Id.*

111. *Id.* Public Officers Law section 17 makes specific reference to §§ 1981 and 1983 of Title 42 of the United States Code. N.Y. PUB. OFF. LAW § 17(2)(a) (McKinney 2001). If the complaint alleges a violation of either of these statutes, a defense must be provided regardless of whether the state employee was actually acting within the scope of his employment at the time of the alleged violation. *Spitz*, 473 N.Y.S.2d at 934-35. Since the inmate’s complaint contained an allegation that the officers violated 42 U.S.C. § 1983, the court ruled that the officers were entitled to a defense. *Id.* at 935.

be provided. \textsuperscript{113} The court determined that the legislature likely intended to provide public employees with a defense and indemnity for actions within the scope of their employment, regardless of the language of the complaint, to "prevent a clever pleader with a grudge against a State employee from, by the use of an artful complaint, causing the employee to lose the benefit of section 17 and be required to bear his own defense costs." \textsuperscript{114} Finally, the Spitz court noted that the statute requires independent counsel be provided to the state employee in situations where the Attorney General may have a conflict of interest, such as where the Attorney General represents a party with an adverse interest to that of the state employee seeking a defense and indemnity. \textsuperscript{115}

Although Temple University is defined by state statute as an "instrumentality of the Commonwealth," \textsuperscript{116} it has been held not to be a state agency under Pennsylvania's Right to Know Act, \textsuperscript{117} and is not entitled to sovereign immunity because it is not a commonwealth agency. \textsuperscript{118} Despite the fact that Pennsylvania courts have recognized Temple as a public employer, \textsuperscript{119} and Temple faculty members as public employees, \textsuperscript{120} and a federal court has found Temple to be a state actor for § 1983 purposes, \textsuperscript{121} no Pennsylvania statute requires the State Attorney General to provide a defense or indemnity to faculty members at Temple. As a result, no state indemnity statutes

\textsuperscript{113} Id.

\textsuperscript{114} Id.

\textsuperscript{115} Id. Since the Attorney General was likely to provide a defense to the state prison superintendent, the Spitz court determined that the Attorney General had a conflict of interest and that the corrections officers were entitled to a defense under New York Public Officers Law section 17 by independent counsel at the state's expense. Id. at 935.


\textsuperscript{117} See Mooney v. Bd. of Trs. of Temple Univ. of Commonwealth Sys. of Higher Educ., 292 A.2d 395, 396 (Pa. 1972). Mooney involved an action by students and faculty members to compel the release of financial information. Id.


\textsuperscript{119} Philadelphia Ass’n of Interns & Residents v. Albert Einstein Med. Ctr., 369 A.2d 711, 713-14 (Pa. 1976) (Pennsylvania Supreme Court noting that there was "no dispute that Temple University is a public employer").

\textsuperscript{120} Temple Ass’n of Univ. Prof’ls, Am. Fed. of Teachers Local 4531 AFL-CIO v. Temple Univ. of Commonwealth Sys. of Higher Educ., 582 A.2d 63, 65-66 (Pa. Cmwmw. Ct. 1990) (finding members of the TAUP were subject to the Public Employee Relation Act and that the court was empowered to enjoin a strike by union members).

\textsuperscript{121} Krynicki v. Univ. of Pittsburgh, 742 F.2d 94, 103 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1984).
apply to the Fyfe situation; any arguments Fyfe would have for a right to a defense and indemnity from Temple in the FOP suit would not be based on a state statute.

Despite the absence of a state statute requiring that a defense be provided to Temple University faculty members, applying the reasoning of the Spitz court to the Fyfe situation is useful in discussing the need for a clear set of guidelines or procedures to determine faculty defense and indemnity requests. Although the Spitz court articulated the three-part test in discussing the Attorney General’s obligations under the state indemnity statute, some of the same requirements should apply in faculty defense and indemnity request situations at private universities or public universities not subject to state indemnity statutes. For example, if written guidelines similar to those articulated by the Spitz court existed at Temple University when Fyfe requested a defense and indemnity, then he would have been assured of: (1) a review of the FOP complaint to determine if it contained allegations that he acted in the course of employment, as opposed to a potential outcome-determinative decision as to the right to a defense and indemnity; (2) a determination of whether the complaint contained accusations of a violation of the plaintiff’s civil rights by Fyfe’s actions under the color of state law; (3) and an investigation by the University, beyond a mere reading of the complaint, of whether, despite the allegations of the complaint, Fyfe acted within the scope of his employment in writing and submitting the op-ed piece.

Since the FOP complaint did not allege that Fyfe acted within

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122. Spitz, 473 N.Y.S.2d at 934-35.
123. Pennsylvania, by statute, provides a defense by the Attorney General to “employees of the Commonwealth government” for actions involving damages to person or property. 42 PA. CONS. STAT. ANN. § 8525 (West 1998). The defense is provided if it is alleged that the act of the Commonwealth government employee was within the scope of employment, unless the Attorney General determines otherwise. Id. If the Attorney General refuses to defend a Commonwealth government employee, it is judicially determined that the action was within the employees scope of employment, and the employee is entitled to reimbursement of his or her legal costs. Id. Pennsylvania statutes also provide that a defense and indemnity should be provided to “an employee of a local agency” for actions involving damages to person or property. 42 PA. CON. STAT. ANN. § 8547 (West 1998). The defense should be provided by the local agency if it is alleged that the employee’s act was within the scope of employment or, even without such an allegation, if the local agency determines a defense should be provided. Id. The local agency employee should be indemnified if it is judicially determined that the act was within the scope of employment or if the employee reasonably believed the act was within the scope of employment 42 PA. CON. STAT. ANN. § 8548 (West 1998).
the scope of his employment or violated the FOP's civil rights while acting under the color of state law, application of the first two requirements stated by the Spitz court to the Fyfe situation would not have compelled a different outcome. However, application of the third requirement stated by the Spitz court—an investigation, beyond a mere reading of the complaint, into whether Fyfe acted within the scope of his employment—may have affected Temple University Counsel's decision to deny a defense and indemnity. The brief period of time that elapsed between Fyfe's written request for a defense and indemnity and Temple University Counsel's denial of the request, coupled with the fact that Fyfe was not contacted for any additional information prior to the denial, raises the question of whether Temple University Counsel investigated beyond the allegations in the FOP complaint. An investigation of the Fyfe situation that included interviews with the parties involved, similar to the one undertaken by Howard University in the Harris case, may have uncovered the possibility mentioned by the Spitz court that the FOP, as a clever pleader, might have purposefully drafted the complaint to deprive Fyfe of a defense and indemnity from Temple and to make Fyfe pay his own defense costs. A committee made up of Temple faculty and administration officials could have conducted such an investigation. Even if this type of investigation had not resulted in a different outcome regarding Fyfe's demand, the fact that the University followed an articulated set of procedures in responding to a faculty member's defense and indemnity request and that the process included a mechanism for faculty input may have fostered a relationship of trust between Temple faculty and University administration. The adoption and implementation of such procedures by all universities would likewise encourage better relations between faculty and administration by assuring a fair and open hearing process of faculty defense and indemnity requests, and would lessen the likelihood of suits by faculty members against universities.

Application of laws that require states to defend and indemnify public employees to academic settings can create conflicts between

124. Fyfe sent a copy of the FOP complaint and a request for a defense and indemnity in the libel suit to University Counsel's office on April 24, 2001, and received an e-mail response denying his request on April 26, 2001. See Fyfe Memorandum, supra note 33; Smith E-mail, supra note 15 (quoted supra note 35).
125. Temple University Counsel George Moore did not respond to this author's request to comment on the decision to deny a defense and indemnity to Fyfe in the FOP action.
state attorneys general and public university faculty members over (1) the scope of the duty to defend and indemnify and (2) who may exercise control over the defense. An example of a dispute between a state attorney general’s office and a professor at a state university over the professor’s right, pursuant to a state statute, to indemnity in a lawsuit, is found in *Chasin v. Montclair State University.* \(^{127}\) In *Chasin*, a college professor brought an action against Montclair State University (her employer), the State of New Jersey, and the State Attorney General for reimbursement of legal fees she incurred in defending herself against a student’s lawsuit to compel her to issue a grade. \(^{128}\)

Professor Barbara Chasin was teaching a sociology course at Montclair University in the fall of 1990 when one of her students, James Lloyd, who was in the Marine Corps reserves, was called to active duty as part of Operation Desert Storm. \(^{129}\) Prior to being called up, Lloyd had an “A” average in the course. \(^{130}\) Before leaving for military service Lloyd “signed an ‘Incomplete Contract’ in which he agreed to take a make-up final examination or write a paper to complete the course” upon his return from military service. \(^{131}\) While Lloyd was still on active duty, the New Jersey Legislature passed the “Desert Storm Law,” which provided that a student who was unable to complete an academic course due to service in the armed forces in Operation Desert Storm “shall be entitled to receive a grade in each course for which the student has completed a minimum of 8 weeks’ attendance and all other academic requirements during that period.” \(^{132}\) The grade was to be based on work the student completed prior to leaving for military service. \(^{133}\) Upon com-

\(^{127}\) 732 A.2d 457 (N.J. 1999).
\(^{128}\) *Id.* at 458.
\(^{129}\) *Id.* The course being taught was "the Sociology of Rich and Poor Nations." *Id.*
\(^{130}\) *Id.*
\(^{131}\) *Id.*
\(^{132}\) *Id.*
\(^{133}\) *Id.* at 458-59. The Desert Storm Law provided:
1. A student who is a member of the New Jersey National Guard or of the Reserve component of the Armed Forces of the United States, and who is unable to complete a course or courses at a New Jersey institution of higher education because the student is called to active duty in consequence of the current United Nations action in the Persian Gulf known as operation ‘Desert Shield’ or ‘Desert Storm,’ shall be entitled to receive a grade in each course for which the student has completed a minimum of 8 weeks’ attendance and all other academic requirements during that period. The grade shall be based on the work completed up to the time when the student was called to active service.
pleting his military service, Lloyd requested that Chasin award him a grade pursuant to the Desert Storm Law, but Chasin refused and gave Lloyd a grade of "incomplete" for the course.\footnote{Id. at 459.} Chasin continued to refuse to change the grade despite being advised by the University Provost that the Desert Storm Law required issuance of a grade.\footnote{Id. at 459.} Chasin's position was that while Lloyd had been tested on material through the midterm in the course, he had not shown knowledge of the material covered after the midterm and before he left for active service.\footnote{Id.} Lloyd's first recourse was to seek a grade change from the University Grade Grievance Committee, which declined to change the grade—a ruling that, despite his earlier contrary position on the issue, the University Provost upheld.\footnote{Id. at 459.} Lloyd next filed an action against Professor Chasin, the University, and the Provost, seeking an order that would compel compliance with the Desert Storm Law, in the form of a grade.\footnote{Id. at 459.} After being served with Lloyd's complaint, Chasin made a formal request to the New Jersey Attorney General's office for a defense and indemnity.\footnote{Id. at 466.} The Attorney General declined Chasin's request on the grounds that the New Jersey Tort Claims Act conferred discretion to refuse a defense and indemnity.\footnote{Id. at 466.} Lloyd's suit was eventually settled; after receiving a grade

\textit{Id.} (citing 1991 N.J. Laws 167 ("Desert Storm Law")).

\footnote{Id. at 459.} \footnote{Id.} The court noted:

On October 14, 1991, the University Provost sent Chasin a memorandum urging that she reconsider her decision to deny Lloyd a grade:

I believe that you have asked that Mr. Lloyd fulfill the terms of the incomplete contract entered into in December 1990 or, alternatively, you will give him an F. I urge you to read carefully the attached copy of the law. . . . Our efforts to change the legislation were unsuccessful and the bill was signed into law on June 19, 1991. I appreciate your concerns and understand the position you have taken. But, as employees of the State of New Jersey we have an obligation to obey the laws enacted by the legislature. I hope that you will agree.

\textit{Id.} at 466.

\footnote{Id. at 459.} The Committee "expressed its reluctance to substitute its judgment for Chasin's and the University Provost upheld that ruling," despite the fact that a Deputy Attorney General appeared at the Committee meeting to state the Attorney General's position that the Desert Storm Law required issuance of a grade. \textit{Id.}

\footnote{Id. at 460.} Lloyd also sought exemplary damages against Chasin and the University Provost for intentional failure to abide by New Jersey law. \textit{Id.}

\footnote{Id.} The court noted that the "Attorney General's decision was based upon the actions of Professor Chasin with regard to this matter and the Attorney General's discretion
with a notation on his transcript that the grade was "administratively awarded," he dropped his claims against Chasin, the University, and the Provost.\footnote{141}{Chasin, 732 A.2d at 460.}

After the settlement, Chasin demanded reimbursement of her defense costs from the Attorney General.\footnote{142}{Id.} When there was no response, Chasin filed suit, naming as defendants the State of New Jersey, the Attorney General, and Montclair State University, for expenses involved in defending Lloyd's action.\footnote{143}{Id.} The trial court granted Chasin summary judgment, finding that she acted in good faith in refusing to give Lloyd the grade.\footnote{144}{Id.} On appeal, the appellate division reversed and ordered a remand for a hearing regarding the circumstances under which the Attorney General gave advice to Chasin.\footnote{145}{Id.} When the case came before the New Jersey Supreme Court, the court described the appellate division's opinion as suggesting "that if Chasin willfully disregarded the Attorney General's advice, her actions would fall outside the scope of her employment and the State would not be required to indemnify her."\footnote{146}{Id.}

\footnote{141}{Chasin, 732 A.2d at 461 (quoting N.J. STAT. ANN. § 59:10A-1 (1992)).}

The statute cited by the Attorney General states:

The Attorney General may refuse to provide for the defense of an action referred to in section 1 [N.J.S.A. § 59:10A-1] if he determines that:

a. the act or omission was not within the scope of employment; or
b. the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or
c. the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.

\footnote{142}{Id.}

\footnote{143}{Id. Chasin incurred $12,216 in legal fees in defending Lloyd's action. Id.}

\footnote{144}{Id. The trial court awarded Chasin the full amount of her attorneys' fees. When the State moved for reconsideration and Chasin moved for an additional award for the cost of the action seeking indemnification, the trial court awarded Chasin an additional $10,000. Id.}

\footnote{145}{Id.}

\footnote{146}{Id. at 460. The Appellate Division found that the Attorney General's advice to Chasin—that the Desert Storm Law required her to issue Lloyd a grade—was binding on Chasin as a state employee and that the indemnity provision of the New Jersey Tort Claims Act applied to actions seeking equitable relief. Id. The Appellate Division remanded because it did not believe there was sufficient evidence on whether Chasin disregarded the At-
The hearing ordered by the appellate division never occurred because the New Jersey Supreme Court allowed an immediate appeal by granting the petitions for certification filed by both Chasin and the Attorney General.\textsuperscript{147} The New Jersey Supreme Court held that the Tort Claims Act creates a duty for the Attorney General to defend state employees only in civil actions where such employees are seeking damages for tortious conduct.\textsuperscript{148} The court further determined that since Lloyd's action sought primarily injunctive relief, the suit was not covered by the Tort Claims Act provisions that mandate that the state provide a defense.\textsuperscript{149} The court further held that even if the Tort Claims Act had applied to Lloyd's asserted claims, Chasin would still not have been entitled to a defense or indemnity because, in willfully disregarding the Attorney General's position that the Desert Storm Law required her to issue Lloyd a grade, she had forfeited her right to a defense and indemnity.\textsuperscript{150} In supporting its conclusion regarding Chasin's position—that no grade could be awarded without some demonstration by Lloyd of mastery of the course materials covered after the midterm and before his departure—\textsuperscript{151} the court noted:

Chasin apparently considered "excusing" Lloyd from assignments undisputedly covered by the Law discretionary, part of a "reasonable and flexible"\textsuperscript{152} proposal. She relied on concerns for

\textsuperscript{147} Id. at 460-61. See Chasin v. Montclair State Univ., 707 A.2d 152 (N.J. 1998).

\textsuperscript{148} Chasin, 732 A.2d at 462.

\textsuperscript{149} Id. at 464. The court found that the fact Lloyd originally sought exemplary relief did not change the nature of his claim for operation of the Tort Claims Act. Id.

\textsuperscript{150} Id. at 465. In making this determination, the court quoted the language of the comment to a related section of the Tort Claims Act, which states that "[i]n order to ensure that the State's interest will be adequately protected it is provided that a State employee shall not be entitled to indemnification unless he cooperates fully with any defense provided by the Attorney General." Id. (quoting N.J. STAT. ANN. § 59:10A-3 (1992)).

\textsuperscript{151} Chasin had proposed that Lloyd demonstrate his knowledge of the material on which he had not been tested prior to his departure by writing a paper or taking a make-up final exam. Id. at 446. The court rejected this alternative as requiring Lloyd to perform work not required of any other student. Id.

\textsuperscript{152} The court explained Chasin's position:

In her Statement to the Grade Grievance Committee, Chasin contended that "it would be a violation of accepted academic principles to assign a grade to Mr. Lloyd..." and that "[a]cademic freedom, in this case, means that a faculty member has the right, according to long accepted procedures, of deciding how students shall be evaluated in a course." Although Chasin again stated that Lloyd had produced no evidence of having mastered the information covered between the midterm and his departure, she did not re-assert that requiring such evidence was con-
academic freedom and political objections to the Law to support her refusal to award a grade. Although she is entitled to those views, it was evident that Chasin's position was contrary to the express language of the Desert Storm Law.\textsuperscript{153}

After finding that Chasin was not entitled to a defense or indemnity under the Tort Claims Act, the \textit{Chasin} court also rejected the professor's claim that she was entitled to indemnification under another New Jersey educational statute requiring the state to defray the costs of defending professors at state institutions of higher education in actions arising out of the performance of their job duties.\textsuperscript{154} In rejecting Chasin's second line of argument, the court found that the enactment of the Tort Claims Act impliedly repealed the statute.\textsuperscript{155}

The \textit{Chasin} court failed to address the difficult position in which its decision places professors at state institutions who are sued for a work-related activity but who do not agree with legal advice they receive from the attorney general's office. The \textit{Chasin} court found that by not agreeing to advocate the Attorney General's position, which was contrary to her defense and in fact was consistent with Lloyd's position, Chasin forfeited her right to a defense and indemnification.\textsuperscript{156} If Chasin had agreed with the Attorney General's position, she would have given Lloyd the requested grade and would not have needed a defense or indemnity; but she would have been forced to choose between paying her own defense costs or issuing a grade she believed was not warranted by the facts or the law.

In addition to suggesting that a state university professor's scope of employment can be determined by whether the employee

\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 467. The \textit{Chasin} court noted the educational statute provided in part: Whenever any civil action has been or shall be brought against any professor . . . employed in a teaching capacity . . . by any other institution of higher education . . . for any act or omission arising out of and in the course of the performance of the duties of such office, position or employment, the state shall defray all costs of defending such action, including reasonable counsel fees and expenses . . . .

\textit{Id.} (quoting N.J. STAT. ANN. § 18A A:60-4 (1992)).

\textsuperscript{155} \textit{Id.} at 467. The court also noted that the statute in question, New Jersey Statutes Annotated (N.J.S.A.) section 18A:60-44, was expressly repealed in 1994 after Chasin had incurred costs of defending herself in Lloyd's action. \textit{Chasin}, 732 A.2d at 467.

\textsuperscript{156} \textit{Chasin}, 732 A.2d at 467.
agrees to follow the advice of the state attorney general, *Chasin* is also significant for the two dissenting opinions that recognized other issues raised by the case, including the proper scope of state indemnity statutes. The first dissent, authored by Justice O’Hern, begins with a characterization of the motivations he believed lay beneath the majority’s opinion:

> I find it unusual that the Court should strain so hard to deny legal representation to a professor at one of our State universities in connection with a student’s claim against her. I have a sense that there is implicit in the Court’s decision a determination that it was an unpatriotic act not to award the requested grade to a veteran of the 1991 Persian Gulf War.157

Justice O’Hern would have affirmed the appellate division’s judgment and ordered a hearing so that Professor Chasin could have explained her position.158 Justice O’Hern’s dissenting opinion lays out the following facts: (1) the Attorney General’s office first informed Chasin that she would be entitled to reimbursement of her defense costs under the Tort Claims Act on the condition she had not committed willful misconduct; (2) then, after she incurred the costs of defense, informed her that she had no rights under the Tort Claims Act; and (3) informed her that the New Jersey educational statute that may have given her a right to indemnification was impliedly repealed.159 Justice O’Hern agreed with the majority that a state employee may not willfully disregard the advice of the Attorney General, but he also recognized that the employee need not follow wrong advice blindly at the expense of giving up her indemnity rights.160

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157. *Id.* at 470 (O’Hern, dissenting).
158. *Id.*
159. *Id.* The claim that the Attorney General reneged on a promise to indemnify Chasin for her legal fees is based on a letter from the Attorney General to Chasin denying her request for representation. This claim pointed to a potential conflict of interest between the Attorney General representing both Chasin and the State and concluded by saying that the issue of Chasin’s indemnification would be governed by N.J.S.A. 59:10-2. *Chasin*, 732 A.2d at 470. The statute cited provides that an employee who can demonstrate that the claimed tortious act or omission occurred in the scope of employment is entitled to indemnification if the State cannot show that the employee acted with willful misconduct or fraud. *Id.* at 470-71 (citing N.J. *STAT. ANN.* § 59:10A-2 (1992)). Since the record did not show fraud or willful misconduct by Chasin, Justice O’Hern believed that the refusal to indemnify her was a broken promise. *Id.*
160. *Id.* at 471. Justice O’Hern opined:

> At the very least, there should be, as required by the Appellate Division, a hearing to determine whether or not Professor Chasin’s understanding of the law was cor-
With respect to the majority’s claim that the Tort Claims Act did not require indemnification in equitable actions seeking only exemplary damages, Justice O’Hern found this position inconsistent with the fact that the state indemnifies its employees both for alleged civil rights violations and for punitive damages. Justice O’Hern also disputed the majority’s contention that the educational statute providing a right to indemnity to professors at state universities was impliedly repealed by the Tort Claims Act.

Justice O’Hern’s dissenting opinion raises unanswered questions regarding the options left to a state university professor who disagrees with the legal advice dictated to her by the attorney general. Is she compelled to make the Hobson’s choice of forgoing the protection of defense and indemnity to assert the legal position she feels is correct at the risk of exposure to personal liability, or accepting a position she finds repugnant simply because it will be less costly, both literally and figuratively? The same problems inherent in university counsel at a private university making the final decisions about providing a defense and indemnity to faculty members also exist when the decision is left to the State attorney general.

The second dissenting Justice in Chasin, Justice Stein, stated the reason for his position:

I write separately because of my conclusion that the Attorney General’s office disregarded the applicable statutes and abused its discretion when it declined to represent or indemnify the professor who was sued by a student to compel her to issue him a grade and to recover punitive damages for her failure to do so. That the Attorney General’s office would adopt so petty and crabbed an approach to the question of defense or reimbursement of a

rect or whether she should be penalized for having pursued her understanding to a legal determination different than that of the Attorney General.

Id.

Id. at 472.

162. Id. at 473. In criticizing the majority’s holding on the implied repeal of the statute, N.J.S.A. 18A:60-4, Justice O’Hern noted that in her original complaint seeking indemnification, Chasin had specifically cited the statute, and that the Attorney General had failed to argue an implied repeal of the statute in his Answer, in papers filed with the trial court, or in the Appellate Division Case Information Statement. Chasin, 732 A.2d at 473 (O’Hern, J., dissenting). The dissenting opinion also cites precedent for the proposition that there is a “strong presumption against an implied repeal” of a statute. Id. (citing Kemp by Wright v. State, County of Burlington, 687 A.2d 715 (N.J. 1997); State v. Milligan, 514 A.2d 1316 (N.J. 1986); City of Camden v. Byrne, 411 A.2d 462 (N.J. 1980); State v. Gledhill, 342 A.2d 161 (N.J. 1975); Swede v. City of Clifton, 125 A.2d 865 (N.J. 1956); State v. Drake, 191 A.2d 802 (N.J. Super. App. Div. 1963)).
University professor asserting so defensible a position and motivated by a respect for academic freedom is disappointing indeed. Like Justice O’Hern, Justice Stein found unconvincing the majority’s position that Lloyd’s claim was fundamentally one for equitable relief, in light of the allegations in Lloyd’s complaint that sought damages for the tortious actions of Chasin and the University Provost, and he also found no proof of willful misconduct by Chasin in the record. Justice Stein concurred with Justice O’Hern’s position that the majority’s claim of an implied repeal of the other statute requiring that a defense and indemnity be provided to college professors was groundless.

Chasin demonstrates that an attorney general can be motivated by interests contradictory to those of university professors. Similar to cases involving employment contracts and collective bargaining agreements, disputes can arise between an attorney general and a faculty member over the scope of employment, the right to a defense and indemnity, and the right to control the defense. As with disputes between faculty members at private universities or public universities not subject to state indemnity statutes, these disputes are best resolved by adoption of, and adherence to, a defined set of pro-

163. Chasin, 732 A.2d at 476 (Stein, J., dissenting). Justice Stein found that the Attorney General’s office had disregarded the statute and abused its discretion in declining Chasin’s request for indemnification. Id.

164. Id. at 479-80. Justice Stein argued that the language of the Desert Storm Law was imprecise and arguably supported Chasin’s position that the statute mandated that the student demonstrate a knowledge of the course materials up to the point of departure. Id. at 480. As to the issue of willful misconduct, Justice Stein also found that the Attorney General’s letter to Chasin had created a reasonable belief in Chasin that the final determination of whether she was entitled to indemnification hinged on the issue of whether she was guilty of willful misconduct, and that since the record failed to show such misconduct, the Attorney General’s office should be estopped from denying Chasin indemnification. Id.

165. Id. at 481. The conclusion of Justice Stein’s dissenting opinion included the following observation:

The simple truth about this case is that someone in the Attorney General’s office exercised questionable judgment in denying representation and indemnification to Professor Chasin. Assuming incorrectly that Professor Chasin “did not comply with the legal advice of the Attorney General,” a decision apparently was made to test the principle that public employees who defy the Attorney General’s legal advice forfeit their right to representation or indemnification. Neither Justice O’Hern nor I quarrel with that principle, but it simply has no relevance to this appeal. Any advice by the Attorney General’s office to Professor Chasin’s counsel was delivered too late and too informally to constitute a justification for the decision to require her to bear the expense of Lloyd’s suit.

Id. at 481-82 (emphasis in original).
cedures to be used in responding to faculty defense and indemnity requests. The procedures should ensure the same protection to faculty members at public universities in states with statutes that require the state attorney general to provide a defense and indemnity as that enjoyed by faculty members at private universities or public universities in states without faculty indemnity laws. These procedures should include a requirement that the state attorney general defend any suit where the complaint alleges that the faculty member, when committing the alleged wrongful act or omission, was acting within the scope of employment or under the color of state law. The procedures also should require, regardless of the wording of the complaint, an investigation beyond the four corners of the complaint to determine whether the act was within the scope of the employment. Finally, the procedures should ensure faculty input into any determination of the scope of employment of a faculty member. Such procedures would provide important safeguards against state attorneys general wrongfully depriving faculty members at state universities of a defense and indemnity in suits arguably related to their job responsibilities as faculty members and would reduce the likelihood of suits by professors against public universities and state attorneys general.

C. Scope of Employment

Whether based on the language of a teaching contract, collective bargaining agreement, university bylaw, or state statute, the ultimate obligation of a college to defend or indemnify a faculty member will hinge on whether the act or omission complained of occurred within the professor’s scope of employment. In Fyfe’s situation, Temple’s University Counsel’s decision to deny his request for a defense and indemnity was based on the determination that the op-ed piece was not written within his scope of employment, but instead was written in his “private capacity.”

The Restatement (Second) of Agency describes the concept of “scope of employment” as follows:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;

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166. Smith E-mail, supra note 15 (quoted supra note 35).
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.167

Unfortunately, the factors set forth in the Restatement (Second) of Agency do little to clarify the exact scope of employment of a university professor. For example, the first factor—whether the conduct is the kind the employee is employed to perform—leads immediately back to the imprecisely defined job duties of a college professor. Similarly, the second prong—whether the conduct occurs within the authorized time and space limits—seems inapplicable to a profession in which class preparation, grading, research, and writing often are done in an infinite variety of places and at different times. The third factor—whether the conduct is performed, at least in part, by a desire to serve the employer168—makes the determination of the scope of employment depend at least partially on the subjective belief of the employee. This factor, applied to the Fyfe situation, would compel the conclusion that Fyfe acted in the course of his employment in writing the op-ed piece, since he has asserted he was "expressing views that are the reasonable results of . . . [his] scholarship and which deal with issues of critical concern to the community that is at the heart of Temple's 'urban mission.'"169 The final factor—whether force, if used, was expected by the master—does not apply to most situations involving college professors because it presupposes the use of force.170

167. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).
168. Courts have recognized that "[t]he fact that the employee's predominant motive is to benefit himself or a third party does not prevent the act from being considered within the course and scope of employment." Harrington v. La. State Bd. of Elementary and Secondary Educ., 714 So.2d 845, 851 (La. Ct. App. 1998).
169. Fyfe E-mail, supra note 36.
170. The majority of courts that have considered the question of whether colleges and schools can be held vicariously liable for their employees' sex crimes against their students have found no liability without a finding of negligence by the college or school. Richard Fossey, Can a College Be Held Vicariously Liable When an Instructor Sexually Assaults a Student?, 142 EDUC. L. REP. 1, 5-6 (2000). But see Harrington v. La. State Bd. of Elementary and Secondary Educ., 714 So.2d 845, 851 (La. Ct. App. 1998) (community college and state held vicariously liable for rape of a student by an instructor, where such actions were held to have occurred within the instructor's course of employment).
The concept of whether an employee has acted within the scope of his or her employment often arises in terms of determining an employer's liability for the acts of its employee under the concept of respondeat superior.\textsuperscript{171} The question of a university's obligation to defend and indemnify its faculty members does not necessarily involve application of respondeat superior because, as with the Fyfe case, not every plaintiff suing a professor seeks to hold the university employer vicariously liable. Therefore, the same factors courts use in deciding scope of employment issues in employer liability cases may be helpful to the discussion of the scope of employment of a college faculty member in connection with indemnity issues.

Some courts look to the general job duties of employees in determining whether an action was within the scope of employment.\textsuperscript{172} Given the difficult task of defining the job duties of a college professor, this approach to determining the scope of employment often leads to frustration. Other courts, in determining whether an act occurred within the scope of employment, focus solely on the employee's motivation for acting and whether the employee's actions were "at least partly motivated to serve the employer's business interest . . . ."\textsuperscript{173} This approach heavily credits an employee's intentions and motivations and, applied to writings by college professors, even op-ed pieces, as opposed to more traditionally recognized pieces of scholarship, will allow a conclusion that the writing was done in part by a motivation to serve the university. Under such an analysis, if Fyfe's claim of serving Temple's "urban mission"\textsuperscript{174} is

\textsuperscript{171} The term "respondeat superior" is Latin for "let the superior make answer" and is defined as the "doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1313 (7th ed. West 1999).

\textsuperscript{172} For example, in Brueckner v. Norwich University, 730 A.2d 1086 (Vt. 1999), the Vermont Supreme Court found that a reasonable jury could have found that the intentional violent hazing of the plaintiff, a college freshman (by upperclassmen selected by the defendant military college to orient freshman), was "in furtherance of their general duties to indoctrinate" new students and hence within the scope of their employment. Id. at 1091. The University was held vicariously liable under the theory of respondeat superior for negligent infliction of emotional distress upon the plaintiff, and for assault and battery claims. Id. at 1090. The hazing of the plaintiff included being punched in his injured shoulder, which was in a sling, having his academic work destroyed, and having his room vandalized. Id. at 1089-90. The court did reverse the award of punitive damages against the University, finding no proof of malice. Id. at 1097.


\textsuperscript{174} Smith E-mail, supra note 15 (quoted supra note 35).
credited, he would be found to have acted within the scope of employment in writing the piece.

Still other courts, like those in California, use a two-prong test: they determine (1) whether the employee’s act was performed on behalf of an employer or was incidental to the work duties; and (2) whether the action by the employee was foreseeable in light of the employee’s duties. Satisfaction of either prong sufficiently supports a finding of vicarious liability. Professors finding themselves in Fyfe’s shoes would undoubtedly argue that writing an op-ed piece about an issue related to their field of expertise and subjects they teach is at least incidental to their work duties. They would also argue that professors writing op-ed articles and offering opinions to local newspaper about subjects in which they have expertise or about which they teach is foreseeable. As to the foreseeability issue, Fyfe, in his correspondence, has asserted:

During my years at Temple, the University has regularly put reporters in touch with me, and has regularly taken credit for things I have written and for commentary that I have given to electronic and print media. Indeed, the University Office of News and Media Relations even posted the allegedly defamatory article on its website.

If Fyfe’s claims regarding the University Office of News and Media Relations encouraging and facilitating his previous commentary in local newspapers are accurate, then he would satisfy the foreseeability prong of the scope of employment test used by the California courts.

Appellate courts have addressed the issue of whether a university faculty member acts within the scope of his employment when speaking to a school newspaper. In Foote v. Sarafyan, a Louisiana appeals court found that a university professor was acting within the scope of his employment when he made allegedly defama-

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176. Id. at 607.
177. Memorandum from James J. Fyfe, Professor, Criminal Justice Department, to Stephen Zelnick, President, Faculty Senate (Aug. 28, 2001) (on file with author). Temple University Counsel’s position with respect to the posting of Fyfe’s op-ed article on the University website is discussed infra note 283.
178. See Young, supra note 175.
tory statements about the department chairman and two other faculty members to the university newspaper.\textsuperscript{181} Diran Sarafyan, a mathematics professor at a state university in Louisiana,\textsuperscript{182} first reported claims of alleged academic improprieties by other faculty members to the university administration.\textsuperscript{183} But because he was unsatisfied with the administration’s disciplinary actions, Sarafyan then told his version of events to the university newspaper.\textsuperscript{184} The other faculty members commenced a defamation action against Sarafyan, who in turn asserted a defamation counterclaim against the faculty members.\textsuperscript{185} Sarafyan also brought a third-party claim against the university’s liability insurer for indemnification and the cost of defending the defamation claims.\textsuperscript{186}

The trial court issued a $20,000 judgment for the other faculty members and dismissed Sarafyan’s defamation as well as his defense and indemnity claims.\textsuperscript{187} On appeal, the court reversed the judg-

\textsuperscript{181} Id. at 878.

\textsuperscript{182} The court’s opinion fails to specify which university employed Professor Sarafyan. Id.

\textsuperscript{183} Id. Regarding the department chairman and a then-assistant professor, the alleged improprieties included the claim that the assistant professor continued to receive salary for classes that were assigned to him for the summer term but were taught by another professor while the assistant professor attended a month-long conference in New York. Sarafyan described to the school newspaper the professor’s and chairman’s actions as “payroll fraud.” Id. When advised of the situation, the university administration removed the professor from the payroll and required him to repay $127.93 in salary that he had already received. Id. Sarafyan also informed the university newspaper that another associate professor had obtained employment with the university through “deceit” and “false pretenses” by stating in a “biographical data sheet” (provided by the university during the employment application process) that three books he authored were under publication and scheduled to be out within the next year, despite the fact that the manuscripts had not yet been delivered to the publisher at the time the associate professor completed the form. Id. at 879-80.

\textsuperscript{184} Id. Sarafyan also reported the alleged improprieties to Louisiana Attorney General’s office and the State Commission on Governmental Ethics. Id. The faculty members accused of improprieties in turn accused Sarafyan of harassment, disruptiveness, and other academic improprieties and sought to have him removed from the faculty. Id. The other faculty members’ efforts to have Sarafyan removed or disciplined were unsuccessful. Id.

\textsuperscript{185} Id. at 878.

\textsuperscript{186} Id. The university’s liability insurer was Niagara Fire Insurance Company. Id. at 882.

\textsuperscript{187} Id. Sarafyan also made statements to faculty members that one of the plaintiffs “had practiced some form of medicine or witchcraft in India, causing 23 deaths.” Id. at 882. The appellate court noted that the trial commissioner rejected Sarafyan’s claims that the plaintiff had told him that story, but the commissioner still found the statements to be de minimis, stating in his report, “The statements in any event were not widely disseminated and the very bizarre behavior attributed to [that plaintiff by defendant] would not ordinarily
ments against Sarafyan, finding that his statements, while “harsh opinion,” were not defamatory.\textsuperscript{188} The court also reversed the dismissal of Sarafyan’s claim for defense and indemnity and awarded him the costs of defense and specifically rejected the insurer’s claim that Sarafyan was not acting within the scope of his employment in making statements to the university newspaper about the other faculty members:

The insurer argues that defendant [Sarafyan], employed as a mathematics professor, was in no case insured because his actions complained of by plaintiffs were not in the course and scope of that employment. We reject that argument because to accept it would tell public employees that they have \textit{no} duty to tell their supervisors (and, if necessary, the public) when they see fellow employees violating the terms of their public employment.\textsuperscript{189}

The \textit{Sarafyan} court not only found that a college professor at a public institution acted within the scope of his employment by bringing claims of academic impropriety to light, but that he had an affirmative duty to do so since the alleged impropriety was performed by other public employees.\textsuperscript{190}

The proposition advanced by the \textit{Sarafyan} court, that faculty members at public institutions have an affirmative duty to bring to light facts regarding alleged impropriety by other public employees, lends support to the argument for faculty members that there exists within the job responsibilities of professors a right, if not a duty, to make public comment on matters of public interest. This right or duty arguably is found in the typical tenure or promotion requirements that faculty members provide service to the university and the community which the university serves. Such a right or duty as part of service to the community would encompass situations in which a professor makes comments based on valuable information about local public employees that he or she has gained as a result of employment by a university that is supported, in part, by public fund-

\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at 879-81.
\item \textsuperscript{189} \textit{Id.} at 882 (emphasis in original). The appellate court also found that an “Additional Insured” endorsement to the university’s liability insurance policy made employees of the university, such as Sarafyan, insureds against libel and slander claims. \textit{Id.} at 881. The court did not address whether the same endorsement also made the other faculty member plaintiffs insureds under the policy and hence entitled to the cost of defense of Sarafyan’s defamation claims from the university’s liability insurer. \textit{Id.}
\item \textsuperscript{190} \textit{Id.} at 882.
\end{itemize}
ing. 191 Fyfe made a public comment on a matter of public interest: the disciplinary procedures of the Philadelphia Police Department and the actions of the FOP. 192 He claims his knowledge of the subject was acquired in his research and writing as a Criminal Justice Professor at Temple. 193 Is informing an individual like Fyfe that his actions in disseminating this information are not part of his job akin to telling a public employee like Sarafyan that he has no duty to report other employees violating their public employment? Given that Temple and other universities require that faculty, to receive promotion or tenure, provide service to the community, the answer to this question is “yes.” Just as Sarafyan had the right, as part of his job as a public employee, to expose alleged fraud by other public employees, so too did Fyfe have a right, as part of his job as a Criminal Justice Professor at a university categorized as an “instrumentality of the Commonwealth,” 194 to submit an op-ed piece in an attempt to correct what he believed was public misperception about police disciplinary procedures.

In determining questions of insurance coverage, courts have addressed the question of whether faculty members acted within the scope of their employment when discussing university proceedings with local newspapers. For example, in Aetna Casualty and Surety Co. v. Ericksen, 195 a federal court in Pennsylvania found that allegedly libelous statements, made by a university professor about another member of the faculty in a memorandum to a university dean, arose out of her employment. However, statements made to a newspaper reporter regarding the disciplinary proceedings arising from the same events were not related to her professional duties. 196

Mary K. Ericksen and Salim Qureshi were both faculty members at Bloomsburg University. 197 At a departmental meeting in 1992, Ericksen “circulated results of an unauthorized student survey critical of Qureshi, and she was forced to apologize to Qureshi dur-

193. Fyfe Memorandum, supra note 33.
196. Id. at 840-41.
197. Id. at 838.
ing the meeting.”

The next day, Ericksen submitted in a memorandum to the Dean of the College of Business a claim of sexual harassment against Qureshi. After a hearing, the University Provost found that Qureshi had sexually harassed Ericksen. Unhappy with the punishment given to Qureshi, Ericksen spoke to a newspaper reporter whose newspaper then published a story about the harassment and the results of the University hearing. Qureshi then filed a libel suit against Ericksen for falsely accusing him of sexual harassment.

Erickson sought a defense and indemnity in the action by Qureshi from her homeowner’s insurer, Aetna Casualty and Surety Company (Aetna). Aetna, in turn, filed a declaratory judgment action in federal court seeking a determination that it was not obligated to defend or indemnify Erickson against the libel claims. Aetna, in a motion for summary judgment, claimed that the business pursuit exclusion in its policy, which excluded coverage for claims arising out of the business of the insured, operated to preclude a defense and indemnity obligation to Erickson because both her statements in the memorandum to the Dean, and those to the newspaper reporter, arose out of her employment at the University. The court agreed that the statements in the memorandum to the Dean and any result-

198. Id.
199. Id.
200. Id.
201. Id. After the finding of sexual harassment, the University required Qureshi to report to the Dean and watch videotapes on sexual harassment, and placed a letter about the incident in Qureshi’s personnel file. Id.
202. Id. Qureshi filed suit in the Court of Common Pleas of Columbia County, Pennsylvania, and named Mary K. Ericksen and her husband, Duane Ericksen, as defendants. Id. The complaint also alleged assault against Mary K. Ericksen for physically menacing and verbally threatening Qureshi. Id.
203. Id. at 837. Mary K. and Duane Ericksen filed counterclaims against Aetna for bad faith, breach of contract, unfair trade practices, and violations of the Consumer Protection Law. Id.
204. Id. at 838-39. The exclusion in question read as follows:

Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:

b. Arising out of or in connection with a business engaged in by any Insured. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstances involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the business . . . .

Id. at 839.
ing injuries to Qureshi arose out of Ericksen’s employment. The court found that Ericksen’s institution of sexual harassment charges against Qureshi was a part of the way she performed her job. The court disagreed, however, with the claim that Ericksen’s statements to the newspaper reporter arose out of her employment, noting that the University’s internal hearing process was intended to remain confidential and that Ericksen violated this confidentiality by discussing the hearing process and results with the reporter. The court also examined Ericksen’s conduct in light of her job duties:

*Erickson is nowhere said to have public relations responsibilities for the University, save recruitment of potential students to the department. Nor did the publication of the allegedly libelous statement arise in the context of a class taught by Mary K. Ericksen.*

Plaintiff points to factors such as the interview taking place in Mary K. Ericksen’s office at the University, and the fact that the subject matter of the interview involved what may have occurred at the University. However, *there is no causal connection between the performance of Mary K. Ericksen’s professional duties and the alleged injury suffered by Qureshi.*

Because the court found that Ericksen’s statements to the newspaper reporter did not arise from her professional responsibilities and hence were not subject to the policy exclusion, Aetna was obligated to defend and indemnify her from Qureshi’s claims arising from the newspaper story. Aetna did not have the same obligation with respect to injuries stemming from Ericksen’s memorandum to the Dean.

205. *Id.* at 840.

206. *Id.*

207. *Id.* *See also* Bd. of Educ. of the E. Syracuse-Minoa Cent. Sch. Dist. v. Cont’l Ins. Co., 604 N.Y.S. 2d 399 (N.Y.A.D. 4 Dept. 1993) (holding that the school district’s insurer had no duty to defend the school district in a sexual harassment and retaliatory discharge action by an elementary school teacher because the alleged acts of the school’s principal occurred in the course of employment and thus were excluded from coverage by the insurer’s policy).


210. *Id.* at 841-42. The court denied the Ericksens’ motion for summary judgment on their nondeclaratory claims, finding that Aetna did not act in bad faith in initially refusing to
The *Ericksen* court narrowly drew the boundaries of the scope of employment of a college professor by finding that Ericksen had no public relations function at the University and that her statements did not arise in the context of a class she was teaching.\(^{211}\) In defining those boundaries, the court found that the professor’s job did not include talking to a newspaper reporter about matters the University sought to keep confidential.\(^{212}\) But what would the result have been if the matter discussed with the reporter was not the result of a confidential university hearing but was instead, as in Fyfe’s situation, a matter of concern to the community that is served by the university? In that situation, the professor would be benefiting the students, the university, and the public by bringing the matter to light, and providing a service to the community. A faculty member claiming that the information was obtained during research and writing in that faculty member’s field of academic study\(^{213}\) would only serve to strengthen the argument that disseminating the information was within the professor’s job duties because mere compilation of the information without dissemination would not serve the community. In the Fyfe situation, the professor claims he acquired knowledge as part of his scholarly research centering on the thesis that the disciplinary procedures of the Philadelphia Police Department restricted the Commissioner’s options in handing out severe punishment for officer misconduct that arbitrators will not subsequently overturn.\(^{214}\) Had Fyfe not disseminated this information, it would not have benefited the community or helped quell the public outcry over the punishment of two officers, which was perceived as too lax.

A narrow interpretation of the scope of employment of a college professor would be counter to a claim that public comments about matters of community interest are within the scope of a college professor’s employment. The *Ericksen* court used such an interpretation where the determining question was whether, in the insurance context, the professor’s alleged wrongful act or omission was part of her specified job duties or instead arose out of a class she was teaching.\(^{215}\)

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\(^{211}\) *Id.*

\(^{212}\) *Id.*

\(^{213}\) Fyfe Memorandum, *supra* note 33.

\(^{214}\) *Id.*

Applying the first prong of the test the *Erickson* court used for determining the scope of employment of a university professor—whether the alleged wrongful action was part of the professor’s specified job duties—^216—to the Fyfe situation, returns to the questions of (1) defining “service” to the university, community, state, and nation;^217 and (2) what constitutes “scholarly” publication. Without a more specified definition of a college professor’s service obligations, a definitive answer to whether an op-ed piece written by a Criminal Justice Professor in a local city newspaper about local police disciplinary procedures was written in the scope of the professor’s employment remains elusive.

Applying the second prong of the test the *Erickson* court used for determining the scope of employment of a university professor—whether the alleged wrongful act arose from a class the professor was teaching—^219—to the Fyfe situation results in a finding of no right to a defense and indemnity unless Fyfe could demonstrate that the op-ed piece arose from a class he was teaching. This reasoning, however, ignores the fact that a university professor’s job responsibilities involve more than the act of teaching classes. Tenure and promotion requirements encourage, if not obligate, university professors to research and write in their chosen field and to serve the university and the community. Restricting the inquiry into the scope of employment of a university professor to whether an alleged act or omission arises from a class he or she teaches is overly narrow and unrealistic given the broad range of demands placed on university faculty members.

The fact that applying the various tests to determine the scope of employment of an employee to a university professor’s scope of employment often leads to still more debatable or unanswerable questions indicates the need for a more definitive expression of the

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^216. *Id.* at 840.
^218. Cutler, *supra* note 25, at 5 (stating that Temple University Counsel George E. Moore, Esq. believes that actions against faculty members arising out of the publication of “scholarly” work would be covered by the liability protection provision of the Temple/TAUP Collective Bargaining Agreement).
^220. In his written communication with Temple University Counsel, Fyfe has not asserted that the op-ed piece arose out of a class he was teaching. See Fyfe Memorandum, *supra* note 33; Fyfe E-mail, *supra* note 36.
^221. See, e.g., Collective Bargaining Agreement, *supra* note 18, at 49-52, Appendices A and B.
job duties of faculty members. To avoid an open-ended obligation requiring a university to provide a defense and indemnity to professors for anything they write or say, a more detailed definition of the scope of employment of a university professor is needed. Such a definition would seek to specify what kind of public expression and publication serve the mutual interests of the faculty member and the university. While such a definition would not necessarily prevent all conflict on the issue, it would have the positive effect of giving notice about what kind of expression by its faculty members a university believes furthers the university’s interests and what kind of expression a university views as solely personal to the faculty member.

For example, such a definition could identify that the results of a university-funded research project published in a trade or educational journal would further the university’s interests, but that a professor’s appearance on a television talk show to discuss a prominent criminal trial, even if the issues discussed relate to the professor’s field of study, would not further the university’s interests. A corresponding defense and indemnity provision could specify that while any claims against the faculty member that arise from the publication of research studies would entitle the faculty member to a defense and indemnity, claims against a professor that arise out of public comment on issues not directly affecting the university, even if related to the professor’s field of expertise, would not obligate the university to defend or indemnify.

The difficulty of defining the scope of employment of college professors also warrants the inclusion of faculty representatives in questions involving the right of faculty members to a defense and indemnity in actions arguably related to their teaching, research, writing, and service to the college or community.

D. The American Association of University Professors Statement

The fact that indemnification for university professors is an issue of paramount importance to faculty members is demonstrated by a statement published by the American Association of University Professors (AAUP), advocating that colleges and universities adopt policies guaranteeing faculty members indemnification in “legal proceedings arising from an act or omission in the discharge of institutional or related professional duties or in the defense of academic
freedom at the institution. 222

The preamble to the AAUP statement notes the growing problem of suits against faculty members. The preamble states:

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. The increasing number of these lawsuits, which often reflect a lack or misuse of appropriate procedures for evaluation and review within an academic institution, is much to be regretted. The parties concerned are subject not only to damage to reputation but also to significant financial li-

222. AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS, 130 (B. Robert Kreiser ed., 9th ed. 2001). The full text of the statement is as follows:

The Association recommends that colleges and universities adopt a comprehensive general policy on legal representation and indemnification for members of their faculties. The policy should ensure effective legal and other necessary representation and full indemnification in the first instance for any faculty member named or included in lawsuits or other extra-institutional legal proceedings arising from an act or omission in the discharge of institutional or related professional duties or in the defense of academic freedom at the institution. It should also include specific provisions as follows:

1. The policy should include all stages of such legal action, threatened or pending, in a judicial or administrative proceeding, and all aspects of the use of compulsory process whether or not the faculty member is a party in the proceeding.

2. The policy should ensure effective legal representation of the faculty member’s interests, whether by the institution’s regular counsel or by specially retained counsel, with due attention to potential conflicts of interest.

3. The policy should be applicable whether or not the institution is also named or included in the legal action, though the institution might consider joining in the action as a party if it has not been named.

4. The policy should provide for all legal expenses, for all other direct costs, and for court judgments and settlements.

5. The policy may provide for legal representation and indemnification through insurance.

6. The policy may provide for a faculty committee to make recommendations on the application of the policy to extraordinary circumstances not foreseen at the time of promulgating the policy of general application.

Id.
ability, which may include cost of legal representation, loss of time, court costs and expenses, and judgments of the court or out-of-court settlements. Moreover, faculty members have increasingly been summoned by legal process to disclose or account for their research and teaching in lawsuits to which they are not parties. Colleges and universities have a responsibility for ensuring legal representation and indemnification to members of their faculties who are subject to lawsuits stemming from their professional performance in institutional service or their conduct of research and teaching. 223

The obvious question raised by the potential application of the AAUP statement to Professor Fyfe's or a similar situation involving a requested defense and indemnity is whether the actions complained of were undertaken in "discharge of institutional or related professional duties or in the defense of academic freedom at the institution." 224

First, while the AAUP statement has some persuasive weight in terms of recognizing the problem, and undoubtedly will be cited by faculty members seeking a defense or indemnity in actions against them, it should be noted the AAUP statement has no force of law. Unless it is specifically incorporated into a university's employment contracts or guidelines, the statement is not controlling on the issue of the scope of a university's defense or indemnity obligations. 225 However, the AAUP "is generally accepted as the spokesman for college teachers, and its assistance is sought in virtually every academic freedom dispute." 226

223. Id. (emphasis added).
224. Id.
226. Elliott Perkins, Developments in the Law: Academic Freedom D. Regulation by Professional Associations, 81 Harv. L. Rev. 1145 (1968). The power of the AAUP to influence decision making by universities has been recognized that

[while the Association does attempt to gain redress for individual teachers when it finds that their academic freedom or tenure rights have been infringed, it has never considered itself to be principally an advocacy legal aid society. Rather, the AAUP views protecting the individual's rights as part of a higher function; it sees each dispute as an occasion to clarify and secure acceptance of what it believes to be the general principles underlying academic freedom. . . . [T]he formidable pressures it can bring to bear enable the AAUP to achieve . . . results. And certainly its reputation and influence within the academic community are in part dependent upon its ability to secure redress for individual teachers in specific dis-
Second, even if adopted by a university, the policy suggested by the AAUP advises only on the establishment of a committee to recommend an application of the policy "to extraordinary circumstances not foreseen at the time of promulgating the policy of general application," not on creating a committee to conduct a hearing and issue a recommendation in each case involving a faculty member’s request for a defense and indemnity. Finally, the suggested policy is silent on the issue of a presumption in favor of providing a defense and indemnity to faculty members, and on placing the burden on the university to demonstrate that the alleged actions fall outside the faculty member’s scope of employment.

Without suggesting more concrete measures to address the problem set forth so prominently in its preamble, the AAUP’s suggested policy, while a step in the right direction, fails to go far enough. The suggested policy does not advocate the creation of mechanisms to effectively address the problems that will arise in disputes between faculty and administration over a professor’s request for a defense and indemnity.

E. Academic Freedom

Beyond the specific terms of a contract or collective bargaining agreement, a potential casualty of a university’s failure to assume the cost of litigation and potential judgments is the academic freedom of the faculty member. Does the denial of a defense and

Id. at 1105-06 (footnotes omitted).


228. Commentators have noted: “What colleges and universities need is an explicit agreement among members of their communities regarding the process used to resolve conflict.” Suzanne Byron et al., ADR Solutions for Academic Workplace Conflicts, 57 DISP. RES. J. 56, 57 (2002).

229. Courts have used the term “academic freedom” since 1952. However, they have not come to a solidified conclusion on what rights this term protects. See Clisby Louise Hall Barrow, Note, Academic Freedom and the University Title VII Suit After University of Pennsylvania v. EEOC and Brown v. Trustees of Boston University, 43 VAND. L. REV. 1571, 1581 (1990).

230. The academic freedom teachers enjoy is the ability to exercise “full freedom in research and in publication of the results, . . . freedom in the classroom in discussing his subject, . . . and freedom from institutional censorship or discipline” in extramural utterances. Brian G. Brooks, Adequate Cause for Dismissal: The Missing Element in Academic Freedom, 22 J.C. & U.L. 331, 331 (1995) (citing AAUP’s 1940 Statement of Principle on
indemnity to a professor in a lawsuit arising out of speech related to his or her field of study create a chilling effect on controversial speech and thereby compromise academic freedom?

As scholars have recognized, academic freedom is an "elusive concept" defined differently by the academy and by the courts. As one commentator explained:

"[A]cademic freedom" is characterized by a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom. Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically

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Academic Freedom and Tenure, reprinted in AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 3-4 (1984)).

231. Speech might be defined as language, whether spoken or written. "[W]hile writing may not literally be speech, it derives from and represents spoken language, thus allowing speech to be cast into a form that transcends its temporal and spatial limitations." Peter Meijes Tiersma, Nonverbal Communication and the Freedom of "Speech," 1993 Wis. L. REV. 1525, 1545 (1993). See also Jamison v. State of Texas, 318 U.S. 413, 416 (1943) (Justice Black noting that the right to express one’s views in an orderly fashion "extends to the communication of ideas by handbills and literature as well as by the spoken word").

232. See, e.g., Pickering v. Bd of Educ. of Township High Sch. Dist. 205, Will County, Ill., 391 U.S. 563 (1968). In Pickering, the United States Supreme Court held that a high school teacher’s constitutional rights were violated when he was dismissed for writing a letter to a local newspaper in which he criticized the school board. Id. at 563. The Court focused its interest on whether the letter concerned a matter of legitimate public concern and balanced Pickering’s interests as a “teacher, [and] as a citizen, in commenting on matters of public concern, [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Id. at 568. The Court held that the letter did not interfere with the performance of Pickering’s classroom duties or the operation of the school, and concluded that “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” Id. at 572-73. In one sense, Fyte seeks a holding in reverse of Pickering: that he contributed to the public debate as a teacher, rather than as a citizen, and hence is entitled to a defense and indemnity.

233. As one commentator has noted: “Critical inquiry and dissemination of research by university professors is essential to the advancement of knowledge. Professors cannot perform these vital roles if others intimidate or punish them for expressing their scholarly judgments, which may often challenge or enrage those who hold prevailing conventional views.” David M. Rabban, Does Academic Freedom Limit Faculty Autonomy?, 66 TEX. L. REV. 1405, 1409 (1988).

related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to qualify either even by the immediate impact of his professional endeavors upon the economic well-being or good will of the very institution that employs him, is to abridge his academic freedom.

This "freedom, . . . is not an enforceable claim upon the assets of others, but a liberty, i.e., the absence of restraints or threats against its exercise. Others may not use their power or authority to restrain the exercise of academic freedom, but they are not obliged to subsidize every academic's professional whims, however unenlightened such refusals might seem."

Contrary to the view of academic freedom as being held exclusively by the individual faculty member, the view expressed by the United States Supreme Court is that academic freedom is held by both the academic and by the institution. Interestingly, despite the Supreme Court's position on the dual right to academic freedom, the Fourth Circuit Court of Appeals has held that the right to academic freedom beyond the First Amendment rests solely with the university.

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236. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985). On the issue of academic freedom, the Court noted:


Ewing, 474 U.S. at 226 n.12.

237. Urofsky v. Gilmore, 216 F.3d 401(4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001). In holding that a Virginia statute that restricted state employees, including professors at state universities, from accessing sexually explicit materials on state-owned computers did not violate a professor's First Amendment rights, the Urofsky court made the following statement regarding academic freedom:
Regardless of differences between academics and courts, and among different courts, as to who may claim a right to academic freedom, faculty members must satisfy two conditions when asserting a violation of their academic freedom as a result of the refusal of a request for a defense and indemnity. 238 First, because academic freedom is recognized as "a special concern of the First Amendment," 239 a court must find a state action violating free speech rights to recognize a violation of the right of academic freedom. 240 Second, it must be shown that the university officials "are acting as state agents or public officials." 241

Because it has been judicially determined that Temple University and its employees are state actors for purposes of alleged federal civil rights violations, 242 Fyfe could allege that the University is a state actor. But Fyfe would not be able to demonstrate that the University's refusal to provide him with a defense and indemnity in the FOP action violated his free speech rights under the First Amend-

Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act. Id. at 410.


240. Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 TEX. L. REV. 1265, 1295 (1988). Professor Metzger summarized the courts' view of academic freedom as follows:

First, against actions by the prime state that overstep first amendment bounds, all holders of faculty appointments are protected by academic freedom. Second, when academic freedom is threatened by the self-acting agent state, the scope of constitutional protection is determined by the source of the threat. Against threats by private academic employers, holders of faculty appointments are constitutionally defenseless; against threats by public academic employers, holders of faculty appointments have constitutional permission to mount an academic freedom defense. In other words, an academic, merely by changing employers, can lose or gain a constitutional right. Third, among holders of faculty appointments, only those who are public employees are constitutionally protected on two fronts—against the misdeeds of both the prime state and the agent state. But this double-sided protection is not uniquely theirs: it is shared by all public employees who teach.

Id. The mere receipt of state funds does not make a university "public." See Williams, supra note 238, at 509 (citing Krohn v. Harvard Law Sch., 552 F.2d 21, 24 (1st Cir. 1977)).

241. Williams, supra note 238, at 510 (citing The Civil Rights Cases, 109 U.S. 3, 13 (1883)).

ment. Hence, he would not be able to maintain a claim for violation of his academic freedom rights as defined by the courts.

In deciding whether to provide a defense and indemnity to a defendant employee, a public institution of higher learning must balance the extremes of using its authority to restrain the exercise of academic freedom and subsidizing an academic's whims. A public university that overzealously refuses to provide such a defense and indemnity to an employee could restrain academic freedom, possibly having the end result of silencing a reticent academia. On the other hand, a truly open-ended defense obligation would only serve to invite abuse. If academic freedom, as defined by academics, includes the right to investigate, teach, research, and publish without the threat of sanction, a public college's failure to defend faculty members who are sued for activities arguably related to their job duties amounts to a severe sanction that threatens the very freedom that is embodied in the term "academic freedom." Will faculty members, if concerned about having to incur unreimbursed legal expenses, truly feel free to engage in unfettered discourse about controversial topics?244

The United States Supreme Court in *Sweezy v. New Hampshire* described academic freedom as follows:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civi-

243. In *Connick v. Myers*, 461 U.S. 138, 142 (1983), the United States Supreme Court set out a test that balances between the interests of the employee (as a citizen) and the employer in promoting the efficiency of the public services it performs through its employers.

244. Colleges and universities are the traditional place for the scholarly advancement of ideas and emerging trends of thought. The purpose of academic freedom for faculty is to ensure the faculty's independence and fearlessness. See William H. Daughtrey, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. RICH. L. REV. 233, 267-68 (1991).

lization will stagnate and die.\textsuperscript{246}

As recognized by the United States Supreme Court in \textit{Sweezy}, "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."\textsuperscript{247} Suspicion and distrust certainly will flourish if professors, who consider their actions as furthering their professional responsibilities, are left wondering whether their public university employer will refuse to defend them in a suit arising from those actions. Similar distrust will arise if professors are required to have their written works reviewed by a university to determine if the writing comports with the college’s view, or if professors are forced to seek authorization to publish their views in their field of study. Requiring university preapproval could create two classes of published writings: those approved by the universities and hence subject to defense and indemnity obligations, and unapproved writings that professors publish at their own peril. Regardless of the courts’ narrow definition of academic freedom, is a university’s failure to defend a professor who is sued for libel based on an op-ed piece that addresses issues related to his teaching area and scholarly interest a threat to academic freedom as defined more broadly by academics? One of the statements made by Temple University Counsel in denying Fyfe’s request was, "[the op-ed piece] was not written on Temple’s behalf or with Temple’s permission or endorsement."\textsuperscript{248} As recognized by Fyfe in his response, does this mean that for a professor’s writing to have been in the course of his employment, it must have been produced with the university’s permission or endorsement?

In considering free speech issues, some courts have recognized that universities, as well as faculty members, can exercise academic freedom and that a conflict can exist between these respective exercises of academic freedom. This conflict has caused courts to apply a balancing test:

\textit{[T]he term academic freedom “‘is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict.’” . . . [I]t is important to bear in mind that a professor’s right to academic freedom is not absolute, and the “autonomous decision making” of the College must be considered when balancing the parties’ re-}

\textsuperscript{246} Id. at 250.
\textsuperscript{247} Id.
\textsuperscript{248} Smith E-mail, supra note 15 (quoted supra note 35).
spective interests. In striking this balance, courts have recognized that some public university interests trump an individual faculty member’s right to academic freedom. For example, in Bonnell v. Lorenzo, the Sixth Circuit Court of Appeals held that a public community college’s interest in the confidentiality of a student’s sexual harassment complaint outweighed the academic freedom rights of the alleged harassing faculty member. The student had written a letter to the administration of Macomb Community College complaining that an English Professor, John C. Bonnell, had created a hostile learning environment by repeatedly using obscene language and by recounting, in class, his own sexual experiences. The letter asked for, among other things, a written apology from Bonnell. As a result of his actions, Bonnell was suspended by the College administration for three days. After being provided a copy of the complaint letter, Bonnell redacted the student’s name from the letter, made copies, and distributed them to the students in all six of his classes, posted a copy on the bulletin board outside his office, and distributed the letter, along with an eight-page satirical “apology” essay, to more than two hundred faculty members. After becoming aware of his distribution of the complaint letter and “apology” essay, the College officials issued a memorandum directing Bonnell not to discuss the sexual harassment complaint or the disciplinary ac-

250. 241 F.3d. 800 (6th Cir. 2001).
251. Id. at 803.
252. Prior to the complaint, the College had warned Bonnell that his continued use of obscene and vulgar language for, among other things, female body parts “may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment.” Id. at 803. Bonnell defended his use of the language to “point out the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade.” Id. (quoting joint appendix).
253. Id. at 809.
254. Id.
255. Id. at 805. The three-day suspension was without pay, was for using vulgar language not related to any readings assigned to Bonnell’s classes, and was for defying repeated College directives not to use such language. Id.
256. Id. at 805. Bonnell distributed the letter to the faculty with an essay entitled, “An Apology: Yes, Virginia, There is a Sanity Clause,” after being warned that his distribution of the letter to his students violated the College’s policy that student complaints about sexual harassment be kept confidential. Id.
tion against him with any of his students.\textsuperscript{257} Bonnell responded by providing copies of the complaint letter and “apology” essay to two local television stations and a local newspaper and by informing the students in his class he had been suspended for three days.\textsuperscript{258} The College reacted by suspending Bonnell without pay pending an investigation into his dissemination of the complaint letter to the media.\textsuperscript{259}

At this point, Bonnell commenced suit against College officials and moved for a preliminary injunction ordering his immediate reinstatement at the College.\textsuperscript{260} The district court granted the request for a preliminary injunction based on its finding that Bonnell had a likelihood of success on the merits of his claim that his suspension violated his First Amendment rights.\textsuperscript{261} In reversing the preliminary injunction issued by the district court, the Sixth Circuit Court of Appeals held that Bonnell could not satisfy any of the four factors necessary for issuance of a preliminary injunction.\textsuperscript{262} On the issue of academic freedom, the court stated:

\textsuperscript{257} Id. at 806. The memorandum explained the College’s position that the distribution of, or discussion with students of, the complaint or Bonnell’s punishment may send the message that complaining students may be ridiculed. \textit{Id.}

\textsuperscript{258} Id. The overwhelming majority of Bonnell’s students failed to attend the meetings of his classes during the suspension, which were taught by a substitute teacher, and instead, the students pre-signed attendance sheets, protesting the suspension and supporting Bonnell. \textit{Id.}

\textsuperscript{259} Id. The suspension was for “disruption of the educational process.” \textit{Id.}

\textsuperscript{260} Id. The complaint, brought by Bonnell and his wife, Nancy L. Bonnell, named as defendants College President Albert Lorenzo, College Vice President for Human Resources William MacQueen, and the College’s Dean of Arts and Science, all in both their individual and official capacities, along with Mark Cousens, an attorney for the College’s union. \textit{Id.} at 803 n.1. The complaint sought a temporary restraining order against Bonnell’s suspension and contained causes of action against the College officials, including conspiracy to violate Bonnell’s civil rights, and violation of Bonnell’s rights to free speech and association, right to counsel, right to due process and equal protection, and gross negligence. \textit{Id.} The complaint also claimed negligence and breach of the duty of fair representation against the College’s attorney for failing to represent Bonnell. \textit{Id.} at 806-07.


\textsuperscript{262} Id. at 826. The court found that Bonnell failed to show that: (1) success on the merits was likely because, although his speech addressed a matter of public concern, he did not demonstrate that his interest in speaking outweighed the College’s interests; (2) despite the fact that he had been teaching without tenure at the College for twenty-three years under a continuing contract, he would suffer irreparable harm because the damage from his four-month suspension without pay could be compensated by monetary damages; (3) the issuance of the injunction would not harm others because it might interfere with the College’s ability to provide a nonhostile learning environment; and (4) the public interest would be served by the issuance of an injunction because the public would not be served by enjoining the College from enforcing its sexual harassment policy. \textit{Id.} at 824-26.
While a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that whatever they say or do will be protected.

The court noted that in order for Bonnell, a public employee, to establish a likelihood of success on the merits of his claim that he was denied his First Amendment right to free speech, he had to demonstrate that his speech involved a matter of public concern and that his interest in speaking outweighed the College’s interest in regulating the speech. If the Fyfe situation involved state action, Fyfe would likely be able to demonstrate that the op-ed article involved a matter of public concern—the disciplinary procedures of the Philadelphia Police Department and the action of the police officer’s union—but likely would not be able to demonstrate that the denial of his request for a defense and indemnity violated his right to free speech.

The fact that a university’s interests may, in some circumstances, outweigh a professor’s right to distribute materials to students and the media only highlights the need for a delineation of procedures by which universities decide whether to defend or indemnify their professors. A clear articulation of a university’s policies on what it views as a professor’s scope of work would diminish conflict by providing a faculty member with an idea of what the university believes is his or her scope of work, rather than being subjected to the application of vague and amorphous standards such as promoting university, rather than personal, interests or expressing opinions that do not reflect the university’s views. A detailed written policy would stand a greater chance of satisfying the potentially competing interests of administration and faculty than would a

263. The court noted that the College was required legally to provide a nonhostile learning environment. *Id.* at 823-24.

264. *Id.* at 825.


266. *See* Smith E-mail, supra note 15 (quoted supra note 35); Letter from George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (May 10, 2002) (on file with author) (quoted supra note 71).
policy that leaves unanswered the question of whether being of service to the community includes public comment on issues related to a professor’s field of study.

III. A Proposal

There must exist a balance between a university’s own interests in not creating an open-ended defense and indemnity obligation and the faculty member’s right to perform actions related to his or her teaching interest without fear of not being defended and indemnified by the university. The best entity to strike such a balance would be a committee made up of both faculty and administration officials, empowered to evaluate faculty requests for indemnity and armed with both well-delineated guidelines setting forth the job responsibilities of a university faculty member and a presumption in favor of erring on the side of protecting the faculty member.

Indemnity provisions, whether they appear in teaching contracts, collective bargaining agreements, university bylaws, or state statutes, provide similar protection to faculty members as that offered by liability insurance policies. In fact, a university’s obligation to provide a defense and indemnity often is secured by liability insurance purchased by the university. Accordingly, in determining questions of faculty members’ entitlement to a defense and indemnity from their university employers, a logical basis exists to treat universities like general liability insurers.

For example, New York courts have recognized compelling parallels between the defense and indemnity obligations of the state that run to faculty members at state institutions under the Public Officers Law,267 and requirements imposed by the New York Insurance Law.268 For example, in Garcia v. Abrams,269 an appeals court, interpreting the provisions of Public Officers Law section 17 that required the state employee to cooperate with the Attorney General’s office, turned “for guidance” to the interpretation of similar provisions in the Insurance Law.270 The same appeals court, in Polak v. City of Schenectady,271 drew comparisons between a related state in-

267. N.Y. PUB. OFF. LAW § 17 (McKinney 2001).
270. Id. at 163.
demnity statute and liability insurance policies for the purpose of determining defense and indemnity obligations. The Polak court recognized "that it is appropriate to analogize Public Officers Law § 18 to private insurance contracts."

In determining coverage under liability insurance policies, American courts generally find that if the facts alleged in a complaint against the insured even potentially fall within policy coverage, the insurer has a duty to defend its insured. The court in Dre wy v. Continental Casualty Co. explained this presumption as follows:

The "... near universal rule" is that an insurance company's obligation to defend a suit "... is determined from the allegations in the complaint."n

"It is also a near universal rule that if the allegations of the complaint against the insured are ambiguous or incomplete and it is doubtful whether or not they state a cause of action within the coverage of the policy sufficient to compel the insurer to defend, such doubt will be resolved in favor of the insured." To make this benefit (insurance coverage) conclusively and in all cases dependent upon the allegations of the complaint over which the insured can exercise no control would leave the protection offered by the policy to happenstance and, in many cases, amount to nothing short of a windfall for the insurer.

The intent behind liability insurance policies and contractual or statutory defense and indemnity provisions are the same: protection of the insured or indemnitee against the costs of defense and potential adverse judgments. Given this fact, application of a presumption similar to those governing liability insurance policies, compelling the resolution of any doubts as to the right of a faculty member to the right to a defense and indemnity in favor of the faculty member, is warranted. The existence of such a presumption in the Fyfe case would have required the resolution of doubts regarding whether

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276. Id. at *3 (citing Graves v. Liberty Mut. Fire Ins. Co., 745 S.W.2d 282, 283-84 (Tenn. Ct. App. 1987)).
277. Id. at *4 (citing Dempster Bros. Inc. v. United States Fid. & Guar. Co., 388 S.W.2d 153 (1964)).
278. Id. at *4 (citations omitted).
Fyfe's actions arose in the scope of his employment in his favor. It is interesting to note that if Temple University Counsel had forwarded Fyfe's defense and indemnity request to the University's insurer, rather than make the determination on his own, the insurer's decision would have been governed by the presumptions in favor of coverage that attend all insurance coverage determinations.

In addition to a requirement that uncertainties about the extent of coverage be resolved by insurers in favor of their insureds, it is widely accepted that any provisions in an insurance policy restricting coverage are to be construed liberally in favor of the insured and strictly against the insurer. It is also generally accepted that an insurer's duty to defend is broader than its duty to indemnify; this results in insurers defending actions in which they do not end up providing an indemnity, or in cases involving both covered and uncovered claims.

The application of these or similar principles to questions of whether a university should defend and indemnify faculty members in suits against them would fundamentally change the way in which such decisions are presently handled. Such a fundamental change is warranted by both the similarities between the shared goals of liability insurance and contractual or statutory defense and indemnity provisions and the damage that can be caused to the relationship between faculties and universities when faculty members are denied a defense and indemnity in lawsuits that arguably arise out of the professors' course of employment.

Without a presumption in favor of providing a defense and indemnity to professors, professors who are sued for activities they believe are within the scope of their employment and are denied a defense and indemnity by their university employers are forced to either assume the cost of defense and potential judgment or sue their university employers to compel a defense and indemnity. Such suits can permanently damage the relationship between the university and

279. See Letter from George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (May 10, 2002) (on file with author).
the faculty member and can have an impact on more than the parties
directly involved by creating an atmosphere of distrust between the
faculty and administration.

Ideally, any procedure for such a difficult task as defining the
limits of the job duties of employees who teach, research, write, and
serve would substantially credit the opinion of teachers and scholars.
Who better to instruct on what is required of a profession than its
practitioners? Including faculty members in the process could yield
positive results beyond the framework of the dispute at hand by rein-
forcing the idea of the university as a place for open debate and dis-
cussion of ideas and by empowering the faculty to take a more active
role in decisions affecting the university beyond the narrow scope of
their areas of interest. However, to avoid a situation where only the
employees define the scope of employment, such a procedure should
necessarily include a place for the university to express its own in-
terests. It is only through forging a new partnership between faculty
and administration that the problems inherent in making defense and
indemnity decisions can be best ameliorated.

An example of such a partnership would be the formation of a
committee comprised of both members of the faculty and school
administration to hold hearings on requests for defense and indem-
nity by faculty members. The hearings would afford professors
making requests for defense and indemnification the opportunity to
present their position and truly explain the motivation behind the
conduct called into question and how such conduct serves the univer-
sity and the public. After hearing from the professor and any
other interested parties, the committee would then issue a written
recommendation regarding how the university should respond to the
request.

Obviously, the numerical split between faculty and administra-
tion members on the committee could be a source of debate; but
given the faculty’s present exclusion from the process, even the
presence of a minority of faculty committee members would mark a
significant improvement and allow at least some input into the deci-
sion-making process. Although far from flawless, such a procedure
would at least ensure the input of the faculty in defining their jobs
while at the same time allowing a thorough consideration of the facts
of each case. It would also create a record from which the univer-
sity could make its determination on how to respond to the request
for a defense and indemnity.

In the Fyfe situation, Temple University Counsel’s office ap-
parently made its decision to deny Fyfe’s request based solely on the FOP complaint, Fyfe’s op-ed piece, and Fyfe’s initial memorandum requesting a defense and indemnity. University Counsel’s decision to deny a defense and indemnity to Fyfe, made without consulting the University’s insurance carriers, was based on the determination that, in writing the op-ed piece, Fyfe did not act to promote the University’s interests. If, instead of University Counsel being the final decision maker on what promotes the University’s interest, the matter had first been put before a joint faculty/administration committee, Fyfe could have explained his intent in writing the op-ed piece, and an attempt could have been made to determine what the University had considered in the past as “service to the community” and whether Fyfe’s actions were consistent with his work for the University. Even if, after a hearing, the committee had reached the same conclusion as did University Counsel, at least Fyfe would have

283. See Letter George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (May 10, 2002) (on file with author) (quoted supra note 71). The May 10, 2002 letter was written in response to an April 5, 2002 letter to Moore by Fyfe (copy on file with author), which requested, among other things, identification of the individual who made the determination that the op-ed piece was not written in the scope of Fyfe’s employment by Temple. In the April 10, 2002 letter Fyfe also inquired why, if the op-ed piece was not written within the scope of his employment, Temple had placed the piece on its website without requesting Fyfe’s permission. See Letter from George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (Apr. 25, 2002) (on file with author). Moore responded to Fyfe’s inquiry about the op-ed piece having been posted on the Temple University website in a May 17, 2002 letter. Moore indicated that most newspapers, including The Philadelphia Inquirer, permit free hotlink access to their websites and that the University’s Office of News and Media Relations (“ONMR”) monitors the media for mentions of and contributions by Temple-related individuals. . . . . ONMR’s website includes an “In The News” section that briefly describes some of those references and provides a ‘hotlink’ to the publication’s website. There is no requirement that the referenced material be generated within the course and scope of employment for the University.

Letter from George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (May 17, 2002) (on file with author). The May 17, 2002 letter also stated that the reference and hotlink to the op-ed piece were removed from the ONMR website immediately upon Fyfe’s informing ONMR that he had been sued regarding the op-ed piece. Id. Fyfe disputes the fact that the reference and hotlink were immediately removed, but instead claims that they remained in place until long after he communicated with ONMR. See Letter from James J. Fyfe, Professor, Criminal Justice Department, Temple University, to Bill Cutler and Terry Kilpatrick, TAUP officials (improperly dated July 9, 1992) (on file with author).

284. See Letter from George E. Moore, Esq., Temple University Counsel, to James J. Fyfe, Professor, Criminal Justice Department, Temple University (May 10, 2002) (on file with author).
been heard and might have had less motivation to pursue legal action against the University. In addition, the University faculty members would know that if they someday found themselves in Fyfe's shoes, they would at least have an opportunity to be heard within the academic institution,²⁸⁵ rather than having to resort to suing their employer.

The elusive task of defining the scope of employment of a university professor also evidences the need for a more specific delineation of the job duties of faculty members. Such a definition should seek to set forth more precisely the expectations of both the faculty and the administration over what is expected of professors. This would entail listing specific activities that are either included or excluded from the general concepts of teaching, research, writing, scholarship, and service. The creation of a specific definition of the job of being a university professor would give notice to faculty members about whether their actions were within the scope of employment. While no definition could possibly encompass all potential factual scenarios, an effort to reach at least some consensus between faculty and administration on these issues would strengthen the relationship between these groups.

Finally, the reality that contractual indemnity provisions in teaching contracts, collective bargaining agreements, university bylaws, or state statutes operate much like liability insurance policies also warrants a presumption in favor of providing a defense and indemnity to faculty members when sued for actions arguably related to their university responsibilities. If universities were treated like insurers for the purpose of defense and indemnity obligations to their employees, faculty members would know that they had greater protection from the costs of even unfounded lawsuits. Possession of such knowledge by faculty members would serve to foster open debate of controversial subjects and thereby advance the learning proc-

²⁸⁵ That the judiciary should avoid involvement in internal university matters has been previously recognized in the context of tenure decisions:

Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.... Such a procedure [court's reviewing tenure decisions], in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court.

Faro v. N.Y. Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974).
ess. 286

IV. CONCLUSION

Even the briefest review of the myriad factual disputes that can arise regarding the question of when a university should defend and indemnify faculty members who are sued for acts the faculty members consider related to their job responsibilities compels the conclusion that substantive changes should be made to the way universities answer such questions. The present decision-making process often precludes faculty input. The exclusion of faculty from the process leads to, at a minimum, feelings of mistrust of, and in some cases hostility toward, their university’s administration. The damage such conflicts can do to the relationship between faculty and administration warrants changes in the process of how universities decide whether to provide a defense and indemnity to faculty members.

286. Application of these principles to the Fye situation undoubtedly would have resulted in Temple University’s obligation to provide a defense and indemnity in the FOP suit.