In the United States Court of Appeals
For the Sixth Circuit

Gerald Bergman, Plaintiff	(	(
vs.	(	Case No. 86-3031
Bowling Green State University	(	
et. al., Defendants	(	
	(	

Appeal of Judge Walinski's *Findings of Facts and Conclusions of Law (R-79)*, by paragraph number. Both the plaintiff and the defendants agree that a central issue is related to the right to not conform to norms that plaintiff concludes are non-functional or even dysfunctional. As the defendants admit, "Dr. Marso, who voted for plaintiff put it, plaintiff "Listened to a different drummer" (TR 846). Many of the concerns the faculty had with plaintiff fall into the amorphous category of 'non-collegiality.'" Furthermore the defendants claim that "as indicated by the court in *Gottleib vs. Tulane University*, 37 FEP cases 116 (Eastern District Louisiana, 1985), that it is a proper consideration in determining tenure" (Brief of Appellees, p. 30). The plaintiff argues that this is not a valid reason to terminate a University faculty.

Dr. Bergman's Scholarly Performance

BGSUs charter requires that tenure is to be granted or denied based only on three criteria, teaching research and service. Therefore, this area will be reviewed first. Dr. Bergman's colleagues' *written evaluation* of his research and publications has been, without exception, extremely positive. Dr. Verlin Lee, Chair of the Dept. of Curriculum & Instruction, an area in which Dr. Bergman has published several articles, carefully evaluated his work and concluded :

> I've known Dr. Bergman since he has been at Bowling Green State University. I visited his office numerous times for long conversations and have read many of his articles dealing with subjects of mutual interest . . . I've also observed him ...in the classroom...Dr. Bergman is one of the most prolific writers I've ever met in all of my professional career. He writes not only material relevant to his own field...but in literally dozens of journals ....Everyone of these articles are well written and show much...thought. I found Dr. Bergman to be extremely honest and open . . . extremely prepared to teach his own classes and also gives individual attention to any student who cares to visit his office (Dr. Lee's office was close to mine, thus he was able to observe this). I consider Dr. Bergman one of our finest [faculty] additions and I am sure he will add much to the field of research . . . [in summary] *I have never met a person with a more varied background of interests or a man whose mind is so extremely brilliant and fertile.* (A-57)

The Chair of the Faculty Evaluation Committee, Dr. Burke, stated, "The Faculty Evaluation Committee wishes to congratulate you fo*r outstanding professional performance*...We find your contribution in the areas scholarly activity to be especially outstanding" (A-58). Provost Ferrari said Dr. Bergman's research showed "diversity, creativity and breadth " and that Dr. Bergman was "a highly prolific writer" (D-50). The administrator Dr. Bergman worked most closely with, Dr. Horton, Associate Dean of the college, stated that Dr. Bergman was one of BGSU's

> ...most talented and creative professors. I've known him for six years and find him to be a very personable and one of the most stimulating conversationalists that I have ever met... Dr. Bergman has an insatiable thirst for knowledge coupled with the desire to write and disseminate his scholarly efforts... he is the most prolific writer on our faculty of almost 200 members. He writes well on a variety of subjects and has an excellent publishing record in refereed and non-refereed journals. Dr. Bergman also maintains good rapport with his students. He likes to teach and does it well. In short [Dr. Bergman] is a creative, flexible person who teaches . . . and writes well . . . (A-59)

The Dean of the college, Dr. Elsass, stated that Dr. Bergman was

> currently...the most prolific faculty author in the college [and] I must concur with positive endorsements received from Dr. Reed and PPPG Council ...[that he has] demonstrated and documented fulfillment of basic criteria-effective teaching, scholarly and creative productivity and service (A-36).

Another faculty Dr. Bergman worked closely with, Dr. Girona noted that he has:

> read a number of his publications and find them thoroughly researched, well thought out, and well written ... His test and measurement book was excellent.... I felt that he had achieved what few test and measurement books had been able to accomplish, namely to convey the essentials (and more so) of the field in a very readable fashion, avoiding much information...which is commonly taught but usually absolutely useless in the field. The textbook is truly an innovation, and such a radical departure from the mainline test and measurement books that it may have trouble becoming accepted. I am certain, though, that in time this approach will become more and more common. In short, Dr. Bergman is a trail blazer (A-33).

Dr. Charlesworth stated Dr. Bergman was:

> ...a gifted, versatile and energetic person who has devoted his career to scholarly pursuits. His papers are well researched, thorough, scholarly, interesting and thought provoking. He carries on a vast correspondence with other scholars in this country and abroad, seeking and exchanging ideas and information. He was clearly the most productive member of the entire department (A-100).

Another one of Dr. Bergman's colleagues, Dr. Wood stated:

> I have also read several of Jerry's articles that related to areas of interest to me. He is an interesting and amazingly active and wide-range writer. Although I do not always agree with every one of his interpretations, I have always found him to be happy to discuss our differences and exhibits a clear understanding of my position (A-56).

Dr. Leslie Chamberlin, chair of Dept. EDAS and one of the most prolific authors at

BGSU, and with whom Dr. Bergman co-authored several articles stated

> Dr. Bergman is truly a research-minded faculty member who works quite diligently at certain areas in research including those of crime and delinquency, suicide ... Jerry Bergman is a prolific writer ... a member of many professional associations ... [and] my association with [him]... has been pleasant and informative. We have written many professional articles together... my observations ...(is) that he works well with students. They ....relate to him and he has good rapport with them. I've had many conversations with Jerry during his years at BGSU and have found him to have a humanistic attitude towards others

... (A-60-63)

Dr. Ron CotŽ stated,

> Jerry impresses me as consistently polite, empathetic and sincere. Professionally he is exceptionally competent, tireless and persistent; his publications record is probably the most impressive in our college. As an academic, he is very intelligent, interesting and informed (A-74).

In his affidavit, Dr. CotŽ added that the reasons Dr. Bergman's colleagues voted against his tenure was probably:

> ...varied and undeterminable...criticisms... seemed to center on irrelevant points such as appearance, philosophy. Dr. Bergman, on at least two major criteria, has achieved notable success: motivation of students and publications ... The expressed, most significant criteria of any university has always been publications. Dr. Bergman cannot be found lacking in this area. Substitute criticisms apparently have been made for personal, unprofessional reasons ... Dr. Bergman would seem to be eminently qualified for ... tenure. Not to grant such a continuation ... seems to me extremely unjust and prejudicial [and] unprofessional and not in keeping with university criteria for continuation of employment .... personally I am very much concerned about the loss of such a colleague; his abilities are a valuable asset to this university (A-66-68).

Dr. Fyffe stated that he read many of Dr. Bergman's publications, and

> ...His record of professional service is known by me to be excellent. Based upon my three years service upon the *College of Education's Personal Policy and Professional Growth Council*, I am utterly amazed that tenure could be denied. Few faculty members ...had a record of performance which matches Jerry Bergman's. He has published in excess of 100 times...I can find no explanation for refusal of tenure. It would be difficult to find faculty at the full professor with such varied accomplishments, let alone a man at the lowest academic rank (A-69-70).

Dr. Bill Reynolds concluded that Dr. Bergman is,

> ...an ...above [average] teacher with a variety of publications to his credit. I have valued at least two of his publications as average and above. He is diligent in maintaining office hours and frequently consults with students. ... Dr. Bergman is a functioning faculty member whose performance seems to be above average... (A-71-72)

And the thorough UPAO report concluded:

> Dr. Bergman was clearly the most productive member of the department both in the quantity and quality of his publications in both refereed and unrefereed

> journals. [and] ... over a dozen colleagues came forward to support Dr. Bergman with official affidavits stating that his teaching and research was clearly outstanding and that the main, if not the only, reason for his termination was his religious beliefs, publications and interests (A-26-27).

Teaching Performance

The fact that Dr. Bergman had virtually no student criticism was acknowledged, and the court evidently accepted this: To the question "in the promotion ..... and .... tenure hearings .... was the fact that Dr. Bergman had practically no student criticism a factor [brought out]?" (T-431-432). Dr. Phillips answered, "I think people .... defending him did bring that up." In answer to the court's response, "He had no student criticism?" (unusual in a university) Phillips said, "Apparently not, sir." (T-752-753)

Chair Reed testified that he knew of no concerns about Dr. Bergman's teaching and considered his preparation satisfactory (T-270). To the question, "Do you recall many students complaining about Dr. Bergman," he answered, "No, I do not." In his role as department chairman, all complaints would come to him and he testified that he was unable to recall *any* concerns worth bringing to his attention (T-301-302). Dr. Yonker testified that it is the chair's responsibility to communicate deficiencies to faculty, and that he did not convey any concerns about Dr. Bergman to the chair; nor did *virtually any other faculty* (T-456; A-232).

The Provost testified Dr. Bergman's *only* "deficiency" was not receiving "an affirmative vote of at least two-thirds of all the tenured members of the department . . ." (T-579). His adverse judgment was not based on his credentials (T-580-581,616). Both Drs. Yonker, and Siefert said that although they did not observe Dr. Bergman in the classroom (T-450) they had no reason to be concerned about his teaching (T-450-452,514). Rita Keefe neither observed nor discussed with Dr. Bergman his rationale for using religious reading assignments that Dr. Bergman allegedly used to which she objected (T-873). Although she (T-872) claimed that she heard some vague "complaints" that were carried to Chairman Reed, he testified that he received *no* such concerns (T-

272-273; A-227).

Malcolm Campbell testified that he had never observed Dr. Bergman's teaching, and had input from only two former students, one favorable, the other "unfavorable," he also noted that it is not unusual for students to make negative comments about professors (T-431-432). Trevor Phillips testified:

> Question . . . did any of your students comment to you about Dr. Bergman in any way?
> Phillips: Yes.
> Question. . . . could you relate to me what comments you've heard from the students of Dr. Bergman?
> Phillips. . . . as with many of us . . . the reviews were mixed.
> Question. Some liked him; some didn't?
> Phillips. Yes. Apparently Dr. Bergman came over as either being very... liked or appreciated orNI don't think the word is disliked. . . .[as] is true any student vis-a-vis any teacher... those who voiced an opinion were on one side or the other... I didn't go out and solicit [opinions]; therefore when students... talk to a professor about another, they usually have some strong views one way or the other. (D-38-39)

George Siefert and Trevor Phillips also testified they had never observed Dr. Bergman's teaching (D-21; T-494-495); and Ron Marso testified that he had never heard a student complaint (T-845-846). Adelia Peters alleged only two student "concerns," both of which were minor, and neither of which she related to Dr. Bergman or even to his chair (T-829). Thus how could Dr. Bergman possibly have responded to them, assuming they were valid concerns actually received from students? She also admitted that most professors receive both positive and negative student feedback, and the comments about Dr. Bergman were not unusual (T-831). When Dr. Bergman was asked for student feedback that he had received, the court concluded (T-46) the answer was "Pure hearsay." Why was the testimony of the one or two professors who alleged negative student criticism, even though they admitted they did not convey it to him (and the criticism was, at best, minor) not also regarded as "pure hearsay"? Although the judge concluded "Student comments are... pure hearsay . . .". (T-932) the alleged "negative" student comments were admitted as evidence, as reflected in his ruling. The hundreds of positive written student comments in Dr. Bergman's vita were also objected to by Mattimoe

because he was "not able to produce ... the original" (T-934). This is not true, if the court requests, we would be glad to supply the originals (A-220-226). It is injustice to permit a few alleged "negative" verbal student comments, but not hundreds of highly favorable onesÑeven those in writing (T-934)?

It is appropriate for the court to determine if the faculty's judgment is "collaborated by teaching evaluations" (*Hooker v. Tufts University* 37 FEP 515) which were in Dr. Bergman's case uniformly superior for the relevant evaluation time (A-204-219). A few alleged "mildly negative" student commentsÑa small number for 7 yearsÑis obviously not a basis for concluding deficiencies exist (T-432, 831). Proper evaluation of teaching effectiveness, according to the written guidelines of the University, requires "peer and/or supervisory evaluations based on first-hand observations and/or acquaintance with staff members' teaching skills" (T-687). None of Dr. Bergman's detractors, including Jim Davidson, experienced first-hand observation or were even acquainted with his teaching style or methodology. As no critic had first hand knowledge, none were in a position to evaluate Dr. Bergman's teaching (A-232). Conversely, those who *had* observed Dr. Bergman's teaching were uniformly positive. Dr. Reed noted:

> I've received only one written complaint from one of your students. This was shared with you and represents maybe one of a half dozen that I have received about faculty in the seven years I have been chair ...I cannot remember any major oral complaints that students have said directly to me ... Indirectly, other faculty in the department have 'claimed' that students have expressed complaints to them. I have asked these faculty to have any student with a complaint concerning you to bring it directly to either me or you. So far, no student has.

Dean Horton stated (A-229) that he had, "no record of student complaints . . . and has no other such communication in any of my correspondence" about Dr. Bergman during his 7 years at BGSU. The Graduate School Dean stated (A-228) that Dr. Bergman had, " . . . no record of student complaints and . . . no such communications in our general correspondence file." Dr. Charlesworth concluded that Dr. Bergman is

> ...an excellent teacher , based on my observing his actual classroom performance... stimulating and creative... clear and concise ... Having shared the office next to him, I can attest to the vast amount of time and attention he gives students. The interactions I witnessed were always warm and positive and the feedback from his students ... was only positive. His student ratings for the last several years ....were consistently exceptionally high (A-100).

Dr. Fyffe concluded "based on personal observation" that Dr. Bergman:

> ...is an excellent teacher. My specialization is in Curriculum and Instruction and my position involves constant and critical observation of teaching candidates to determine their strengths and potentiality. Jerry clearly ... exceeds the requirements in this area... His student evaluations were consistently high....I observed his teaching, interviewed some of his students...(concluding) Jerry made good use of the chalk board .... His vocal and facial expressions are quite good, varying, yet consistently energetic and emotive. Many opportunities were given for students to seek clarification or extend ideas. Jerry moved about the front of the room while lecturing . . . kept visual contact with all segments of the room and elicited responses to many questions. The mood of the class was varied, sometimes responding with laughter to humorous situations and at other times reflectively thinking about probing questions. The 28 students present seemed interested and generally attentive ... with most taking notes on a regular basis. This class was probably the best single presentation of sociograms that I have ever seen. During the times I have studied in, and, even, when I have taught EDFI 402 ... the presentations have not been as organized and understandable. Jerry used numerous personal, student, and research examples to enliven the situation ... (A-98, 230-231)

The department chair stated in his evaluation that when he visited his class Dr. Bergman was

> ....well organized and knowledgeable about material being covered. He structures his classes to provide his students with many individual and group activities. He spends considerable time in preparation for class and uses a variety of hand-out material...spends considerable time outside of class working individually with students in his office ... [in conclusion] ... Jerry [has] demonstrated that he is *a most effective teacher* (A-54).

Dr. Peter Wood, visited Dr. Bergman's class once in conjunction with his research. Part of this involved asking students to comment on their satisfaction with college life. He concluded that his "students generally reported that his classes were very interesting and conducive to learning." Typical of comments solicited by his open-ended questionnaire were the following:

> 'Very interesting class . . . your method of instruction should be used as a model for the entire staff at BGSU. Keep up the good work and thanks for remembering

> us as individuals and not just as ordinary students' . . .'He makes the class more useful and personal to me' . . . 'I like the assignments of making up the different kinds of surveys . . . I like the way... [Dr. Bergman] relates personal experiences to the class. 'I like the open discussion in class and the examples... [Dr. Bergman] uses to get a point across. I feel that this information is more useful than just facts and book material.' ' . . . the discussion sessions . . . are interesting and help me remember the point being stressedÓ (A-55-56).

A professor who taught with Dr. Bergman, Sheldon Carsey, Director of Environmental Studies, stated he found Dr. Bergman:

> to be a hard worker and interested in the welfare of... students. The class we are involved [in] leads me to believe that he is well received ... and that he contributes well to their education (A-289).

Documented Due Process Violations

Due process usually requires that the person be given valid reasons for discharge and have an opportunity to present his side of the story (*Goss v. Lopez*, 419 U.S. 565;1975). Dr. Bergman's case required much more than this. The Supreme Court has distinguished between purely academic, and *disciplinary* dismissal (such as unethical behavior) stating "Misconduct is a very different matter from failure to attain a standard of excellence . . ." (*U. of Missouri v. Horowitz* et al. 435 U.S.;1977). Dismissal for unethical behavior involves one's reputation, and *therefore requires a procedure more similar to a criminal court process*, bringing "an adversary flavor" to the hearing. The Supreme Court (*Bishop v. Wood*, 426 U.S. 341 1976) also noted that one's employment circumstances affects whether one has a *protective liberty interest*, stressing that publicizing reasons for adverse employment action, which amounts to a stigma, *does infringe* upon one's liberty. In *Board of Regents v. Roth* (408 U.S. 564) the Supreme Court ruled that publicizing reasons puts a case in a different category than if no public disclosure for the discharge is made.

This would clearly apply to this case. Dozens of articles have been published in local and national magazines, many of them containing highly inflammatory and inaccurate statements made by the university and its agents (A-75-91, 140-160). Various

memos that contain numerous false allegations were circulated and became known among the faculty, and have since been reflected in numerous published articles. All this has seriously adversely affected Dr. Bergman's attempts to achieve employment and clear his record. These professors, including the University's attorney, have no right to slander Dr. Bergman's name, circulate malicious letters, cause them to be printed, or give false statements to the newspaper that obviously adversely affect his reputation and ability to make a living. Dr. Bergman's reputation and honor have been severely impaired by the negative publicity and the wholly erroneous statements that university attorney and administrators made to the press, and spreading them amounts to character assassination and malicious slander (T-73;A-75-91,140-160)(see *U. Of Missouri v. Horowitz*, 435 U.S.1977). Mr. Mattimoe made much of the difference between *academic* and *legal* due process, but if the university formulates a written set of rules and procedures they are *bound by law* to scrupulously follow them (*Woolley v. Hoffman-La Roche* 491 A 2d 1257;1985; *Thomson v. St. Regis Paper* 685 P.2d 1081;1984; *Ferraro v. Koelsch* 368 N.W. 2d 666; *Hooker vs. Tufts University* 37 FEP). Although untenured professors can be discharged for a variety of reasons except constitutional, if the college's own rules dictate that certain procedures are to be used when an instructor is not reappointed, it *must* scrupulously follow them (*Mabey vs. Reagan* 537 F.2d 1036;1976).

Charter required academic due process is thus *legally* obligatory. BGSU Charter expert Dr. Carpenter stressed that evaluation must *elucidate* in writing *one's progress toward tenure*, any perceived shortcomings, and if one was meeting the department's expectations (T-366-368). This is clearly the intent of the Charter because it was derived from AAUP principles. The purpose of probation is for the probationer to work with the department so as to meet their standards. Lack of evaluation is not only a major due process violation, but a negation of the whole intent of probation. Without it, according to both the Charter and the court testimony, the required probation hasn't occurred (T-367).

A statement developed by the National Faculty Association in conjunction with NEA (A-170-177), notes due process requirements have their origin in common law. They are to insure "fair and equitable treatment" by protecting as far as possible against arbitrary, capricious, or inequitable actions, "consistent with a fair and equitable treatment guaranteed to all American citizens by the first, fifth, and fourteenth amendments to the Constitution." These guidelines specifically state that the *reasons* for an adverse decision must not be arbitrary or capricious, but clearly relevant to competence to adequately perform the responsibilities of ones position. It stresses that the decision "Must not either directly, or by their effect, deny the individual the right to exercise *any* rights under the Constitution . . . [or cause] retaliation for such exercise" (A-176). The faculty openly objected to Dr. Bergman exercising his Constitutional rights, such as his right to author and publish a monograph by Phi Delta Kappa titled, *Teaching About the Creation/Evolution Controversy* (293).

Due process requires that the respondent have specific accusations, the opportunity to face his accusers, to respond to charges, and have an opportunity to refute the evidence used against him. While at BGSU, as is shown by the court testimony, Dr. Bergman was aware only of vague concerns, and this only through the grapevine, rumor, or innuendo. The document further stresses that "reasons and *timely notice* be given before action is taken." Dr. Bergman was never formally given valid relevant reasons except "a lack of two-thirds faculty vote" in his favor, nor appropriate documented evidence relative to his tenure denial (A-186).

Furthermore, it is "the burden of the institution *to substantiate its claims and justify its actions* through presentation of proper, relevant, and sufficient evidence" (A-186). Unsubstantiated, vague or erroneous accusations, rumor and assumptions were used to support an action that is clearly contrary to the documented evidence. Dr. Bergman was not able to present this evidence at his hearing because the charges have never been delineated as required. Thus, he was unable to "hear and see all the evidence,

cross examine any person giving evidence . . . and present [his] own evidence to refute the charges of [his accusers]." The AAUP guide further states that, "the individual has a right to appeal this decision to a neutral third party (such as the American Arbitrary Association)." Dr. Bergman was never given this right. The document concludes that,

> Violation of civil, professional, and human rights by college[s]... is a wide-spread phenomena [witness the long list of DuShane Fund cases and AAUP's long list of censored institutions] . . . and in view of the serious and long-lasting personal and professional damage done to individuals affected by current hiring and dismissal practices, all institutions of higher education ... must ... adopt genuine due process safeguards .... (A175-176).

Other due process requirements include a probationary period, defined as a period when the professor's work

> . . . is under evaluation to determine whether or not it meets known, pre-determined standards of scholarship and teaching ability . . . During this period . . . he has a right not to be denied renewal of employment for arbitrary, capricious or frivolous reasons, or for reasons not related to known standards of performance, or for no reason at all
> ... Regular, formal evaluation of the performance of the probationary staff member should be carried out on the basis of established standards . . . [and] the institution has an obligation to provide every assistance possible [to help one overcome difficulties, before taking adverse action against him] (A-175-176).

Aside from objections to Dr. Bergman's religious beliefs and conclusions in certain publications, no valid relevant difficulties were ever directly delineated while he was at BGSU, thus obviously no assistance was ever made to overcome alleged "deficiencies." Tenure, the document stresses, "must be based upon relevant criteria." Much totally irrelevant criteria was used as a reason for Dr. Bergman's termination, such as his conservative dress (T-270, 580, 758-759, 733, 797).

AAUP standards (A-178-183) that "nearly every university in the country...follows ..." (T-346-347) and are almost uniformly adhered to by courts in an effort to support accepted professional standards, were also clearly violated. AAUP guidelines are not legally binding, but the University Charter, that was molded from them, *is* considered an extension of the faculty contract, and is thus legally binding (*Franklin and Marshall v.*

EEOC 1985; T-349). The university is therefore obligated to follow their own written guidelines, including the necessity for detailed, written, relevant, documented annual evaluations, that was proved, and the court ruled, were never provided.

This report (A-180) notes that direct evidence of discrimination rarely exists, and thus must be ascertained from a failure to give valid, acceptable reasons for nonrenewal upon the faculty member's request (which, in spite of repeated written requests, including from the president, were not given by BGSU in writing or otherwise), from deviations from procedures normally employed by an institution (and over a dozen deviations can be documented in this case). The chief concern of AAUP is academic freedom and proper procedures, including necessary hearings and due process. "Fairness throughout is seen as undergirding principle... the university should treat the faculty member... with good will in trying to reach these decisions" (T-348).

A major evidence of discrimination is unequal application of standards, or disparate treatment. The court in *Namenwirth v. U. of Wisconsin* 769 F.2d 1235 (1985) notes:

> To prove in Title VII [42 U.S.C.A. ¤ 2000e et seq.] disparate treatment case that employer's proffered motive for its action is not worthy of belief, evidence of a comparative sort is appropriate; if others were hired or promoted though by same reasoning they ought to have been excluded, then the motive is a "pretext" for discrimination. *Civil Rights Act of 1964,* ¤ 701 et seq., as amended, 42 U.S.C.A. ¤ 2000e et seq. In a Title VII [42 U.S.C.A. ¤ 2000e et seq.] disparate treatment case alleging discrimination in tenure, comparison evidence is appropriate (although)... such comparisons may be more difficult in ... academic employment decisions...they (are still often)... essential to a determination of discrimination. *Civil Rights Act of 1964*, ¤701 et sez., as amended, 42 U.S.C.A. ¤ 2000e et seq.

This requires comparisons of the person denied tenure with other faculty (a school cannot claim inadequate teaching if the person alleging discrimination had teaching evaluations similar or better than those of non-protected faculty who *were* granted tenure) or if standards traditionally viewed as important would have "strongly suggested a different result." No comparisons whatsoever on the appropriate criteria were made in court or elsewhere between Dr. Bergman and other faculty members, and all efforts to do so were

successfully blocked by the University. Jim Davidson, for example, who was granted tenure about the same time Dr. Bergman was denied, had no publications, often poor student ratings and, at best, an average record of service (T- 777).

Dr. Bergman's performance must be compared with the performance of other recently tenured faculty members in the same department, as required in cases on sex and race discrimination (A-273). This approach is the required standard (*Cussler v. U. of Maryland*) 430 F.Supp 602 (1977)). Yet the court seemed unaware that religious discrimination is proved primarily by comparative data, as is evident by comments such as "I think we are going too far afield with *what they did with somebody else*. We are talking about Gerald Bergman" (T- 735). To prove disparate treatment, one *must* make comparisons as to how similarly situated persons not in the protected class of the claimant are treated (*Mozee v. Jeffboat* 746 F.2d 365; 1984).

Discrimination can be determined only if performance is compared and/or evidence of "inadequate evaluation procedures and provisions for due process, the failure to state reasons for nonreappointment, or the statement of vague reasons..." exists (A-181). The court has refused to enforce these standards in this case, even though race or sex discrimination are proved by focusing on these very factors.

The University's Allegations

A review of all of the written evidence shows all of the universities allegations to be totally false. Each of these allegations will be considered below. It is clear that Dr. Bergman's distracters were clearly on a "fishing expedition," looking for whatever dirt they could find, valid or invalid. They repeatedly made, at best, innuendoes and, at worst, numerous false charges. Dozens could be mentioned, but three that were successfully squelched will suffice.

The allegation that Dr. Bergman was falsely claiming credit for an article that he had published under a pseudonym was spun around the faculty. Dr. Bergman was never given a chance to respond to this, and finally the university itself wrote to the publisher,

confirming that Dr. Bergman had indeed written the articleÑyet faculty continued to believe and spread this lie (A-12). They also claimed that he had not written a certain book chapter in a book edited by Dr. Calvert Dodge. At his deposition they produced a copy of this book, and tried to corner him. The edition they had though, was *not* the one with his chapter (D-4). Another allegation was that Dr. Bergman was not a co-author of a workbook. The university again tried to prove Dr. Bergman a liar by producing the wrong bookÑhe co-authored the *instructor's* guide, as it clearly stated in his vita and on the cover of the book itself (D-5-6). These rumors were squelched *only* after his tenure was denied because the allegations were brought up at Dr. Bergman's deposition, and he was then given a chance to respond. This, of course, *is not the case with the new allegations brought up at the trial itself*. If they had, the judge likely would have concluded that he falsely claimed credit for a chapter that he did not write, and falsely claimed co-author status of a book.

Another example is an advertisement that the University falsely claimed listed Dr. Bergman "as a faculty member at BGSU" (T-211). BGSU was printed below Dr. Bergman's nameÑwhich means *only* that Dr. Bergman was connected with the university. Dr. Bergman was then a BGSU graduate student, thus *was* affiliated with the University in a formal way. Dr. Bergman signed the contract, completed the book, and sent them the final manuscript while on the faculty, and the book came out a few months later. Dr. Bergman has no control over their decisions relative to how he was listed (Karlen v. N.Y. Univ. 464 F. Supp 704(19). When Dr. Ferrari inquired to the publisher as to what happened, they sent their explanation, noting that Dr. Bergman did not misrepresent himself. Nor did he have any input in the advertisement, and did not even see it until it was published. Furthermore, it is clearly wrong (and hardly ethical) for Dr. Ferrari, John Mattimoe and others to claim that Dr. Bergman was listed as a BGSU faculty member in this advertisement, when it did not list Dr. Bergman as such. A publication lag of a year or so is not uncommon, and it is normal for publishers to list one's university affiliation

when one wrote the article or when it was accepted. Publishers commonly list an authors affiliation when the book was written, completed or accepted for publication, even though it may not come out until a few months after one's formal affiliation as a faculty member has terminated.

Numerous accusations were brought out in court, which, even although not verified, were likely assumed to be true. The judges findings contain scores of inaccuracies and wrong informationÑeven some basic information is incorrect. Dr. Bergman taught in the Educational Psychology and Tests and Measurement areas. Mattimoe inferred that Bergman taught Educational Psychology at Oakland Community College when he claimed he taught Introduction to Psychology (T-226). The college could easily be contacted for verification to establish that he, indeed, taught not education psychology, but introduction to psychology, child development, etc.

Contract Allegations

The defendants claimed that Dr. Bergman was only a temporary employee from 1974 to 1978. Whether Dr. Bergman was a probationary or a temporary employee from 1974 to 1978 is one of many documented internal contradictions. A memo from Chair Reed (T-46) clearly stated he was then in his "fourth of sixth years toward tenure"(T-52; A-127); another says his "second year of six" (A-136). This contradicts the allegation that he was a temporary employee because, as stated on the contract, a temporary contract does not lead to tenure (T-307). Dr. Bergman was told verbally, his chair testified, and numerous memos stated, that he was in a tenure track position, not a temporary position as stated on the contract itself. Mattimoe ridiculed this contention, noting that most of Dr. Bergman's contracts were checked "temporary" not probationary (the box below it). On the '76-'77, '77-'78 and '78-'79 contracts a "temporary contract" is defined as an appointment for "a specific period of time and ... does *not lead to tenure*" (A-2-10). Why than did Dr. Bergman go up for tenure? Why was he given these temporary contracts?

As per the agreement, he should have been tenured *in his sixth year*, as BGSU did not meet their notification deadline (A-127, 136). Jim Davidson was tenured for this very reason. Dr. Bergman repeatedly experienced this difficulty Ñhe simply did not know what or who to believe, and even the written rules were constantly violated (T-278-279). He inquired about this contradiction, and was told he was on a tenure track, and to sign the contract; these documents reflect a serious inconsistencyÑis this ethical?

Dean Elsass' reservations were solely because Dr. Bergman did not receive the support of the department and not, as implied, because of reservations about performance, ethics, or other concerns (T-702-703).

For these conclusions, the judge obviously relied heavily upon the defendant attorneys' *Proposed Findings of Fact and Law,* not upon the court testimony or the documents presented. Not one person testified that they had first-hand knowledge of documented ethical violations as delineated here. And of those concerns raised, most were seen as invalid, even by the defendant, and for this reason were not included in their *Proposed Findings of Fact and Law.* The allegations in paragraph 12 are all patently false because the faculty evaluation committee voted to terminate Dr. Bergman long before most of these issues surfaced, and **before** Dr. Bergman had in print a single article under his name.

The area he taught in then, educational psychology, also voted to terminate him *before most all* or *all* of the alleged ethical concerns existed (A-128-137). Thus the real reasons for termination must be concerns that existed before this date (late 1975), and the alleged reasons that occurred after this date cannot be valid. Dr. Bergman was given another contract because the faculties' vote was overturned by the administration. No written reason for their negative vote was provided, although Dr. Bergman repeatedly asked for a formal explanation. Concern's over his religious beliefs, though, were repeatedly mentioned (T-532,533,739,737,738,741,745,749,852,861,959).

Dr. Bergman was then given a terminal contract in 1976 because it was alleged

that he had not completed his Ph.D., and for no other reason (T-276). If this is true, he was the only faculty in the department terminated for this reason (Richard Burke, Jim Davidson, Peter Wood, Rita Brace and numerous others did not have a Ph.D. during much or most of their probation, and were not given terminal contracts; Peter Wood even left the university, completed his doctorate, and was *rehired* with tenure). Dr. Bergman in fact had at this time completed all the work for his Ph.D., and when verification was supplied, the contract was changed (A-127). Why was verification not asked for before a terminal contract was issued? Colleges cannot require a minority to follow a standard that is not applicable to all other similarly situated persons (Ferguson v. Thomas 430 F. 2d 852: 1970).

As to the allegedly *incorrect contract*, Dr. Bergman obviously cannot know exactly what transpired, but seriously question if it was "incorrect." A letter to Hollis Moore stated that Dr. Bergman was appointed at the rank of assistant professor in the department EDFI; (T-31) and Dr. Bergman assumed that this is what the person who wrote the letter intended. Further, Dr. Bergman was offered this contract and both the "Acting Chairman of the Department of Education . . . and his appropriate Selection Committee" recommended it (A-1). Is it ethical to retroactively claim a dozen years or so later that this contract was incorrect? University due process requires that once issues are dealt with, they are to be dropped.

No fault was ever placed upon Dr. Bergman for producing the allegedly incorrect contract, only for accepting it years later (T-277). Dr. Bergman assumed that in evaluating his background (several years part-time teaching experience, co-author of several publications, etc.) the university had decided to offer him the higher rank which Dr. Bergman believed he merited. If one assumed one's car was worth $4,200, and was offered $4,500, it is not unethical to accept the higher amount. The rank he would be offered was"up in the air"Ñonly a likely level was given. Nor is it unreasonable to assume that given his three years research experience and, about the same part-time

teaching experience, nine years of college and a signature away from his Doctorate, a salary of $11,000 for a large state university professor was hardly excessive, even in 1973. Is it unethical for him to assume that his credentials merited an offer of $11,000 instead of $10,500? And his inquiries to Dr. Harrington, the former dean, confirm that this was a reasonable assumption (T- 29, 33).

Allegations about Putative Vita Inaccuracies

Many false claims were made about Dr. Bergman's vita. For example, the statement "claiming to be expecting a second doctorate from BGSU in psychophysiology when he was not enrolled in the Psychology Department" is manifestly untrue. This issue is from Dr. Bergman's 1978 *promotion* vita. Tom Bennett stated that when he was on the committee that considered Dr. Bergman for *promotion*, which was in 1978, he called the Psychology Department who, he claims "could find no record" of Dr. Bergman "as a graduate student there" (T-550; 815). Dr. Bergman's transcript proves that at this time he was a graduate student taking courses in the Department of PsychologyÑand was such since the *winter quarter of 1977* until he later transferred to the sociology department (A-129-130).

The statement "claiming to be a therapist when he had no license" is hardly unethical when *no license is required to be a "therapist."* The judge does not specify the *type* of therapist Dr. Bergman claimed to be, but this likely refers to a vita which noted that a role he filled at BGSU was "as a therapist" which, in the context, clearly refers to a *pedagogical or educational therapist* as defined by the *Dictionary of Education* (Prof. Good pp. 290) as one who corrects problems, "particularly in the academic area, through specialized educational techniques." As "working at a pain center as a therapist" obviously refers to a "pain therapist," dealing with the pain problems or "working at a stroke rehabilitation center as a therapist" likewise could only refer to a *physical therapist*; from the grammatical construction the statement, "working as a teacher and as

a therapist," could *only* refer to a pedagogical therapist. The term "therapist" is thus fully appropriate, and the syntax is proper because it is redundant to modify the word *therapist* such as "working as an *educator*, teaching, and as an *educator* diagnosing and treating learning problems." Dr. Bergman was highly involved in this accepted field dealing with learning problems, specifically utilizing cognitive mapping and other learning therapy techniques (T-78), and his colleagues knew this (See *Educational Therapy in the Elementary School* by Patrick Ashlock, Springfield IL, Thomas Pub. A-18-20).

The *American Heritage Dictionary of the English Language* defines a therapist as a specialist in conducting any therapy to treat illness, disability, or malfunction, that includes licensed M.D.s to nonlicensed auxiliary staff. The word is from the Greek *qepupeutik—s* and means to *minister* or attend to another's needs. Even hydrotherapists (using water to treat or ameliorate a variety of problems) are properly called *therapists*. Common use of the term supports this, as is obvious from the following quote (A-11-13).

> What short-term <u>therapists</u> are finding is ... that to some extent the supportive relationship itself can help ease emotional difficulties. A congressional study . . . found *there was no difference in the efficacy of therapy as administered by M.D. psychiatrists, psychologists, psychiatric social workers or lay counselors, such as clergymen.*

Even Ann Landers noted: "A person with no college degree can call himself (or herself) . . . a therapist"(A-14). Jim Davidson claimed to be a "counselor" during the first few years Dr. Bergman was at BGSU although he did not then have a license. Dr. Carpenter was thrice referred to as a counselor. Why did he not protest, noting that he is not licensedÑwhich Ohio law now requires to use this term (T-350, 368, 372)? He even thrice used the term to refer to his AAUP work (T-353-355). If confusion exists regarding the use of this word, asking the writer what is meant is the only proper way to deal with the concern. Why was this never formally done, as required by the University Charter, so Dr. Bergman could have had a chance to respond (T-402)? Even in court this

issue was not raised, thus Dr. Bergman could not even here respond to it!

It is also manifestly untrue that Dr. Bergman claimed to have "published books" that were not published. What books are being referred to here, we can only assume, but likely refers to concerns resolved during his successful promotion. The original promotion papers, submitted 1-27-78, clearly state that these books were "in process" and this is *underlined* (A- 164-166). It also states the "expected publication date" for both. The first one was not in print, and those colleagues concerned knew this (T-475-476; 507). The second was a revision of his Ph.D. thesis, which was *already published* and thus can appropriately be listed as such (A-135). Dr. Campbell listed his thesis as publishedÑand it was ethical for him to do so (T-434).

In the revised version as well, it states on page 7b, "Books in Process" and lists *expected* publication dates (A-167-169). At this time Dr. Bergman had about twenty books, monographs and book chapters in press or in print, and *most* of these were not listed. One would hardly not list books that were completed or accepted for publication, and then falsely claim to have others. As Dr. Bergman was the most productive faculty member in the college, and quite likely in the university, Dr. Bergman would obviously not need to make false claims as to publications (A-36). Dr. Bergman understated his background partially because he had published well beyond that required, and was told that to list all of his publications may cause jealousy problems. The *vita* used for promotion only listed publications, not *in press* or *in print* status, and from an academic evaluation viewpoint essentially *no difference* exists between a publication *accepted for publication* and one that is *in publication* (*Carr v. U. of Akron*, 465 F. Supp. 886 pp. 893;1979). Both can be listed (T-687). Furthermore, this issue surfaced *only* during promotion (T-309-310) and the court stressed as to these concerns,

> . . . I have told you promotion is not the issue in this case, any testimony we take about his promotion [is not relevant]. His promotion was eventually granted, and the testimony about the promotion is useless. All we are talking about is denial of tenure [and that] promotion is [not] an issue in this case; it is denial of tenure ... why are we wasting time talking about promotion evidence? [as Dr. Bergman

> was] finally granted promotion... there is no issue here ... the tenure ... which was denied... is the issue in this case (T-781, 742-743).

A few faculty testified the vita issue was not resolved in their minds and affected their tenure vote. It was resolved in Dr. Bergman's favor by his Chair, the college-wide committee, the Dean, the Provost and others, so why was the issue not put to rest? (T-307, 403, 690-698, 705-706; D-43-45). To the question: "If there were any questions about adherence to ethical standards," under "the university's governance procedures" should the concerns of the faculty as to "the ethical-unethical charges be brought to the attention of the probation or faculty?" Dr. Carpenter answered, "Absolutely . . . it would be a star chamber otherwise" (T-402). They were never raised to Dr. Bergman except via the grapevine, yet were obviously not valid because they *were* fully resolved in his favor (T-307, T-295, T-698).

AAUP guidelines are adhered to by nearly every American university, including BGSUÑor so they claim, but did not follow them in this case (T-347). AAUP's major rule is that "the university should treat the faculty member fairly and with goodwill in trying to arrive at these decisions" (T-348). Minimal fairness *requires* concerns be elucidated and that faculty members be given an opportunity to respond. As Dr. Bergman repeatedly stated in his deposition and testimony, when Dr. Bergman gave his working vita to his colleagues as part of the promotion packet, he stressed that this document was prepared for his own use, and thus was not complete. Allowed only a few days to prepare, he barely had enough time to complete the promotion papers (which were correct and never questioned) and he did *not* have a vita, so used his rough incomplete draft, and has never denied such (T-57, 58, 61, 82-83).

The committee stated that no problem existed in using this document, and would ask for clarification if questions arose. Why did they not do so? If a document is not clear, or a reviewer believes it may be incorrect, the proper response to approach the person who prepared it. It is grossly unethical to respond in this way to a document that was, at best, supplemental material (A-92-95). Dr. Bergman's promotion should have

been based on the *promotion papers*, not a rough draft *that was obviously such* considering the typos, omissions, and many hand corrections in the document. This was adequately discussed in numerous memos and Dr. Bergman was exonerated by the promotion committee that voted to promote him, and he assumed the matter was dropped. Even the university's attorney, in discussing this with his attorney, agreed that it was resolved, claiming only that vague "lingering doubts" were left. Yet it was resurrected.

Because all of these concerns were satisfactorily resolved in Dr. Bergman's favor during his promotion process, it is clearly unethical to bring them up again. Thus, in answer to the question "If ethical questions had been raised earlier and resolved earlier, can we assume that ethical standards had been adhered to when we start considering the other three criteria?" Dr. Carpenter said, "Yes. . . otherwise, it is double jeopardy . . ." (T-403). Dr. Bergman's department chair, Dr. Reed, testified that if any deficiencies existed, they would have been conveyed to Bergman, yet none were expressed. He stated, "That's right . . ." in answer to "If there are any deficiencies along the way, ... you would have . . . told him . . . " (T-307). Dr. Reed also testified that if a professor was performing unsatisfactorily, written communication would be *required* (T-287).

Why were no written communications sent to Dr. Bergman relative to the alleged vitae inaccuracies or other concerns if this was in fact an issue? The vita concerns existed **only** during promotion, and were resolved in his favor (T-309-310) and no new similar concerns surfaced between when Dr. Bergman was promoted and applied for tenure (T-310). Dr. Reed also stated that he was *not* aware of any lingering rumors because they were all satisfactorily dealt with (T-311). Even the *Ohio Civil Rights* concluded that Dr. Bergman was not denied tenure because his "vita was inaccurate" (A-236).

All promotion concerns were resolved in Dr. Bergman's favor by the promotion committee, and he was promoted. Reed agreed as to concerns relative to misrepresentation that "Once the PPPG [the college-wide appeal committee]

recommended promotion we assume the PPPG had resolved those concerns for themselves, at least" (T-295). Dr. Reed concluded that the vita concerns were a misunderstanding, not intentional, "benign" and not deliberate misrepresentation (T-296-297; D- 1-2). Dr. Bergman has admitted that his working vita was not as clear as possible, but the ambiguity was hardly misrepresentation. This information should have been conveyed to the department to forever lay the issue to rest. Yet the issue was not fully resolved there (T-294). In answer to the question,"whatever concerns about the vita which may have been resolved at the PPPG level may not have been ... at the department level," Dean Elsass said, "That's true" (T-698). The issues he cited was the second Ph.D. and his misranking in various publications (something that Dr. Bergman has little control overÑsee Karlen v. N.Y. Univ. 464 F. Supp 704).

Because this misinformation affected the tenure vote, the court asked, "Has any thought ever been given to giving him another tenure hearing, and if . . .[not], why not?" (T-705-706). Dr. Elsass replied that *there was no need for another hearing* because Dr. Bergman *was exonerated by the college level committee*Ñand his promotion was forwarded to the Administration. The Dean testified and wrote in his recommendation that, with the submission of clarification, the "requirements for promotion had been met" (T-689). He noted that at the college level clarification was still needed, but the college-wide evaluation committee was satisfied that no breaches of ethical conduct occurred, and so recommended promotion (T-690). The need to repeatedly deal with false accusations demonstrates that a valid reason for Dr. Bergman's termination does not exist, and thus what appears to be one was contrived.

No concerns existed relative to any papers that Dr. Bergman prepared for tenure (T-309-310). In fact, no claims, memos, etc., exist relative to any vita concerns *after* promotion (T-694). The proper way to deal with this is to communicate to the faculty that all concerns have been answered, and specifically offer the evidence and rationale thereof. Is it not unethical to let them believe, for example, that Dr. Bergman

deliberately misrepresented himself on publications when publishers' letters and other evidence proved that this was not the case, and the judge ruled in harmony with this? The judge's awareness of this problem is reflected in his statement:

> One of the things that is bothering me ... Dr. Elsass, is that the FPCC [the final appeal board] made a decision based on misinformation that was not Dr. Bergman's fault ... that [for] his promotion, he submitted a vita which had listed a bunch of publications where he was [mis]ranked ... the faculty members ... took umbrage with that and then when it came up for tenure, some of the matters had been straightened out but not all of them. Then he got an unfavorable vote ... based on misinformation. (T-707-708)

This is exactly our contention. Why was Dr. Bergman not formally informed of their exact concerns, and permitted to respond to those that were still alive? As Dr. Bergman's Chair, Dean and Provost, according to discussions with them and their testimony, concluded that these matters had been taken care of, why were "Some of the matters . . . straightened out but not all of them"? Why was Dr. Bergman not given an opportunity to straighten out all of them? The court noted that

> "all through the case...the last four days,we have been hearing that one of the reasons for the unfavorable vote by the tenured teachers is that Dr. Bergman misstated his status in his publications.... He did not do that..."[Dr. Ferrari then answered] Yes, I would agree..."(T-627-628)

The majority of the *department promotion committee* did not conclude that the vita was "inaccurate," since *most* voted in Dr. Bergman's favor (D-3). Many professors admitted that they still do not know the facts about these concerns; George Siefert, instead of investigating what occurred, admitted he "shouldn't say anything because I really don't know." (T-512) As to ethics, Siefert admitted *he* personally did not verify his concerns (T-507-509). And Dr. Marso concluded that, after hearing both sides, he resolved his doubts *in Dr. Bergman's favor* (T-853). Even Provost Ferrari did not view vita concerns as "a major factor," and if he was *not* convinced valid ethical concerns existed, why was tenure denied (T-636)?

Religious Discrimination Evidence

The judge dismissed the massive evidence of *religious discrimination* in this case with one sweep of his judicial hand: "The court finds that the faculty was not influenced by inappropriate considerations of Bergman's religion." In cases of race or sex discrimination, it is not necessary to demonstrate the seriousness of these problems, and the court should be well aware of the fact that religious discrimination is a major social concern and problem, both in its extent and historical duration. Recent documents conclude that the history *in this part of the world* has been one of "officially sanctioned religious bigotry, political intolerance and suppression of ideas . . . entire families who practiced their religion were imprisoned" (A-182). De-classified documents reveal that the Justice Dept. took "Draconian action against anyone who dared to continue practicing" certain religions (A-182).

Even violence is not rare against religious conservatives, especially on American state college campuses. Thousands of documented examples could be cited to illustrate what a recent event shows. Benjamin Hart, while at Yale, wrote an article criticizing what he thought was favoritism for certain groups and discrimination against others, such as religious conservatives. The article, although admittedly insensitive, "precipitated a physical attack on Hart by Stefan Smith [a college administrator] . . . Smith was finned $250, but the Dartmouth faculty showed its colors
. . . three days later by voting 113-5 to censor, not the assailant but [Smith]." (Fund, 1986:53) The vote well illustrates the wide spread intolerance towards certain religious conservatives. In condoning this violence, one is condoning intolerance. It is thoroughly documented that a wide spread intolerance against religious conservatives exists in most colleges and universities (A-274). Examination of college textbooks reveals that atheism is openly taught or assumed. One not familiar with current textbooks may question this conclusion, but extensive research has empirically confirmed this (A-190-191 and Addendum).

According to Donald Sills, President of *The Coalition for Religious Freedom*, religious persecution is now occurring "in unprecedented numbers" and "at least 8,000 cases" are now in litigation, mostly involving conservatives [Quoted in Smith, *Human Events,* Aug. 31, 1985, p. 8]. Amnesty International concluded that religious intolerance is "rife around the world" (A-187-189). Many works have been written by well-known conservative Christian leaders who, in essence, stress that it is so serious in America, that civil disobedience cannot be ruled out. It would be tragic if the civil rights movement of the 1960s was repeated, only this time with religious minorities as the main participants- See *A Time for Anger, The Second American Revolution,* and other works that portend what may happen if the courts do not appropriately respond to the basic human rights of this group. Their rulings have tended to reflect prejudice against the human rights of conservative Christians, creationists and others, and biased in favor of a non-theistic position, often termed secular humanism (See Whitehead, *Tex. Tech Law R*. Vol X, No. 1, 1978).

Discrimination because of Dr. Bergman's creationist beliefs and involvements is blatantly obvious in this case. Although about 44% of the population are creationists, we know of not a *single* out-of-the-closet creationist faculty at BGSU (A-192-199). Research has found *extremely few* out-of-the-closet creationists at *any* state university anywhere who, as creationists, were openly granted tenure, especially in the life sciences. Those with tenure most often become creationists after they earned it, and most have problems after they become creationists. A short review of the massive evidence that creationists are one of the most hated minorities in academia is found in the addendum.

Many writers have compared the American anti-creation movement, and the bias and open bigotry expressed by many scientists against creationists, as similar in many ways to the antagonism and discrimination that Jews faced at the beginning of the Nazi era. There are differences, of course, but many clear similarities. To prevent a "Christian holocaust," awareness must exist of the clear, insipid states of a movement or, more

accurately, a rapidly growing trend. This movement of intolerance reflects itself not only in censorship, but firings, denial of degrees and other forms of discrimination as documented in the book *The Criterion* (A-294). In order to respond to this situation, we first must be aware of it and, secondly, rationally deal with it (A-142-143, 75, 91). While every creationist is not affected, most are. University faculty commonly comment *in print* that they do not know of a *single* creationist in their department, or in any university science department (A-300). Although this claim is made in an effort to cast disrepute upon the creation world-view, it clearly reflects the extent of discrimination against creationists (A-140, 78).

An analogy would be faculty bragging that they do not know of a *single* Jewish science professor in a country that is approximately half Jewish. This was the case in Germany during WWII , but was clearly so because of discrimination, not the incompetence of Jews. Nor is it due to incompetence of creationists, unless we assume, as do many anti-creationists and most university academics involved in the creation-evolution controversy, that **all** creationists are incompetent (see Addendum). A BGSU faculty said in print that creationists "do not gain academic positions . . . not because they are not given fair treatment as Jerry Bergman claimed, but because their approach to the subject is not scientifically justifiable." (A-91). He then concluded if creationists built bridges, they "would collapse," if automobiles and T.V. sets, they "wouldn't work." It is no wonder discrimination against creationists is so common. What if he claimed Jews could not be scientists because their approach was not "scientifically justifiable"Ñas **was** often said in Nazi Germany?

The fact that Dr. Bergman was terminated primarily because of his religious beliefs, activities and involvements was well known at the university. Dozens of newspaper and magazine articles have been published, both locally and nationally, openly criticizing his religious beliefs, several even stressing that termination on the basis of his religion was just and proper. With little trouble, we obtained a dozen signed,

notarized affidavits from Dr. Bergman's immediate colleagues to testify to this fact (A-98-126). EEOC investigator Mary Thompson, and a review of hundreds of EEOC cases, verified that only two or, at most, three affidavits are usually necessary to establish a *prima fascie* case (See *CCH Employment Practice Decisions* Vol. 1-26). Cases are often won on the basis of one such affidavit (See *Wilson v. City of Aliceville* 779 F.2d 631 (1986). The judge totally ignored both the reams of testimony and all of the affidavits (most were submitted with *Amicus Curiae* brief). The state considers itself fortunate if they have one or two good witnesses; twelve is extremely rare (and often the witnesses had criminal records, problems existed with their testimony, or the only witness was an accomplice to the crime who turned state's evidence, making his testimony suspect because of motivations that, some conclude, amount to succumbing to bribery). Dr. Bergman could have easily obtained 30, or 40 affidavits, but the judge specifically told both attorney's not to stack the evidence (have four or five witnesses claim the same thing), we used a few appropriate witnesses to testify *to each* claim. Dozens of individuals could have testified to each claim but, in contrast to the University who often had numerous persons testify to each of their claims, we followed the judge's instructions. We were clearly handicapped for so doing; why was the university not also obligated to follow the judge's orders? Furthermore, how many reputable witnesses would it take to prove discrimination? If two dozen is not sufficient *What about a hundred?*

The AAUP report above notes that derogatory statements "provide direct evidence for ...discrimination." (A-180) Dozens of statements demonstrate that religious bias existed against Dr. Bergman. The university's attorney, in full open court, called him names, namely "*a Jehova"*, equivalent to calling a black a "*niggerÓ* (T-229). He not once but twice used the unacceptable derogatory term (T-229).

Some slurs were not clear because the transcript contains hundreds of spelling and obvious typographical errors. Although in most cases, except in the spelling of names and terms such as "hermeneutics," the mistake is obvious, it occasionally distorts the

testimony (T-27). Our point was, Dr. Bergman claimed discrimination because of his religion, and one of their principal tenets is creationism (as well as opposition to abortion and homosexuality). *His specific stand on these issues* is what caused difficulty. All were involved, and all are intrinsically interrelated and cannot be separated, although most of his problems at BGSU resulted from his active involvement in creationism. Dr. Charlesworth, shortly before Provost Ferrari denied Dr. Bergman's tenure, noted the religious antagonism against Dr. Bergman by the tenured dept. members, and wrote that she concluded :

> From my conversation with the tenured faculty regarding the... evidence they had to support their concerns,... was pretty flimsy . . . there is discrimination because of religious... beliefs (and interests)....numerous times when I was in the mailroom ... certain tenured faculty read ... addresses on Jerry's mail and giggle and make derogatory comments, especially if the mail was from a religious press or organization... (A-28-31).

Such slurs have been held "sufficient to establish direct evidence of discrimination" (*Wilson v. City of Aliceville,* 779 F.2d 631 1986). The name-calling was not just limited to personal contacts. Numerous letters printed both in local and national papers and magazines criticized not only Dr. Bergman's religious beliefs, but his conservative moral standards. After a rash of arrests for soliciting homosexual sex in public BGSU lavatories, Dr. Bergman wrote to the *Bowling Green State University News* reiterating what happened when he brought his concerns about this problem to the attention of the officers at BGSU. In response many letters from faculty and others were printed who criticized his religious position (A-276-277). Mr. Hessey (English Dept.) stated, "Dr. Bergman invokes those old standbys 'legal and community moral standards,'" and concluded, "Whatever happened in those bathrooms could never be as downright ugly as the type of 'thinking' evidenced by Dr. Bergman's letter." A Sociology professor (R. Serge Denisoff) stated that a letter he wrote expressing Dr. Bergman's concern about homosexuality openly occurring in the BGSU public restrooms was a "wonderment" and "an exercise in ad homonym innuendoes" calling into question his integrity: "Is he

seriously suggesting, without any documentation, that the BGSU faculty is 'immoral', and the administration is engaged in a Watergate-like cover-up. This comes very close to McCarthyism." Dr. Bergman's statement was based on several research studies he conducted, which he was *openly criticized* for completing (T- 302, 938). Several persons objected to his doing empirical research on the immorality of professors, especially the problem at BGSU relating to inappropriate behavior between professors and students. Why was this survey even brought up at the trial? All other studies have consistently found the same results that Dr. Bergman's did. One of these (A-295) concluded that among students and faculty, "extremely exploitative and harmful ... sexual contact [that involved coercion] is quite prevalent overall (17%) and among recent doctorate recipients (22%) and among students divorcing or separating during graduate training (34%)."

Mattimoe's questioning also evidenced clear bigotry: "And so you went onto the faculty at Bowling Green . . . with a built-in feeling that a good many groups are antagonistic to your beliefs?" (T-237). Questions as, "From your writings and in your deposition, I take it that you feel... that creationists .. are unpopular; is that correct?" (T-235) are absolutely amazing. Mattimoe's bigotry was also reflected in statements such as "Northern Kentucky is probably still in the '20s and '30s, aren't they?" akin to "Southerners are backward," or "blacks are ignorant, aren't they?" Dr. Carpenter, likely shocked, answered, "No comment." (T-391)

Questions were even asked about Dr. Bergman's Selective Service classification, and if he filed for C.O.status (T-230). What does his beliefs on war have to do with his current religious discrimination case? This line of questioning was designed to produce bias against Dr. Bergman. Mattimoe, as the judge noted, appeared before his court numerous times: "Mr. Mattimoe and I tried a lot of cases together, and Mike Scalzo is the son of a very close friend of mineÑwe used to office together when I was practicing law . . ." (T-928). He thus knew the judge's background and military views. Judge Walinski (T-895) spent "37 years with the U.S. Navy . . ." and his strong interest in the

Navy was reflected elsewhere (T-903-904).

The general hostility of some judges and higher education in general towards religion, especially certain religious beliefs, is reflected in the fact that creationists have, of the numerous cases they brought before the courts since the turn of the century, lost virtually every one except the Scopes trial (that was later overturned on a technicality). That this court loss record is because of religious bigotry and intolerance is well illustrated in the forceful, but yet minority decision in the Louisiana Supreme Court case. Bergman's case must be appealed *forma pauperis* partly because, after an extensive legal research, the dozen or so civil rights attorneys contacted, including several of national repute, all concurred that the likelihood of winning *any religious discrimination* case is virtually zero, regardless of the evidence. And the results of his BGSU case have rendered him unemployableÑhis almost 6 year search for regular full-time employment has been unsuccessful. The record is clear: as the U.S. government itself concluded, American courts are not vigilant in defending the rights of religious minorities in employment situations, and tend to support the employer regardless of the evidence (A-197-200). Religious discrimination cases finds persons commonly terminated for incredibly flimsy reasons that almost invariably are upheld by the courts (A-15-16). Even accommodation cases have "no teeth left" (A-15-16). It is grossly hypocritical for this nation to claim freedom of religion exists when until recently civil rights abuses abound with government sanction. And one of the most common techniques of harassing religious minorities is denial of employment.

Organizations dedicated to researching and litigating religious freedom issues (such as the *Rutherford Institute* and *The Freedom Council*) have documented *thousands* of cases of gross religious discrimination, nearly all which are censored by the secular press and can be located only by reading sympathetic journals. They are so common that they were constantly highlighted by the Soviet bloc countries as proof that religious freedom does not exist in USA (witness the statement in *Time* (A-17) "that the Soviet

press virtually every day" discusses "rampant" religious discrimination in USA). The courts either can respond to court earned human rights, or contribute to the tragically increasing violence against those who are now fighting for their religious freedom and human rights.

The Witnesses, although they have earned an astounding record of success before the Supreme Court in freedom of religion, speech and other cases their record in employment cases proves that the claim of government concern for religious minorities is a lie (See EEOC Decision 76-60 [Nov. 20, 1975], *Palmer v. Board of Ed, City of Chicago* 466 F. Supp 600 [1979]). The lower courts, as the many thousands of decisions that they have rendered prove, have shown limited concern for their rights, and have at times manifested a hostility that, in the light of Shadrach, Meshach, and Abednego, William Tell and others, proves bigotry.

The court testimony in the Bergman case relative to these concerns was clear and forceful. Dr. Gusweiler (T-330) stated that "Jim Davidson . . . showed me a pamphlet from Phi Delta Kappa that Dr. Bergman had written on creationism...He threw it on my desk and said this is what Jerry was teaching ... He was very adamant it [the pamphlet] was based on religious views and Jerry was teaching religion in the classroom" and that (T-334) Dr. Campbell believed Dr. Bergman "belonged to a fanatic religious group . . . taught religion in the classroom and the university didn't need people like [that] and" we had to do what we had to do to get rid of them. Her motivations for testifying, an important factor in assessing its value, were as follows:

> I didn't say anything for months... about this information because Malcolm was my friend and I was really torn between friendship and [whether] ...people on the Tenure Committee had a right to do this kind of thing to another person, and it wasn't that I had any loyalties toward Jerry .... [Actually, there were open, known conflicts between them]... I felt can a person really be denied tenure based on what they believed in . . . Malcolm is my friend and ... I struggled for months ... do I say anything, and ... I finally went to Jerry and ... I told him what I knew (T-336).

The reasons first given as to why tenure was denied included "looks", then "As the months went on, more and more talk in the Bldg. was concerning Jerry [the word in the transcript is John, it is obviously Jerry] and eventually Jim told me . . . he belonged to a crazy, religious group and . . . was denied tenure on those reasons" (T-329).

Dr. Peters even stated that she felt Dr. Bergman would fit better in a Christian college! Although she later claimed this was "advice," Dr. Bergman considered it derogatory, similar to telling a black he "belonged" in a black college. She later elucidated this advise (T-832) likely in an effort to blunt her testimony, claiming that she went to a "small Christian college". Valparaiso, though, is hardly either small or Christian, and is not even a member of the Christian College Coalition.

Dr. Bergman's colleagues knew full well of his concerns in this area, thus cannot claim that they voted blind as to his religion (T-514;A-289). Trevor Phillips admitted that he had enough personal conversations with Dr. Bergman to know what his religious interests and beliefs were (T-741) and was fully aware of his religious concerns (D-24): "The fall of the year he came... I was introduced to Dr. Bergman . . . And we discussed his religious philosophy . . ."

Although Provost Ferrari *at first* denied knowledge of Dr. Bergman's discrimination concerns (and openly lied in his affidavit, R-39-41,43-44), he admitted in court that he was fully aware of accusations and concerns relative to Dr. Bergman allegedly "carrying on religious activities in the classroom" (T-582) and in his deposition noted that the faculty were concerned about Dr. Bergman's religious writing and alleged "proselytizing" (D-46,48). Dr. Ferrari *then later* in contradiction to his previous statement, testified that he *did not* have any discussion regarding Dr. Bergman's religious beliefs and did not know what his religion was "ever" (T-630). Yet still later in his testimony he admitted he was aware of Dr. Bergman's religious concerns, but he

recognized this:

> Òessentially as an academic freedom issue, that . . . colleagues were concerned that he *might* be introducing materials into the classroom [and]... *might* be meeting with students on religious issues [thus I saw it] totally, as an academic freedom matter, not as discrimination againstÑbecause of . . . religion." (T-633-634)

It is obviously difficult to separate academic freedom and religious discrimination concerns, but Dr. Bergman has consistently presented it, and others saw it, as a concern over both issues (T-738). When one hears of concerns of religious proselytizing, "the natural question that comes to most people's minds is what religion would the person be." (T-651). Although Ferrari *denied* that he knew of Dr. Bergman's religious concerns when his promotion was before him, he admitted he found out "after proceedings began in FPCC" (the hearing board), and thus *must* have known before he ruled on the FPCC's erroneous conclusions (T-635). Is this not perjury?

The academic freedom issue was clearly a long standing concern, especially the allegations that Dr. Bergman's handouts contained "religious material." Trevor Phillips claimed that he and other colleagues were concerned about his "injecting religious material in" his teaching (T-745) and that his curriculum was "in sync . . . with his religious beliefs" (T-741). Yet he admitted that he only *assumed* that this was taking place, and did not:

> look into these concerns [even noting that if hand-outs that discussed religion were being]. . .handed out, yes, I would be [concerned] . . . Because I've never regarded a state institution as... a place where one blatantly discussed . . . the role or the place of a religious idea, but if I understand [meaning he did not know, but understood that they were] . . . the nature of these documents ... it was more than this. (T-745-746)

Faculty concerns that Dr. Bergman "might have" (T-739) injected "religious content" in his curriculum (T-737; T-859-861), occurred "almost entirely during Dr. Bergman's term of employment with the university [with the possible exception of the]

"very first few months" (T-738). The faculty also admitted that it is difficult to separate concern relative to "injection of religious criteria" into a classroom from one's own "personal religious beliefs" (T-738) admitting that concerns about what Dr. Bergman *might be* talking about in his classroom were obviously an offshoot of his personal beliefs. In *Moore v. Gaston Board of Ed.* (357 F. Supp 1037; 1973) the court ruled that an agnostic teacher could not be discharged for teaching ÒDarwinian theory . . . agnosticism, and questioning the . . . Bible . . .[or that we did not have evidence for] a soul or . . . life after death, or . . . heaven or hell [and that] these constitutional protections are unaffected by the presence or absence of tenureÓ (pp. 1038, 1039).

Dr. Fyffe likewise testified that he heard of "concerns" about Dr. Bergman teaching religion (T-732), testimony that unfortunately was cut off by the court. The allegations that Dr. Bergman was "using religion content in the classroom," Drs. Fyffe, Carriker and Girona concluded were false (A-32, 99, 122; T-733). A major concern was use of a book on the Scopes trial as *optional* reading in an educational psychology class. Dr. Reed (T-303-304) concluded that he was satisfied that this book had a bonafide function in the class.

The judge repeatedly asked whether or not Dr. Bergman's personal religious beliefs were discussed at formal tenure meetings, and most of his colleagues answered in the negative (T-437,443 457,549, 820,859). This is an amazing question in that it is extremely *rare* in sex or race discrimination cases for a faculty to *admit* in front of about two dozen others that a person's race was a reason for their opposition. These factors, as the Court admitted, (T-740) are almost always hidden, rarely brought out in the open ("people don't admit" religious discrimination)Ñyet in this case they were brought out in the open far more so than any single case of the hundreds that we reviewed (see *Yellin v. U.S.* (1963) 374 U.S. 109, 83 S.Ct. 1828). Yet, Dr. Phillips admitted that "religious issues" *were* in fact discussed at Dr. Bergman's tenure meeting (T-749-750) as did Dr. Gusweiler (T-335). And Dr. Ward (A-24), in his affidavit supporting the university,

admitted that religion was "mentioned" at a tenure meeting and, *was part of* the decision to deny tenure although, in defense of the university he claimed it played a minor role, if any at all. Why should it be considered at all? In the case of a Africian-American, if it was acknowledged that his race was *part* of the reason, or even discussed at a tenure meeting, it was held as inappropriate (*Skehan v. Bd. of Trustees Bloomsberg State College* 95 S.Ct. 1986). Religion was far more than "part" of their concerns, but was a major and constant issue, as the few of many scores of available quotes in this brief demonstrate. Bennett testified that he was "aware that there were some topics in" Dr. Bergman's class that "were of a religious nature" admitting that he had heard from colleagues "talk about some religious issues that were going on in his classroom." (T-527)

A major concern was a handout that Dr. Bergman used for an educational psychology class which, among the 24 topics included, were issues related to religion and the schools. Although simply suggestions and optional, Dr. Bennett had "concerns about some of those issues [topics that students could do papers on] that relate to their religious content" stressing, "Yes, I have some concerns to those" (T-530). His specific objections were to students doing a paper in an education class on the creation/evolution controversy, the Scopes trial, religion in the schools, the flag salute controversey, the religious holidays issue, etc. In court Dr. Bennett tried to claim that his concerns were expressed *after* the tenure vote, which was impossible because they were discussed in many memos and numerous other documents dated well *before* this, and soon after the vote Dr. Bergman was forced out of BGSU, thus feedback at this point would be of no use (T-535). Also, due to successful faculty censorship, this assignment was dropped a full two years earlier (T-531-533). His obvious attempt to cover up what was clear testimony in his deposition (T-531) is invalid, for in answer to the question, "What did you do as a result of hearing those concerns from your colleagues [about religion]" he admitted that they were "part of a *review* of Jerry's work in the area level and at one time

Jerry was in the EDFI area ...I was in... we had to make an annual review or recommendation on continuing his contract, and then I was [later] part of the larger tenure review" (T-532). In response to the question, "And it was in *these two capacities* did you act on the information or concerns that were provided to you by your colleagues regarding Dr. Bergman's use of religious materials in his curriculum ...? " Bennett answered, "I made my own decision in that regard. I had enough information that came to me directly ...." (T-533) He then *admitted* that *at the time of tenure review* he *did* have concerns about alleged religious content of Dr. Bergman's teaching, even admitting that religion was *part* of his deliberations stating, "I was aware of what was going on in his classroom through those documents and perhaps other avenues.... and it was part of my own personal decision, yes." (T-535) This admission clearly demonstrates that his vote was more than tainted by academic freedom and illegal factors. He also admitted that "other colleagues might have made the same conclusions that I did" (T-537) and that "there were other people in the area that had concerns about the religious content" of Dr. Bergman's classes (T-538). Noting that "things of a religious nature" would be "inappropriate in an educational psychology class" (T-540) concluding, "I think some of the material [allegedly used] was inappropriate for educational psychology. . . Because of its religious nature." (T-546)

Tenured department member Richard L. Burke was a major source of the religious antagonism against Dr. Bergman. In answer to the question "Isn't it true that you told him that you didn't like people pushing Christianity?" he said "Well, I suppose I could have. I don't know." Burke, as well as several other Department members, objected to some of Dr. Bergman's curriculum materials because they perceived them to be religious (D-8-10):

Q. ...one of the objections you had to the handouts prepared by Dr. Bergman was that they had some materials which you interpreted to be religiously oriented, is that right? . . .
A. In some way or other, yeah.
Q. During your ten years at the University have you had occasion to object to handouts

prepared by other of your colleagues? . . .
A. I can't recall I have.

Thomas Bennett showed the same religious antagonism (D-12-14):

Q.... these peers perceived Dr. Bergman's curriculum to contain religiously oriented materials?
A. I'm not sure that the comments were directed to religiously oriented materials.
Q. Then to what were they directed?
A. I believe that some of the comments were ... topics of a sexual nature.
Q. That was all?
A. I think there might also have been some . . . about the religious things.

Bennett acknowledged often that Department members noticed and commented about religious mail I received (D-16):

Q. Was there any talk among your colleagues regarding the fact that Dr. Bergman received mail which by observing it would lead one to believe that it had a religious orientation?. . .
A. . . .some of it was obviously of a religious nature. . .
Q. What objections were there to his receipt of religiously oriented mail?
A. ... just that, well, here's Jerry receiving this mail

Dr. Campbell acknowledged that Dr. Bergman's creation beliefs were discussed by the tenured faculty (D-18-19):

Q. . . . have you heard any mention made of his religious affiliation or allusion to his religious affiliation by your colleagues or any mention of. . . his inclusion of religious materials in his curriculum by your colleagues. . .
A. There was mention made in conjunction with an article published in the *Sunday Toledo Blade* . . . in which there was reference to Jerry's involvement in . . . controversy regarding creationism and its inclusion in the curriculum... The discussion centered on Jerry's work with and investigation into creationism.

Dr. Phillips also objected to aspects of Dr. Bergman's curriculum that Dr.'s Burke and Bennett perceived as religious, yet admitted that he had no first hand knowledge as to what Dr. Bergman was teaching, only hearsay (D-20-22):

Q. What comments did Richard Burke make to you that would have made you uneasy had they been valid?
A. Well, they had to do often with the relationship between what Dr. Bergman was contracted to teach and . . . materials that he *may* have used to assist him in the teaching of such courses. And the only other thing related to supposed material of a religious nature which some of my colleagues found it very difficult to match with, say, test and measurements or ed. psychology., whatever it was that Dr. Bergman was teaching... I, of my own knowledge, did not know what that was going on; but you ask me if I was perturbed in any way. To the degree that this sort of talk persisted over the years, then I was concerned.
Q. Okay. What you just described and what you attributed to Richard Burke, are you also attributing those comments to other colleagues...?

A. Yes . . .

Dr. Phillips even admitted that he did not feel some persons had full academic freedom:

"Academic freedom ... *covers tenured faculty far more than it does others*..." (D-23).

Professor Gusweiler described the religious antagonism of Malcolm Campbell toward Dr. Bergman:

A. . . . I asked Dr. Campbell if there was a religious base at all to Jerry's being denied tenure.... he stated too that *he thought Jerry had belonged to a group of religious fanatics; that Jerry himself was a religious fanatic,* and he thought that *that was part of the reason he was denied tenure,* and that was one of the things he had against him . . . Malcolm Campbell had said that he . . . was in an unusual religious group...
A. ...He thought Jerry had taught religion in the classroom. He was adamant ... Jerry taught religion ...
Q. Did he say that his religion came up at the tenure vote meeting?
A. I asked him if that was a reason Jerry was denied tenure, and *he said, yes, that was one of the reasons* ... (D-29)

James Davidson expressed the same religious antagonism, actually befriending Dr. Bergman for the purpose of obtaining damaging information to pass on to the tenured faculty:

A. . . . He felt Jerry belonged to a crazy religious group and that he did teach religion in the classroom. . .
Q. What purpose did he explain or tell you of his friendship with Dr. Bergman?
A. He felt if he got Jerry on his side, he'd get information to use against Jerry on his tenure hearing (D-27, 32).

Dr. Robert Joint was even more overtly motivated against Dr. Bergman's religion:

Q. Do you know or did you ever overhear any of your colleagues... commenting on Jerry Bergman's religion?
A. Yes. One of our own colleagues, Robert Joint, felt Jerry should be thrown out of the university because of his religion. He . . . was very adamant (D-31).

Dr. Charlesworth, under oath, concluded,

> As to why Dr. Bergman did not obtain tenure, I believe that the most prevalent criticism by the tenured department members relates to the subject matter of his publications, especially the religious content. These criticisms are totally out of place and invalid as they amount to religious discrimination and smack of censorship. . . . his tenured colleagues in EDFI were also suspicious that he was bringing his religious beliefs into the classroom, a suspicion which, as far as I know, has no validity whatever. They obviously strenuously objected to his religious orientation.

> . . . the department constantly made criticisms relative to Dr. Bergman's religion ... I have heard tenured faculty in EDFI make a number of derogatory comments relative to Dr. Bergman's religious interests and involvements. They laughed at the religious publications ...and that he published in such publications...probably a major reason that Dr. Bergman was terminated was a lack of respect for his strongly held religious beliefs, and the tenured faculty's objections to his publications on religious topics, their intolerance for diversity of opinion, and their strongly held objections to his religious involvement (A-100-101).

Dr. Fyffe concluded:

. . . that the major, if not the sole, reason for Dr. Jerry Bergman's denial of tenure was his strongly held creationist and religious beliefs evidenced by his publications in these areas. At no time did I ever find that these views were misused in his teaching responsibilities (A-99).

Dr. Rigby stated

> My interest in Dr. Bergman's case is both as a colleague and one very concerned about civil rights. I am fully convinced that there is, at the very least, a strong *prima fascie* case of religious discrimination. Aside from religion, I am aware of no other valid reason for tenure denial. It is thus clear from my examination of the facts that the major reason if not the only reason for Dr. Bergman's termination was concern relative to his religious beliefs, values, publications, interests and views (A-109-110).

Dr. Remmington claimed that she was aware

> ..of a number of statements made by tenured persons in [my]...department which clearly reveal their religious bias... It thus seems abundantly clear that the major if not the only objection to Dr. Bergman's tenure candidacy was his religious ideology. I am aware of the politics of universities, and this is not at all surprising (A-105-106).

Dr. Perry, Chair of the Department of Ethnic Studies, noted that (A-107) in Dr.

Bergman's case "religion was a major factor, if not the only factor, in ... tenure denial ..."

Dr. DePue, a full professor, noted that he was

> . . .shocked to learn that Dr. Jerry Bergman had been dismissed ...because of his religious beliefs, namely his espousal of creationism. It is clear to me from reviewing information and talking to individuals about the case that Dr. Bergman, in violation of the University Charter, articles 1, and .4C, was dismissed solely because of his religious beliefs. The charter clearly specifies that tenure is to be "granted or denied" solely on the basis of . . . teaching effectiveness, scholarly or creative work, service to the University ...Dr. Bergman unquestionably meets all of these criteria. Few full professors have achieved the publication, teaching and

> service record of Dr. Bergman. Further, he not only has completed "the terminal degree or its professional equivalent" but is currently completing his second Ph.D. The University Charter clearly guarantees academic freedom, so termination on the grounds of espousing creationism in one's publications is surely a violation of this article. Further, to dismiss an employee because of his or her religious beliefs is illegal, and grossly contrary to human rights and the constitution ... (A-113-114)

And Dr. Don Carriker, a member of the College of Education when Dr. Bergman was at Bowling Green, noted:

> Dr. Bergman is a dedicated, scholarly individual who is a highly competent teacher and well respected by both students and many of his colleagues. Certain of his colleagues, though, did not share my high opinion of him, and reportedly have accused him of proselytizing. That accusation is false. Tenured colleagues were frequently said to have criticized his religious beliefs and publications. It is my conclusion that he was denied tenure primarily (if not solely) because of his conservative religious beliefs . . . (A-122-123)

Dr. Buron stated that he was:

> . . . directly involved in [Dr. Bergman's] . . . case against BGSU, and have discussed his case extensively with...others who are involved. ... It is clear to me ...that the only reason for Dr. Bergman being denied tenure in Bowling Green State University is his religious beliefs....no one has questioned Dr. Bergman's outstanding scholarship; both his chairperson and Dean had high evaluations of his work. There are many other cases of discrimination at Bowling Green State University. Denial of equal opportunity, based on minority status, is widespread, and thus this case does not surprise me, although it is extremely upsetting. I have contacted and talked extensively with a number of people about Dr. Bergman's case, and thus my conclusions are based on firsthand information and documents. I am aware of a number of statements, made by tenured faculty members of his department, which clearly reveal their religious bias toward Dr. Bergman. It thus seems abundantly clear that the major if not the only objection to Dr. Bergman's tenure candidacy was his religious and personal ideology. Thus,... I strongly encourage whatever action is necessary to rectify this inequitable situation (A-103-104).

Dr. Rigby also noted that:

> I am most concerned that this case seems to suggest the relevancy of a religious-orthodoxy test for tenure at this University. Insofar as Dr. Bergman's views on religious matters, be they correct or incorrect, conventional or non-conventional, majority or minority views, were taken account of by those casting tenure votes, there exists a clear case of irrelevant factors entering into that decision. I think the record speaks quite clearly to this point--such views were considered in the decision process. That constitutes a ...violation of Dr. Bergman's rights. Apparently the Fastback, "Teaching About the Creation/Evolution Controversy," which Dr. Bergman authored for Phi Delta Kappa, entered into the decision; at least, his expression of "creationist" views seems to have been an issue ... I have read this presentation . . . while I , too, find myself supporting the "conventional

> wisdom" about evolution, this little booklet is a superbly done consideration of the issues involved. I can find no fault with Dr. Bergman's analysis and presentation; it is excellently written (as are all his publications I have been privileged to read), soundly reasoned, and eminently fair in its approach. No one could legitimately cite this as support for... adverse judgment on Dr. Bergman's scholarship ... the University is a forum for exploration and exchange of ideas. Even the most unacceptable ought to have a fair hearing in a University, and the advocates of all views ought to ...receive the opportunity to explore, expound, and advocate their ideas. An *a priori* validity test on ideas is the death of new ideas. While those of us who believe we know what ideas are valid are privileged to so argue, so, too, the one who advances unconventional views ought to be privileged to advance them. The corrective for incorrect ideas is exposure, not prohibition of exposure, of the ideas among the community of scholars. Any other approach stifles new ideas and binds us to that which is, for the moment, conventional wisdom (A-201-202).

And, last, Dr. Girona, who was both in Dr. Bergman's department and his area of educational psychology, stated:

> Specifically, it was related to me by a number of his colleagues, most notably, Dr. Richard Burke, but also Dr. Bennett, Dr. Pritscher, Dr. Stang, Dr. Rabin, Dr. Campbell and others, that Bergman "is a religious fanatic," "a fundamentalist," "a born-again type," "a member of a weird religion," etc. and as such does not belong here. They also repeatedly alleged that Dr. Bergman taught religion in his classroom. They had no firsthand information... [but] stated only that they "heard" that this was occurring. They were also very concerned about several of Dr. Bergman's handouts in which he had quoted Biblical scriptures [and]... articles which dealt, either directly or indirectly, with religious topics. Probably their major concern was his active and open involvement in creationism. He included on a reading list a book on the Scopes Trial to which they objected and on a list of topics of papers that students could do reports on, he included topics such as "religion in the schools," etc.
>
> It is my opinion that a number of my colleagues are very antagonistic to a conservative Christian orientation and their main objection to Dr. Bergman was because of his outspoken conservative religious beliefs, interests and activities. They were especially concerned about his involvement in creationism which they felt was an embarrassment to the university. They believe that no one knowledgeable today can reject evolution, although they admitted that, in their many conversations with Dr. Bergman on this topic, he seems to know a lot about this issue. Nonetheless, they feel strongly that he must be wrong since... scientific opinion supports evolution (A-32-33).

The extensive investigation by the *University Professors for Academic Order*, concluded:

> A sheaf of affidavits and descriptive testamentary documents obtained by our investigator confirm in detail to the testimony evinced by all those interviewed; they are not contradicted significantly by the responses of Dr. Bergman's detractors. The overwhelming majority of twenty-two of Dr. Bergman's colleagues interviewed on this matter, state unequivocally that Dr. Bergman experienced the two forms of injustice indicated above . . . Those who voted against Dr. Bergman and were interviewed for the research were extremely

> guarded, and none would defend the procedure or the attitude evidenced toward Dr. Bergman's religion during the process of the decision on his tenure . . . The testimony of the three primary detractors of Dr. Bergman... expresses clear obvious religious prejudice against Dr. Bergman as the primary motivation for their vote against him. Their conversations with our investigator confirm the same . . . The Committee Chair considered all of the materials relating to this case... with the finding that an on-site investigation has revealed evidence beyond a reasonable doubt for religious discrimination, as well as a lack of due process in tenure proceedings, and that Dr. Bergman should be immediately reinstated with tenure.... (A-25-27)

Hundreds of quotes in addition to the above could be cited, both from the court records, affidavits, newspaper articles, etc., clearly verifying the academic freedom violations Dr. Bergman and other creationists have experienced. Even several congressman and an appellant court judge concluded discrimination existed in Dr. Bergman's case (A-278-280). This issue should have at least been addressed by the court, yet Judge Walinski chose to ignore all the above evidence. He recognizes the enormity of religious discrimination in modern society, noting that this problem "is going to be with us the next 10,000 years" and "A trial won't solve it." (T-740) yet did not discern the academic freedom issue, stating, "Unless there is something specific from Dr. Phillips about Dr. Bergman's teaching [the comments on his teaching religion have] . . . no probative value at this point...." This concern was clearly a key element in this trial. Dr. Bergman's religious beliefs, values, and publications were constantly inappropriately criticized, and he was repeatedly accused of "injecting" his beliefs and values into the classroom. Yet all of this evidence was ignored by the court. The majority opinion *Agurilliad et al. vs. Edwards et al*., 765 F. 2D 1251; 1985) ruled, "The vigilant protection of the First Amendment is *nowhere* more vital than in ... public education" (*Epperson v. State of Arkansas* 393 U.S. at 104, 89 S. CT. at 270; *Wieman v. Updegraff* 344 U.S. at 194, 195, 73 S.Ct. 215; *Pickering v. Board of Ed.* 391 U.S. at 574, 88 S.Ct. 1731).

The University Does Nothing About Dr. Bergman's Claims

As is clear in the testimony of both sides, the response of the university was do blatantly ignore Dr. Bergman's rights. The Universities Affirmative Action Office, Myron Chenault, testified that *he did absolutely nothing to help him with his concerns* even though Dr. Bergman raised the religious discrimination issue long before he was denied tenure (T-660-661). According to his testimony he did not even discuss his case with Dr. Ferrari (T-661), but "just looked at it, said something to Beverly [the new director] and then put it away . . .", ignoring what he considered, "a lot of trivia" because he doesn't " like to have my time wasted" (T-666). What kind of vigilance is this by someone charged with dealing with religious discrimination? Is it honest for the university to claim they do not discriminate on the basis of religion when they consistently did nothing about Dr. Bergman's concerns and stated or implied that the concerns of religious minorities is a waste of time? This is a violation of Ohio law; BGSU officially opposes all forms of religious discrimination, and thus this policy is legally part of our contract (*Adler v. John Carroll Univ.* 549 F. Supp 652 (1982). BGSU is not to be even influenced by personal religious views (*Franklin v. Atkins* 409 F. Supp. 439; affirmed 512 F. 2d 1188)

Mr. Chenault admitted that the university knew before Dr. Bergman's promotion that there might be "a problem coming up," and that he was provided with copies of all of the documents that Ferrari received (T-648). Thus, in view of the letter from Beverly Mullins dated Oct. 31, 1978 marked copy "to Myron Chenault"(A-34) , that expressed concerns relative to religious discrimination, and the many letters Dr. Bergman sent to Dr. Ferrari, he was clearly fully aware of Dr. Bergman's concerns (T-658-659,667). Dr. Ferrari admitted that he had many discussions with Dr. Bergman about this case (T-663), and when specifically asked about Dr. Bergman's "religious discrimination case," answered, ". . I can recall her [Mrs. Mullins] reviewing with me at least one time her discussions with him." (T-662-663) adding, "It was standard operating procedures after he [Dr. Ferrari] had reviewed a particular document . . . his secretary would bring it over

to my secretary for my review" (T-648-649) and that he even kept a file on Dr. Bergman's case!

When Mr. Chenault received the charges of religious discrimination from the outside agencies, he stated, " . . . the natural question that comes to most people's minds in that situation...[is] what religion would the person be . . ." (T-651) Is not the same question natural when one receives a memo, such as that from Beverly Mullins, or hears allegations about religious proselytizing, or about the alleged inclusion of religious content in one's classroom? His later testimony is direct and to the point; in answer to the question "In fact, the person you supervised, Beverly Mullins, [wrote] . . . a communication in which it was brought to your attention that Dr. Bergman was seriously concerned about religious discrimination in his employment?" Chenault said, "Yes sir." (T-659) This directly contradicts his answer to the court's question, "Prior to that time [the receipt of the EEOC charge] you personally had no knowledge of any religious problem [Dr. Bergman was having] in the teaching community [at BGSU] ?" namely, "Yes. . . . I was ... surprised" when I received the EEOC charge (T-667). Myron Chenault here claims that he knew nothing about Dr. Bergman's religious discrimination concerns until after Dr. Bergman filed EEOC charges, yet his own testimony clearly contradicts this. Is this not perjury? Mr. Chenault received copies of the many memos on this case; why did he not respond to them? As Director of Affirmative Action it was his responsibility to be both aware of, and respond to, religious discrimination concerns. Thus, not knowing about these until after Dr. Bergman filed the charges with EEOC is certainly a serious derelict of duty, obviously unethical. In fact, he was fully aware of Dr. Bergman's concerns, but did nothing to address them (T-662-663, 648, 658-659, 667). He had talked about them extensively with Dr. Bergman, and review of his calendar will reveal that Dr. Bergman had several appointments with him long before he was denied tenure. And, obviously, what would Dr. Bergman talk to him about except discrimination, as this was his role at the University when Dr. Bergman first contacted

him? Instead of helping , this office actually "represents the University" against religious minority persons (T-15). How can BGSU in any sense claim that they do not discriminate and are an "equal opportunity employer"?

In *Hooker vs. Tufts Univ.* (37 FEP 515) the court ruled that it is the court's task to "scrutinize defendant's evaluation . . . to ascertain whether it was both procedurally fair and substantially reasonable." Thus courts are "forced to examine critically university employment decisions" (*Daris v. Weidner* 596 F.2d 726; 1979). The court thus must scrutinize the fairness and reasonableness of BGSU's decision to determine if it was based on accurate, fair and adequate knowledge of the professors performance, adequate evaluation, and followed appropriate procedures. Although BGSU claims a large degree of immunity from court scrutiny (T-162), the above cited case the court has:

> firmly declined to accord universities a special deference such that discrimination and privileges are rarely enforced (See *Sweezy* 569 F.2d at 176 and N.14, disclaiming *Faro v. New York University,* 502 F. 2d \ 1229, 1231-32, 8 FEP cases 609 (second car. 1974), and I am unwilling to do so. Thus, although I limit my scope of review to assuring that evaluation decisions made by the defendants are reasonable, I simultaneously apply a strict Title VII scrutiny to insure that those subjective decisions were somehow not infused with . . . bias."

Review by Dr. Bergman's Area was Positive

The colleagues who taught in Dr. Bergman's area , certainly most familiar with the subject that he taught, almost unanimously supported him (A-36, 203). The blind review process (which reduces the likelihood of bias due to race, religion, etc.) of his three hundred publications means a positive review of almost one thousand colleagues, clearly demonstrating scholarly performance, as does completion of his first Ph.D., with a 4.0 for course work (A-290), his first Master's degree with a 3.71 HPA for course work, a second Master's, and the completion of nearly all requirements for a second Ph.D. Furthermore, his consistently high student evaluations, positive student comments, (A-204-231) and the written evaluations by 4 colleagues who visited his class (A-33,73,56,230-231), 7 successful years at BGSU, and 6 at the University of Toledo (A-40-

42), certainly indicates those qualified to make judgments, as those who viewed his teaching and evaluated his articles for publication (appointed because of their recognized expertise) prove a high level of competence (A-46-54). Unlike race and sex, religion can be more successfully hidden, and creationists usually encounter problems only when their religious beliefs are made known in the academic community, and their problems are far more common in the academic and scientific community than nearly any other area of society (see addendum). In publishing and related areas, Dr. Bergman thus can avoid much discrimination.

The judge claims that Dr. Bergman's colleagues questioned the "quality" of his publications, yet the court record clearly shows that *almost all of them have never read a single one* and nearly all of those few who claim they did, at best only glanced at early drafts of a few articles written in Dr. Bergman's first few years at BGSU, and had essentially no substantial comment to make about them except undocumented and vague meaningless concerns such as "methodology." Valid criticism requires that one specify which article is being referred to, and the specific methodological or other concerns. Dr. Bergman's 300 in press or in print publications, most of which he published or at least wrote while at BGSU, were reviewed by acknowledged national experts in the field (at the minimum, by the editor, and most refereed journal articles are reviewed by two and sometimes three reviewers; his measurement book was reviewed by eight individuals). Given an average of three reviewers for each article (a conservative estimate) his publications were favorably reviewed by over 900 authorities.

No faculty in his department has served as a reviewer for a national journal, most not even for local ones (and those few who did accepted several of Dr. Bergman's articles for publication!). Persons who have not been selected to serve in this capacity cannot make the claim of being qualified. The faculty are thus questioning the judgment of nationally recognized experts. Furthermore, in that Dr. Bergman has over twice the level of graduate education (credit hours) as does any member of his department, one

must question if they can even judge his work. Dr. Bergman's election to the graduate faculty, which was a "special privilege" (T-729), also demonstrates high evaluation of his work by his colleagues (T-728). Dr. Reed, his formal evaluator, testified that his research, service and teaching performance were all "adequate," rating his research and scholarship "very highly...the most prolific" in the department (T-270-271). It is ludicrous to substitute the judgment of persons who have not even read Dr. Bergman's publications for those regarded by their colleagues as experts in the area and selected to review articles. Furthermore, can those who have not demonstrated a skill stand in judgment of those who have? As Dr. Zeller noted (A-37-39):

> Many of Dr. Bergman's colleagues in his department ... have such inadequate publication records that there is serious question about their scholarly abilities (i.e. they have not published a single article in a reputable journal in their entire career). What is the reaction to ... a relatively young faculty member who has published dozens of books and hundreds of articles? Such a person will, I believe, be threatened by the appearance of a young, bright, hard-working colleague. ... unproductive faculty members will seek to eliminate productive faculty ... from the faculty so that their own relative unproductivity is not made apparent ...they will seek to deny...tenure to their... productive colleagues. I believe that this occurred in the Bergman case...

And Dr. Girona concluded (A-32) that he believed:

> there is clear professional jealousy of Dr. Bergman. He published more than our entire department combined, and many of our colleagues have rarely published anything. Publishing is one of the most important activities in the university, and was constantly stressed in our department. Most of my colleagues felt inferior to Dr. Bergman, and concluded that their likelihood of publishing was low and thus seemed to put forth little effort.

Dr. Phillips concluded that research is of primary importance in the department (D-41-44) and Dr. Carpenter testified forcefully (T-377-378) that the faculty

> Should have reached their decision on the basis of evidence, and if they didn't have evidence on which to base their decision, . . . then I can't see [how they could arrive at a decision although] that would imply ... that the faculty member, in absence of any other indication, should . . . be supported. .

To defer *carte blanche* to the faculty's "judgment," effectively negates the *Civil Rights Act* in an academic situation. *Nemenwirth v. U. of Wisconsin* (769 F. 2d 1235;

1985) noted the basis for their decision must be scrutinized (that would require, for example, that *all* the faculty had read most of Dr. Bergman's over 300 publications, and could intelligently comment thereupon, and had visited his classroomÑwhich not one of his critics did (A-232). How can discrimination ever be proved if all the faculty have to do is simply give the person denied tenure a putative "hearing" which itself does not have to comport to even minimal due process? The hearing should be examined to determine whether or not it comported with the law and the university's own rules.

Relevancy of Dr. Bergman's Publications

A few colleagues alleged non-relevancy and quality of Dr. Bergman's publications, yet Chair Reed testified that the "minimum criteria for tenure" was the completion of the terminal degree and "some evidence, although it...has not been qualified ... of effective teaching, research and service to the university" (T-281). Not even *one* publication is required, only "some evidence of effective teaching." As many, if not most, tenured faculty in the department about when Dr. Bergman was denied, had no publications whatsoever, this cannot be used as a reason (*Holliman v. Martin* 330 F. Supp 1;1971; *Ferguson v. Thomas* 430 F. 2d 852;1970). Jim Davidson received tenure with no publications (T-777). Siefert testified that when he received tenure he "didn't have any refereed articles" nor a book, not even one in progress (T-502-503). Rita Keefe testified that she likewise did not have a single book published (T-873). Dr. Yonker, who was hired the same year that Dr. Bergman was, admitted that he had never written a book, was not in the process of writing one, and when he achieved tenure had only "three, four, something like that" articles (T-455-456). Drs. Burke, Marso, and most other tenured faculty had either no articles or very few when they were tenured, and most still have none or very few. Aside from Dr. Bergman, the department's most prolific author was Dr. Campbell who testified that he had "around ten" articles published when he was tenured (T-433-434) and only one co-authored book (actually it was a collection of

readings he edited, considerably different from publishing a book; T-435) plus his doctoral dissertation. Yet, he claimed that as the most prolific published author, he voted in favor of Dr. Bergman (T-443-444).

Dr. Darrel Fyffe, who has served on PPPG and reviewed the credentials of about 75 faculty (A-98), noted that Dr. Bergman had more publications than any other candidate who came through the three years that he served, had excellent student evaluations, and evidence of service comparable to other successful tenure candidates (T-725). The average number of faculty publications for a person up for tenure, he noted, was two to eight (T-726). After having read many of Dr. Bergman's articles, both before and after they were published, his assessment was very positive.

The concern in court was over only one of Dr. Bergman's over 80 books, monographs and book chapters then in press, in print, or in preparation, yet Dr. Bergman was the only faculty in the entire department who had ever produced *a single authored book* not based on his or her dissertation (T-289). Dr. Fyffe noted that, during the 3 years he was on PPPG, he remembers *only one person* who had published a hard cover book (T-727). And as Dr. Bergman's book did not come out until after he was denied tenure, the decision could hardly have been based on this work. It was reviewed by at least 8 reviewers, published by one of the most prestigious publishing houses in America (Houghton Mifflin of Boston), adopted by scores of colleges, bought by hundreds of libraries, and Dr. Bergman has received numerous letters and feedback relative to its high quality (T-913-914, 289). Only one review, published in an obscure foreign journal, was critical (unusual in publishing). Among the favorable mentions was by Robert Ebal, one of the foremost researchers in the field who, impressed with this work, cited it as an "authority" in an article published in the prestigious *Journal of Educational Measurement* (T-896-897). Dr. Wiersma testified that Dr. Ebal is an acknowledged expert in the field of measurement, and that this journal is very reputable.

Dr. Zeller (who also published a book with Houghton Mifflin) testified that this

book was "Dummied Down" on the demands of the publisher (T-915-918). Most criticisms relate to this concern, and thus cannot be appropriately leveled against Dr. Bergman, but the publishing industry. George Siefert, who said he only read *a draft of a chapter* before Dr. Bergman was denied tenure, and he was the only person in Dr. Bergman's department who claimed during the court proceeding to more than have glanced at this book (T-492-493). One cannot base an evaluation on a single person's view that was based on examination of only "a particular" portion, of a *draft* of a "statistics chapter?" (T-476). This is all he looked at because he "had enough ...to worry about this particular section..."(T- 513). This alleged evaluation was not given to Dr. Bergman in writing (or even verbally) as the Charter requires (T-505). When asked if he read other sections before Dr. Bergman's tenure meeting, he replied, "...I had something. Now, again, I don't know." Then he later claimed that he "definitely had, by that time, fully read the book" (which was impossible because it was not published until after Dr. Bergman was denied tenure; he later admitted he read only a manuscript (T-477). Can a person honestly put much credence in this testimony? His own words clearly demonstrate that he lacked basic knowledge of the field, not even understanding the concept of bitiles (T-479).

Siefert admitted that he did not read *any* of Dr. Bergman's published articles, was only "aware" of them, and that "other people could pursue his publication record. That was not of interest to me..." How could he possibly evaluate Dr. Bergman? He did not even try to separate refereed and non-refereed articles (T-494-495, 514). As to competency, Siefert, who was in Dr. Bergman's area, in answer to the question, "Do you have any reason to question Jerry Bergman's competence in the area that he taught?" said "Not really" (T-504; 514). Only "one thing" was of concern, namely the statistics chapter. In that Dr. Bergman's assignment at BGSU was *not* teaching statistics classes, and Dr. Bergman never taught a course in this area at BGSU, this criticism is totally irrelevant.

Rita Keefe also claimed that, although it was not in her subject area, she "reviewed" this book prior to the tenure meeting, which was again, impossible (T-865). No one else claimed to have read the book or manuscript before the tenure vote. Adelia Peters, admitting she did not teach courses in Dr. Bergman's area, relied upon those who did (T-833), yet was aware that the vote of these in Dr. Bergman's area was 6 for and 2 against! In summary, not one faculty could articulate valid concerns about competency based on evidence.

Dr. Zeller, in contrast to Dr. Bergman's opposers, completed a thorough evaluation of this book (A-37-39). Yet, the court relied upon the opinions of those individuals who either had no knowledge in the area, or did not read the book, and the *one* person who claimed he skimmed a rough draft several years before it came out. Mattimoe did not question Dr. Zeller's expertise (T-906). Dr. Zeller, who's credentials were fully equal to Dr. Wiersma, testified (T-912) that this book showed Dr. Bergman had "a strong level of understanding of the material," adding, "Not only did the text indicate that, but my conversations with him indicated that, as well." Yet, the court objected to Dr. Zeller's testimony claiming that, in a religious discrimination case, the quality of publications is not at issue (T-919)! Yet, in the final decision it turned out to be *very much* an issue, for the conclusion that Dr. Bergman's publications were "inadequate" was held valid by the court! This was the substance of Dr. Zeller's testimony, a highly published and respected BGSU professor who not only reviewed the book in detail (as not one person in Dr. Bergman's department did), but was very knowledgeable about Dr. Bergman's work and competence because Dr. Bergman was a student in two of his classes (T-920).

Dr. Campbell also testified that he had never "formally reviewed any" of Dr. Bergman's publications (T-432) noting that his article in the prestigious *The Futurists* journal was the only publication that he had read, but had no comment on it (T-433). Dr. Keefe, also not in Dr. Bergman's area, claimed she only "skimmed" some of his articles,

and her only claim was that they were not related to Dr. Bergman's discipline "in most instances" (T-864, 871). Clearly, though, many if not most of Dr. Bergman's articles were in his area, as is evident from cross examination (T-870-873) and as testified to by many others, including his department chair, who noted that some of his publications were not related to the area Dr. Bergman was then teaching, and some were in religious journals, but even these were not necessarily irrelevant (T-272).

Also, how can anyone possibly judge the **relevance** of an article without reading the article? Bob Yonker testified that he did not read any of Dr. Bergman's publications (T-448, 450), yet claimed he had concerns over how he carried out his research, admitting that he could not be more specific (how can he know this if he never worked with him on research and never read his publications?). He admitted that early in his employment, Dr. Bergman gave him "rough drafts" of articles (actually 2, both theoretical articles on reading, neither containing any research methodology) and one article later. He admitted that he did not know if Dr. Bergman incorporated his feedback, nor did he compare the original with the final product, which he admitted he never asked Dr. Bergman to show him (T-450). Although he claims (T-459) he critiqued "maybe nine different documents" during his first few years, and could not recall any criticism except "methodological issues" (T-450). He was *not* concerned about the quality of Dr. Bergman's publications (T-450-452)! Asked if he felt Dr. Bergman followed necessary methodological principles, he stated, "not in all cases." Does any researcher in "all cases"? (T-463). Vague concerns about methodology by only one faculty member during Dr. Bergman's first few years at BGSU which were never conveyed to him, are hardly reasons to terminate a facultyÑespecially in that most of Dr. Bergman's colleagues have never published any research, thus used no methodology at all. Although Yonker criticized Dr. Bergman's textbook, he did not know if he reviewed it prior to the tenure vote, and could not recall any specific valid deficiencies (T-466). Of what value are vague comments based on rough drafts of a few articles out of 300? One or two or even

a dozen of Dr. Bergman's articles may be poor, but this does not negate the value of others; any author can expect the quality of his work to vary. In all fields, even the great writers occasionally bomb. He admitted he did not segregate refereed from non-refereed publications, and was not even aware that many were religious (T-451-452).

Dr. Bergman's Tenure Process

In accordance with the tenure procedure Dr. Bergman was to follow, he was first evaluated by the "area" (professors teaching the same courses the candidate does) which almost unanimously supported him (A-203). His papers next went to the department (both area and non-area faculty, the majority of which do not teach the same classes Dr. Bergman did, and usually lacked expertise in his field), which is where his difficulty arose. The Chair then *overruled* the department's negative decision. Next the college-wide faculty evaluation committee reviewed his credentials and voted in his favor (A-36). Although the vote was not unanimous, this much support is *very unusual* for a creationist, indicating that religious prejudice at BGSU is less than at many state schools (A-75-91). The Dean's positive recommendation was then forwarded to the Provost who, in essence, changed the written routing procedure, and sent it back to the department for reconsideration! The Dean assured Dr. Bergman that a "safeguard" was available to protect against discrimination at the department level, namely that he could overturn a biased two-thirds faculty vote. The Provost, though, negated this safeguard through his action (T-587).

Dr. Bergman received a positive vote from both his area and the chair, and a negative vote from the department, thus need not appeal but, as per college written policy (A-257), ÒWhen a faculty and the unit administrator (department chair) have conflicting recommendations [they] are automatically forwarded by the unit to the dean. Such cases are not considered appeal cases....Ó

As per this guideline, Bergman's recommendations were forwarded to PPPG,

evaluated in his favor, then to the Dean, who ruled likewise. The Provost violated this department requirement and, instead of considering Dr. Bergman's qualifications, negated his already completed successful tenure review, reversing it to stage one! Aside from violation of written procedures, and making retroactive changes, the college tenure process which they claim was "changed" specifically because of Dr. Bergman's case, was in fact not changed, producing a property claim in BGSU following their procedures, and their failure to do so violates the 14th amendment (*Skehan v. Bloomburgs State College* 501 F. 2d 31; *Jacobs v. Stratton* N.M. 615 P. 2d 982).

The Provost retroactively changed this written procedure because, he claimed, it was, "in conflict with the ... Charter" (T-564). He may have the right to interpret the Charter, but not violate written documents (A-257-258). Actually, the written procedure did not change after Dr. Bergman's case (T-565-570). The college guide prepared *after* Dr. Bergman was denied tenure contained the very same procedures! A copy was sent to the Provost office, thus he should have been aware that it did *not* change (A-257-258). The fact that he did nothing indicates that he approved of the routing procedure that Dr. Bergman followed. When Ferrari was asked what steps he took to ensure the College of Education conformed to what he considered proper procedures, he answered, "I really don't know " (T-573). Thus, because the procedures were in fact not changed, the allegation that the procedure is wrong is specious. The procedure Dr. Bergman followed was also shown on the flow chart as well as college documents, memorandums, etc. (A-258). Yet, the provost, in answer to the question, in "January 1980, . . . the year after Jerry Bergman went through tenure, the college was still moving the recommendations in an improper procedure, . . . can we assume that this is true?" (T-573) said, "Clearly, the Bergman case was so far down the road that for them to . . . be advancing this is ridiculous." Yet this was the written college policy, and the *Presidents Joint Conference on Charter Interpretation* dated 4-5-1984, recommended that it be university-wide ! (A-233-235) Since on 1-18-1980 the written procedure was exactly the same as when Dr.

Bergman went through the system (T-570, 145-146) how was Dr. Bergman supposed to respond when so many contradictory procedures such as this are prevalent? While at BGSU Dr. Bergman learned one simply could not know what to believe, yet he had a right to depend on established practice (*Scagnelli v. Whiting* 554 F. Supp 77;1982).

Dr. York testified that Dr. Bergman's case was the first one that he knew of in which the Provost "kicked it back" (T-718), adding that it was improper to violate written policy in this way (T-719). The court, questioning this, asked, "Let me hear that again. They changed the rules in the middle of the game?" to which Dr. York answered, " . . . the evaluating and review process was *different* in Jerry's case than previously . . . (T-719-720). Dr. Elsass adhered to the procedures that he had followed beforeÑDr. Bergman's case was the *first* one for which they were deemed "improper" and changed "after the fact" (T-691). It is not unethical to declare a written policy consistently adhered to by the Dean improper after the fact? Referring the Bergman case to PPPG was, in effect, a *successful appeal* that overturned the lack of two-thirds faculty vote at the department level. (If an individual was found innocent of a crime at the appellate level, the Supreme Court could not remand it back to the lower court where guilt was the verdict?) The department refused to reconsider, so it went to the university-wide evaluation council, that ruled against Dr. Bergman. The reason was as Dr. Ward noted:

> . . . Bergman, in his presentations to the hearing board, did not support his allegations with either witnesses or written evidence, and ... this was the primary, if not only, reason that the hearing board did not support Dr. Bergman's tenure appeal . . . In the past year, four faculty members have received hearing board support for their complaint that they had received no negative annual evaluations prior to being denied tenure by their respective departments. Dr. Bergman may have had a legitimate appeal on the same procedural grounds as these four faculty members, but... in comparison to other cases I have observed (as chair of FPCC), Dr. Bergman provided his hearing board with very little information .... (A-22-23).

The reasons were little information was provided was primarily because Dr. Bergman was given wholly inadequate time to prepare (3 days) and was not given a list of the charges used against him as required by BGSU policy and case law (*Anapol v.*

Univ. of Delaware 412 F. Supp 675 (1976)), and thus did not know what to respond to (T-588,610,611).

The notice, received on July 13th, would not provide enough time for a hearing on the 17th, a 4 day span (A-132; T-610) and, as Dr. Carpenter testified, he has never seen a case where so little time was allowed, producing a failure of academic due process (T-373, 364). The general practice is to allow over a month for preparations as this is a "complicated procedure" (T-368-369). Dr. Gusweiler's appeal was in Feb. of 1980, and the hearing was the following July, about 6 months later (T-319-320). Dr. Bergman's complaints about not having enough time to prepare were ignored. (T-588).

It is true that Dr. Bergman was given "notice" of the hearing, but nothing more. Dr. Bergman repeatedly requested a list of their charges, concerns, and the documents used against him, and none was ever given (T-157). Thus Dr. Bergman could not cross-examine witnesses, or even prepare his own (which Dr. Bergman obviously had, as evident from the many quotes above). Furthermore, Dr. Bergman was repeatedly thwarted in his efforts to do soÑin violation ofthe charter that says "... both appellant and respondent (will) have seen *all written evidence* before a ... hearing " (A-254). It is a fundamental right to know the charges names of witnesses etc., in order to defend one's self (*Soni v. Univ. of Tenn.* 376 F Supp 289 Affirmed 523 F. 2d 347 (1974)). Dr. Charlesworth walked to the meeting with him, but they did not know if she was going to be permitted to testify until it was decided that she could at the meeting itself. Why did BGSU not cooperate with him to insure that he was able to have witnesses? As is obvious from the above, dozens of persons could have testified in his behalf. Dr. Bergman repeatedly requested a transcript of the hearing to confirm this, and was denied. As Dr. Carpenter noted "It seems to be very difficult to get these transcripts" (T-387).

The hearing was obviously a sham, and did not begin to achieve even minimal fairness. The hearing report contained little "evidence" to support the board's findings, only repeated allegations and innuendoes. A major issue, incorrect departmental

affiliation printed in Dr. Bergman's publication, was ruled on in Dr. Bergman's favor by judge Walinski. Several faculty at the trial stated that Dr. Bergman's misranking, etc., in publications was not part of their decision, yet Dr. Ferrari stated that this "represented a major factor in consideration of the faculty decision at the department level" (T-640) and also in the hearing board's conclusion. If this is true, Dr. Bergman was obviously being judged on incorrect information and should have been provided an opportunity to respond, which Dr. Bergman could have done if he knew this was a concern.

Dr. Bergman received a series of "temporary" contracts "converted" to probationary and then, about 2 months later, was subject to tenure review. Dr. Carpenter, concluded that this was manifestly unfair (T-363). Converting to a probationary contract, then 2 1/2 months later being reviewed for tenure, is not only highly irregular, but meets neither the notion of fairness or academic due process (T-363-365).

Although the judge concluded that the "failure to provide descriptive, annual, formal written evaluations was in contravention of the spirit if not the letter of the academic Charter" (p.12) he concluded that this failure did not "rise to the level of a due process violation." This is the most serious due process violation possible for it contravenes the entire purpose of probation. The judge claimed that even "the Supreme Court . . . doesn't know what due process is" (T-383). If the judge believes this, how can *he* make a ruling that due process was not in Dr. Bergman's case violated? The Provost admitted that lack of evaluation in Dr. Bergman's case was a "serious omission" (T-590), but yet rubber-stamped the committee's conclusions that this failure would not warrant a reversal of faculty judgment in this case as it did in all others. Either a due process violation occurred or it did not. The Charter either required annual written detailed evaluation of one's strengths and deficiencies, or it does not (A-23). The Provost admitted that "Most of the boards that have heard these cases, if they ...*believe* there to be serious omission [of procedure],...have taken a very strong stand on behalf of the faculty member." (T-591) Why did they not take a strong stance in Dr. Bergman's case? The

Provost claimed that he does not know why! (T-591).

Dr. Carpenter testified that the Charter requires annual written evaluation of all faculty on probation, term, and temporary appointments (T-357-359) to form a record of "progress toward tenure" as to one's teaching, research, and service (T-361-362). Also the Charter requires that "tenure is to be granted or denied **solely** on the basis of. . . teaching effectiveness, scholarly or creative work (and) service ..." (A-270). The local AAUP report concluded that in Dr. Bergman's case the department,"failed... to follow written and pre-agreed evaluation procedures and failed to assist" him in meeting these criteria (A-96). And the UPAO investigation concluded that Dr. Bergman "... was never provided the standard and required evaluations and critiques which would have brought to his attention any inadequacies .... This represents a severe procedural default... " (A-27).

All BGSU cases that due process violations were claimed because of lack in written evaluation were ruled in favor of the appellant (A-23, 120, 121, 124, 125, 76-95), and Dr. Ferrari endorsed this view in all cases but Dr. Bergman's (D-49). Dr. Gusweiler (T-322-323) stated that they ruled that not providing her with annual written evaluation *was a due process violation*, and the University-wide appeals committee (FPCC) concurred, and awarded her tenure. That it was *not* of sufficient gravity in Dr. Bergman's case, but of sufficient gravity in *all others* clearly proves disparate treatment. Not evaluating the probationer and not following required procedures is clearly a due process violation (T-323). As the court concluded, a "failure to evaluate" existed (T-642), and that there were no evaluations (T-382), adding, "from a court standpoint, I think your acts of omission have created a ... monster in this process."

Dr. Ferrari admitted (T-607) that the procedural problems in Dr. Bergman's case has "been troublesome and distressing," adding that he was concerned with whether "the department had complied with all Charter provisions regarding mandatory probationary evaluations in ... Dr. Bergman's tenure review...[and that] there may be problems ahead"

(T-607). Although it was manifestly evident that serious procedural problems existed, *he did nothing*! Ferrari obviously supported the contention that certain procedures were not followed. The judge was concerned that "certain procedures ... were not followed, for instance, there were no annual evaluations" (T-641) and asked, "*Outside of the failure to evaluate*, what other procedural irregularities were there ....? "The Provost admitted *this* one procedural irregularity, but claimed that he did not know of others [T-642]).

Written evaluation is required by the Charter, not "informal feedback," which most courts have ruled is necessary to prevent later misunderstanding. Yet the court concluded in Dr. Bergman's case that, "informal evaluation concerning . . . performance" was sufficient! The trial evidence, though, shows that no *relevant informal evaluation* was provided before tenure review! Not a *single colleague* testified that they had *personally*, either verbally or in writing specified to Dr. Bergman specific relevant shortcomings before his tenure review, other than feedback that Dr. Bergman himself requested during his first few years at BGSU on a couple of manuscript drafts. Even the vague, often erroneous feedback relative to his book *manuscript* which was given by one person *after* Dr. Bergman was denied tenure, was mostly nebulous, blanket name calling rather than constructive feedback.

The Accountability Problem

The Provost admitted that it was his responsibility to evaluate faculty for promotion and tenure and implement the Charter (T-555,612), yet he did not do so in Dr. Bergman's case (T-579, 580-581). Thus, as the "final academic officer" for reviewing tenure, he is ultimately responsible (T-558). He further admitted that, although not bound by the Dean's judgments, he gives "great weight" to them (T-37). Yet *no weight* was given to the Dean's judgment in this case (A-36). The University is, in essence, claiming the unique situation that the tenured faculty are not members of the administration, thus are immune from suit, and the administrators are claiming that they relied on the tenured

faculty for their decision, and therefore are not accountable! How can justice ever exist at universities if, in essence, no one is accountable for their actions?

The University's position is that the faculty make the decision, yet the court objected to faculty statements as "hearsay," of no consequence, concluding those made by "management control" are to be given primary weight (T-36). Mattimoe claims that the faculty are not agents of the University (T-40-41), yet he also claims that they are the ones that make the decision relative to tenure, a conclusion that was supported by the judge! This Catch 22 makes legal discrimination almost unenforceable in individual cases. Yet Ferrari cannot pass the "blame" back to the faculty because he explicitly stated that he was *not* bound by the faculty's decision, and would look *solely* at Dr. Bergman's qualifications. He likewise stated to Dr. Gusweiler that he would award her tenure *regardless* of the faculty ruling. (T-326).

The judge even asked: "Dr. Carpenter, at Bowling Green during the period we're talking about, it was the trend then for academic freedom . . . to be decided by the peers and not the administrators...? "(T-399). If whether a person is to have academic freedom is to be "decided" by one's peers, how are they immune from litigation for they are the ones who "decide . . . academic freedom.." The courts have consistently ruled academic freedom *was a basic right of all educators!* Mr. Mattimoe said relative to the peer review system that, "A number of years ago . . . faculty members were gentlemen and not litigators?" What does he expect faculty members to do who, as a result of being illegally denied their livelihood, suffered ruination of their career, a divorce, and loss of health, as all occurred in Dr. Bergman's case? What would he say about the blacks who finally turned to the streets in desperation? Civil unrest during the sixties was the primary catalyst for significant legislation that evolved to help remedy the clear injustices against them that existed in the United States. Should blacks have been "gentlemen" and simply accepted rampant discrimination, even separate lavatories and drinking fountains as was common for years in the South? Litigation is the means that society has both socially

approved and developed in order to deal with grievances.

Peer reviews are of limited use and can be harmful because of their inaccuracies (A-240-247). The serious department dissatisfaction that caused them to be dropped had a reasonÑthey were **rarely** based on personal knowledge or observation, only what amounts to an assumption of performance, that is often not based on valid criteria or relevant evidence (T-284, 793, 380). The department faculty evaluation committee itself concluded peer evaluation has "too many obvious logical and psychometric disadvantages" (A-97;T-793) and Chair Reed concluded it lacked validity (T- 805; T-192). Peer evaluations tend to be based upon criteria such as political affiliation, race, sex, religion, etc. (A-273). The court recognized meaningful evaluation was not done in Dr. Bergman's case (T-382), yet claimed that peer evaluations, that lack validity, could substitute! Yet Bergman's **gradually went up**Ñuntil the last year they were used he ranked 15 out of 27 on teaching, 15th out of 27 for service , and 7th out of 27 for researchÑwhich means on the average, the *majority* of tenured faculty rated below Dr. Bergman.

And on the criterion referenced system used the following year, Dr. Bergman rated of 5th out of 26 which rates him above *most all* of the tenured faculty (T-801-802) making him eligible for more merit pay than 21 department faculty (T-803). The university has an obligation to develop faculty potential, and Dr. Bergman's peer evaluation, even if high, does not explain *how* Dr. Bergman might improve perceived deficiencies (T-426). The responsibility for valid, meaningful evaluation lies with the department. Judge Walinski asked, "If an annual evaluation is not prepared, that is the fault of the department... ?" Dr. DenBestin answered, "Yes, it is." (T-427)

Other major examples of the more than a dozen major due process and procedural violations that occurred in Dr. Bergman's case are as follows: The academic charter and department policy document both stress that the sole purpose of probation is apprenticeship, the probationer's obligation is to cooperate in a self development

program, and the journeyman's obligation is to provide accurate and specific feedback to ensure that the probationer masters his trade and achieves competency. The *Charter* notes that the annual written evaluation is to specifically discuss *only* relevant criteria: teaching, research, and service. Article 14.4 and 14.4c notes:

> Careful evaluation of ... each probationer faculty member is . . . an important responsibility of the university ...[and] should be a collegial activity carried out for the productive purpose of improving the instruction, research or service activity of the faculty member... (A-268, 270).

Of the listed nine procedures to be followed relative to making tenure decisions (A-259-260) almost all were violated in Dr. Bergman's case. The first: "It is necessary to have a procedure for evaluating all faculty in the department," (for most of his probation no meaningful faculty evaluation procedures existed except non-valid peer review and those that the faculty initiated on his or her own, such as student evaluations); second: "as many faculty as possible should have input into all personnel decisions ..."; and the fifth: "...procedures should provide sufficient [and presumably correct, relevant] information upon which to base decisions" were all violated. Dr. Bergman's input in the decision was very limited and much "information" used came via rumor and was false or malicious. All accusations are to be in writing, all documents are to be given to the accused, and he or she is to *be given enough time* (certainly more then 4 days) to bring witnesses, written documents, etc., to answer the accusations. Not a single critic has ever observed Dr. Bergman's teaching, and thus none could make a valid evaluation in this area. Furthermore, as almost no department member has read his publications, nor has any worked with Dr. Bergman on the various committees that he served on, they have no valid basis for making any evaluation whatsoever.

The third procedure is the "procedures for making personal decisions should be known by all faculty in the department." Contradictory information relative to the procedures used was common. Written procedures were often not followed, or were negated by the Provost. The fourth item states, "Data used for making decisions about a

faculty member should be given to that faculty member." Except student evaluations (which were clearly superior for the relevant evaluation period) data used to make decisions was not given to Dr. Bergman until at the appeal hearing itself, and this was limited and contained much erroneous information (T-375). Repeatedly, accusations, innuendo, rumors, etc. were brought up at the various meetings that discussed Dr. Bergman's case, and Dr. Bergman was not privy to most of the "evidence." Dr. Bergman never had a chance to confront incorrect allegations brought up at various faculty meetings and assumed to be true (T-161). Dr. Bergman found this out only through rumor and via the grapevine, often months after the meeting occurred. This document also states that "the procedures should be flexible, able to be changed to accommodate exceptional situations." Dr. Bergman's case was clearly exceptional; He repeatedly complained to numerous administrators about religious discrimination long before his case came up for tenure, and none did *anything* to ensure that inappropriate considerations of his religious beliefs did not influence the decision. They did, though, work diligently to protect the university.

Dr. Bergman's grievance hearing was likewise poisoned by numerous violations. The grievance arbitration procedure, dated 6-3-75, states (A-261), "Initial complaints regarding unlawful discrimination . . . should be referred to the *Equal Opportunity Review Board*. Findings of "probable cause" will be referred to FPCC. Dr. Bergman was never informed of the existence of such a board, and requested the assistance of Beverly Mullins who claimed that no such board existed! If it existed, Dr. Bergman should have been referred to it (he was not; the grievance was heard by FPCC directly). If it does not now exist, it should be established to satisfy the requirements of this Faculty Senate approved procedure.

Fully half of *Section E* procedures were violated in Bergman's case (A-263). The first one states, "The hearing board expects that all known written evidence pertinent to the case will be presented by the appellant and respondent." Item two says that the Chair

of FPCC "shall make certain that both appellant and respondent have seen all written evidence submitted to the hearing board before a case comes to a hearing." Dr. Bergman was given none of the many documents used by the respondent at the FPCC meeting, and was thus unable to respond to the evidence presented (which he could have done without difficulty had Dr. Bergman had time to prepare). The fact that this due process violation existed was even noted at the hearing itself.

Item three states, "Both appellant and respondent may request the aid of FPCC in securing documents or the attendance of persons who possess information relative to the case." They not only failed to help Dr. Bergman bring his witnesses to the meeting, but Dr. Bergman was never told specifically the rules, nor given a copy of the grievance procedure we are now quoting from until after the meeting was completed. Yet the rule states "the appellant and respondent shall have the right to . . . present witnesses relative to their cases. [Their] names .... must be given in writing to the chairperson of FPCC five days before the hearing." (Dr. Bergman knew the hearing date only 4 days in advance.) Dr. Charlesworth asked to testify at the meeting and was given permission (although the FPCC did not have any advance notice). The many witnesses who would have testified on Dr. Bergman's behalf, as is obvious above, did not because this right was not protected. AAUP stresses that scholarship and teaching are afforded constitutional protection, and that universities may not use, as they did in Dr. Bergman's case, irrelevant criteria, such as dress, or illegal criteria, such as religion.

The 3rd Circuit Court (A-183) noted due process includes, (1) written notice of the grounds for termination (Dr. Bergman was told only of lack of positive two-thirds vote), (2) disclosure of evidence supporting termination (aside from that which Dr. Bergman himself submitted he saw none until at the hearing board; it was only years later, that he saw the many slanderous memos uncovered by discovery), and (3) the right to confront and cross examine adverse witnesses. This right is useless if Dr. Bergman's accusers do not specify reasons in advance as is required. The fourth requirement is, "An

opportunity to be heard in person and to present witnesses and documentary evidence." As he was not informed as to what the evidence or charges were, Dr. Bergman was at a loss as to what to present at this meeting.

The fifth requirement is, "A neutral and detached hearing body." The hearing body was not neutral, as was evident at the meeting and after. At least two persons were extremely hostile (one raised his voice numerous times, and at least two members later criticized his religious beliefs).

The last due process requirement is, "A written statement by the fact finders as to the evidence relied upon." Aside from information presented that was inaccurate, even slanderous innuendo, We are at a loss as to what evidence was relied upon for their conclusions. The information presented was obviously not the sole source of their conclusions. For example, all written evidence proves that Dr. Bergman am a superior teacher, yet the hearing body claimed that "deficiencies" existed, even though no one who testified against Dr. Bergman had observed him teach, and had no evidence except hearsay relative to his teaching. Even the verbal feedback he received was that he was a highly capable teacher and a competent researcher (A-237, 238, 248,249).

If Dr. Bergman was deficient in some relevant area (specifically teaching, research, or service), this should have been noted in writing along with supporting evidence, and time given to remedy whatever deficiency was identified. Thus, in essence, he never received a probation. Mattimoe had copies of the above documents, thus he knew (or should have known) his many allegations were incorrect, yet this did not stop him from making them. Why didn't the court check these? Are they concerned about truth, or just getting "rid of" this case? The judge's attitude was clear : "I'd rather get rid of the [Bergman] case. All right?" (T-743). This is the response Dr. Bergman has received over and over in response to his human rights concerns. A fair trial is a constitutional right and clearly the court trial was grossly biased.

Mattimoe also brought in many new documents, most of which were written or produced long after Dr. Bergman left BGSU, many that were taken out of context and used to infer something that was clearly not true, and many of which Dr. Bergman's attorney had no access to (T-249). So many things were thrown at him, some of which were spurious, none of which he had a chance to document, most of which he was not prepared to respond to. Why was not the inclusion of these objected to by the court? If Dr. Bergman's transcripts were compared, and the terminology utilized was considered, it would be clear that *all* of the valid documents that he produced were fully accurate. Dr. Bergman was told that the issues before the court would be those that were discussed previously, and that Mattimoe would not raise any new arguments (T-207-208). The day before the trial started, Dr. Bergman's attorneys asked for *all* documents that were going to be used in court. Dr. Bergman's attorneys provided the university with all of their documents, yet they did not do the same. It was impossible for us to adequately respond to all of these, especially in view of Mattimoe rapid fire, highly insinuating and derogatory line of questioning. Endeavoring to win cases by intimidation, slander and innuendo as opposed to the facts of the case is extremely unethical. As Dr. Bergman's attorney noted, we had a right to these documents, and requested them because "It is impossible for us to prepare our witnesses, our case, our redirect examination, based on this kind of trial tactic. It never happened to me, in my past, in my practice, and .. we are highly prejudiced by this tactic..." (T-250).

The documents produced included copies of letters that were never mailed, copies of personal correspondence between Dr. Bergman and others, copies of vitae, some of which are spurious, all prepared for jobs that had nothing to do with BGSU after Dr. Bergman left BGSU. They were presented solely to prejudice the judge. The court argued that (T-250), "I suggest that if there is any error, it is a miscommunication between you and your client. He should have produced the documents which are involved here." This is not true! We asked for them but their tactic was to spring them

on us in court. Is Dr. Bergman actually expected to send his attorney a copy of every vita he has ever prepared, every personal, private letter he has ever written, every article of the thousands he has produced, every article of the hundreds ever produced about similar cases? This would entail a dozen file cabinets of information, most obviously irrelevant. How could he have been denied tenure based on information produced after he left the university?

Among the many examples that demonstrate that the judge was often not aware of what was going on was Dr. Campbell had just testified that he *was* at the tenure meeting (T-437) and in response to the question, "What was discussed at the tenure meeting?" the judge asked, "I just thought he said he was *not* at any meetings" (T-422). Another case when the judge was obviously not listening to what was said was when Dr. Davidson alleged that Dr. Bergman claimed tenure denial because of the way he dressed, but no one was actually claiming this and thus, he inferred, it was irresponsible for Dr. Bergman to make this claim. The court answered, "Excuse me, Mr. Latanick, [he meant Dr. Davidson] we've had a lot of talk about how Dr. Bergman dressed. What was wrong with the way he dressed?" Obviously the court did not hear what Davidson said, but understood his comment as referring a reason why he objected to Dr. Bergman being tenured when he was only stating that Dr. Bergman was making this claim.

Some statements by the judge were incredible such as, "If I hear anything more about tenure I'm going to kill myself." If this was said by the defendant on the stand the judge would seriously question the sanity of a person who made such a statement.

Isaac Asimov stated in *The Humanists* "All creationists are liars." A review of hundreds of creationists' articles and publications finds that this is among the most common of charges. It is difficult to find an article on creationism published in the secular press that does not make this claim. Kitcher (1982: 181-185) even claims that lying and distortion characterizes creationists, claiming "for the creationists misleading quotation has become a way of life." The allegation of misrepresentation and a "pattern of

lack of credibility" is a clear indication of prejudice on the part of the judge, akin to termination of a black employee because of charges that he is shiftless and lazy, and offer as proof that he slept during part of his lunch hour, even though his production was well above average. The most common charge against creationists is that they lack credibility and are dishonest. A good illustration of the bigotry is an editorial in *The Detroit Free Press* which stated creationists are grossly incompetentÑjust as a geographer who believes that the earth is flat (A-239???).

Summary of the Relevant Law in this Case

Due process requires that one be provided *valid* reasons for discharge, have an opportunity to respond and present one's side of the story (*Goss v. Lopez,* 419 U.S. 565, 1975; *Gagnor v. Scarpelli*, 411 U.S. 778; 1973). In that Bergman was accused of ethical misconduct, this case required much more than this. The Supreme Court has distinguished between purely *academic* dismissal and that for *disciplinary* reasons (i.e., misconduct, unethical behavior, etc.) stating "Misconduct is a very different matter from failure to attain a standard of excellence . . ." (*Barnard v. Shelburne*, 216 MASS 19, 102 N.E. 1095, 1913 and *Cafeteria Workers v. McElroy*, 367 U.S. 886 895, 1961). Dismissal for unethical behavior involves a person's reputation, and therefore requires a procedure more akin to a criminal rules court. The Supreme Court, in *U. of Missouri v. Horowitz et al*. 435 U.S.;1977, concluded that alleged misconduct brings "an adversary flavor" to the academic situation. In *Bishop v. Wood* (426 U.S. 341 1976) the court noted that the circumstance of dismissal determine if a person has a protective liberty interest, stressing that publicizing reasons for adverse employment action, that amounts to a stigma, *does infringe* upon one's liberty. Earning a livelihood is seriously burdened if "questionable circumstances under which he left his previous job" exist (*Lefkowitz v. Turley* 414 U.S. 70, 83-84 (1973); *Fusari v. Steinberg* 419 U.S. 379, 389 (1975). In *Board of Regents v.*

Roth (408 U.S. 564) the Supreme Court ruled that publicizing reasons for discharge puts a case in a different category than if no public disclosure is made. Numerous articles about the Dr. Bergman case were published in local and national magazines, many with highly inaccurate and inflammatory statements made by the University and its agents. Memos that contained numerous false allegations were circulated and became known among the faculty, and have since been reflected in many published articles and court cases, seriously adversely affecting his attempts to achieve employment and clear his record. In such cases, faculty have a right to written reasons, their source or basis, and must be given a fair opportunity to defend themselves (*Green v. Howard Univ.* 412 F. 2d 1128, 134 U.S. APP D.C. 81 (1969); Jackson v. Griffith 480 F. 2d 261 (1973); *Whitney v. U. of Wisconsin* 355F. Supp. 321 (1973); *Adler v. John Carroll Univ.* 549 F. Supp. 652 (1982)).

1) To be found innocent of ÒethicsÓ charges, then adjudicated guilty seven years later is unconstitutional and double jeopardy (Breed v. Jones 421 U.S. 519 (1975)). Also unconstitutional is a "second prosecution for the same offense after acquittal" (*Justices of Boston Municipal Ct. v. Lydon* 104 S. Ct. 1805 (1984)); *Abney v. U.S.* 97 S. Ct. 2034 431 U.S. 651, 52 L. Ed. 2d 651 (1977)). BGSU cannot, after the first charges were dismissed, use a second trial to supply evidence that they had failed to muster in the first proceedings (*Tibbs v. Florida* 102 S.Ct. 2211, 457 U.S. 31, 72 L. Ed. 2d 652.

2) The University, as previous courts have consistently ruled, is obligated to follow their own procedures as published in their faculty handbook (*Yellin v. United States* 374 U.S. 109, (1963) 83 S.Ct. 1828, 10 L.Ed.2d 778; *Vitarelli v. Seaton* 359 U.S. 535, (1959) 79 S.Ct. 968, 3 L.Ed.2d 1012; *Service v. Dulles* 354 U.S. 363, (1957) 77 S.Ct. 1152, 1 L.Ed.2d 1403; *Amluxen v. Regents of the Univ.of California* 53 Cal.App.3d 27, 36, 125 Cal. Rptr. 497, 502 (1975).); *Mabey v. Reagan* 537 F.2nd 1036 (1976); *Christoffel v. United States*, 338 U.S. 84, 69 S.Ct. 1447, 93 L.Ed. 1826; *United States v. Smith*, 286 U.S. 6, 52 S.Ct. 475, 76 L.Ed. 954; *United States v. Ballin*, 144 U.S. 1, 12 S.Ct. 507, 36

L.Ed. 321. The employee handbook is a legal document, and BGSU *must* by law adhere to it (*Woolley v. Hoffman-La Roche* N.J. 491 A.2d 1257 (1985); *Thomson v. St. Regis Paper Co*. 685 P. 2d 1081 (1984); *Ferraro v. Koelsch* 368 N.W. 2d 666 (1985). BGSU must also follow all its policies, rules and regulations (*Adler v. John Carroll Univ*. 549 F. Supp. 652 (1982); *Assaf v. U. of Texas* 399 F. Supp 1275 (1975)

An essential principle of due process is an "opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust co*., 339 U.S. 306, 313 (1950). "The root requirement" of due process is that one is given "an opportunity to respond to accusations before he is deprived of any significant property interest" (*Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Bell v. Burson*, 402 U.S. 371, 379 (1971). This requires a fair hearing prior to the discharge of an employee who claims a constitutionally protected concern (*Board of Regents v. Roth*, 408 U.S., at 569-570; *Perry v. Sindermann*, 408 U.S. 593, 599 (1972); *Davis v. Scherer*, 468 U.S.____. ____, n. 10; *Cleveland Board of Education v. Loudermill* U.S. (1985)).

3) Courts are bound to rule according to the facts of the case as brought out in the testimony and documents presented, and not simply uncritically rubber stamp the defendant's *proposed findings of fact and law*, but to scrutinize B.G.S.U.'s decision carefully (*Mabey v. Reagan* 537 F. 2nd 1036; 1976).

4) Name calling alone, that occurred in print at BGSU, and even in open court against Dr. Bergman, has been ruled by the courts as *sufficient evidence* to establish proof of discrimination. (*Wilson v. City of Aliceville*, 779 F.2d 631 1986; EEOC 4574 (4-7-72) CCH ¹ 6321), yet was ignored in Walinski's ruling. Title VII requires a work environment free of racial intimidation; does it not also require one free of religious intimidation?

5) If a University claims not to discriminate and establishes an affirmative action office to reduce discrimination, they have an obligation to investigate identified concerns to insure that both due process and a person's rights are protected. The *University*

Affirmative Action Office did nothing to help Dr. Bergman in his claims but, in contrast, consistently and only defended the University. BGSU must conform to their own policies of affirmative action relative to discrimination *in the area of religion*, as well as race, sex, and disability. They did virtually nothing whatsoever to respond to this concern, which is not even listed in most documents dealing with discrimination, nor have guidelines been published.

6) In determining a professor's Title VII [42 U.S.C.A. ¤ 2000e et seq.] disparate treatment case in which discrimination on account of religion was claimed, the correct method is to consider comparative evidence, comparing professors granted tenure to determine if they were treated differently than the person in the protected class. If the evidence supports disparate treatment, one must conclude that BGSU's motive was legally "arbitrary" (*Civil Rights Act of 1964* ¤ 701 et seq., as amended, 42 U.S.C.A. ¤ 2000e et seq.). The judge incorrectly prohibited any comparisons from being made, and totally ignored all of the evidence in this area (such as Dr. Bergman was the most productive faculty in the college, had high student ratings and was promoted only months before tenure was denied).

7) The reams of direct evidence of religious discrimination, as well as pages of clear court testimony were all totally ignored by the court. Victims of religious or other discrimination are *not even required to provide direct evidence* of discriminatory intent (Zaustinsky v. U. of Calif. 96 F.D.R. 622;1983). As the U.S. Supreme Court ruled:

> The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, see N. 3, supra . . . As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. . . . [T]he District Court should not have required Aikens to submit evidence of discrimination intent. (See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44(1977) ; *U.S. Postal Service Board of Governors v. Aikens,* U.S. 103, S.Ct. 1478, 1483, 1481 n.3 (1983) *Namenwirth v. U. of Wisconsin* 769 F.2d 1235 (1985).

Although academic freedom is not specifically enumerated as a First Amendment right, the Supreme Court has consistently emphasized that the right to teach, inquire,

evaluate and study is fundamental to a democratic society (*Moore v. Gaston Board of Ed.* 357 F. Supp 1037 (1973); *Sweezy v. New Hampshire* , 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). The Supreme Court has stressed the need to expose students to a:

> ...robust exchange of ideas in the classroom: Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate ... [casting] a pall of orthodoxy over the classroom. The classroom is peculiarly the marketplace of ideas. (*Keyishian v. Board of Regents*, etc., 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.E.2d 629 (1967), Cf. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)) *Accord, Perry v. Sindermann*, 408 U.S. 593, 596-97 (1972); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Adler v. Board of Education*, 342 U.S. 485 (1952).

The safeguards of the First Amendment protect academic freedom because any unwarranted invasion of it will have a chilling effect on the exercise of the right by all teachers. Cf. *Pickering v. Board of Ed., etc.*, supra 391 U.S. at 574, 88 S.Ct. 1731 (1968).

8) Denial of tenure of a public university professor, even if based only in part on his First Amendment exercise, abridges his academic freedom (E.g. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). Dr. Bergman was not only denied academic freedom, but deprived of due process as required by BGSU.

9) Professors in state universities enjoy the constitutional protection of academic freedom, even though they may not be tenured and do not have a constitutional right to public employment, because these rights are:

> Safeguarded by the Bill of Rights and by the Fourteenth Amendment [that prohibit] inhibition of freedom of thought, and of action upon thought[and]... teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers...has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

And the Supreme Court has ruled that "the First Amendment covers the right of freedom of speech . . . freedom of inquiry, freedom of thought, and freedom to teach . . . indeed the freedom of the entire university community . . ." (*Griswold v. Conn*. (1965)). By denying Dr. Bergman tenure and discharging him based in substantial part on his speech, belief, and religious exercise of his creationist and religious beliefs, and his optional classroom reading list, and suggested research topic list, and concerns of possibly having discussed his beliefs in the classroom, BGSU clearly violated his academic freedom guaranteed under the U.S. Constitution. And if the university's action is "partially because of constitutionally protected reasons, the entire action is defective" (*Megill v. Bd. of Regents of State of Florida* 541 F. 2d 1073 (1976)). The reasons are not even to be *tainted* with illegal discrimination *(Stern v. Shouldice* 706 F. 2d 742 (1982)).

10) That teachers are entitled to First Amendment freedoms is not an issue in dispute. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969); see *Pickering v. Board of Education, etc.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Pred v. Board of Public Instruction*, etc., 415 F.2d 851, 855 (5th Cir. 1969). These constitutional protections are unaffected by the presence or absence of tenure (*McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Johnson v. Branch*, 364 F.2d 177 (4th cir. 1966), cert. denied, 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967)).

11) Non tenured faculty have a "property interest in their job if the existence of rules and understandings promulgated and fostered by state officials . . . justify [the faculty member's] claim of entitlement to continue employment absent 'sufficient cause'" (*Perry v. Sindermann* 408 U.S. 593; 1972). University documents made it clear that Dr. Bergman would be tenured if his teaching, research and service were satisfactory.

12) Stonewalling by BGSU and Tenured Department Members is impermissible. The

tenured Department members and BGSU have refused to disclose their votes on Dr. Bergman's tenure or valid reasons therefore. In recent race and sex discrimination cases, tenured professors were required to state the votes and the reasons for them. The same standards apply in this case (*Gray v. Board of Higher Education,* 692 F.2d 901 (2d J Cir. 1982), involving the refusal by a state college to disclose the votes and reasons for the denial of tenure of a black professor). The Second Circuit required disclosure, concluding:

> The district court minimized the importance of the Appellant's discovery needs in connection with the votes ... because it was "not clear" how knowing the votes themselves could aid Dr. Gray's case. Closer examination of the elements... makes Gray's need for the votes transparently evident.... Dr. Gray might prove ... intent to discriminate if he could establish that [the faculty]...harbored a racial *animus* against him and that this was manifest in votes against his reappointment and tenure--but to begin with he would, of course, have to know the votes. ..[only then could he] establish that the reasons given ... were *pretexts* for its refusal to rehire and tenure himÑif the Committee had given reasons. [Id. at 905];

Such disclosure does not impermissibly burden the rights of the tenured Faculty because :

> Academic freedom is illusory when it does not protect faculty from censorious practices but rather serves as a veil that covers those who might act as censors. Because our decision today inhibits capricious nonrenewal of employment based on race rather than academic grounds, we believe it to be basically consistent with the goals of academic freedom. (Id. at 909).

The Eleventh Circuit in *Dinnan*, 661 F.2d 426 (11th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), also held that a state university professor *must* divulge his vote despite the voting professor's claim of an alleged evidentiary academic freedom privilege:

> We hold that no privilege exists that would enable Professor Dinnan to withhold information regarding his vote on the promotion of the appellee.... if the concept [of academic freedom] is expanded too far, it can cause other important societal goals (such as the elimination of discrimination in employment decisions) to be frustrated . . . To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a *carte blanche* to practice discrimination of all types (*Id.* at 427, 428, 429).

The judge *based his ruling* in Dr. Bergman's case (R-66-70) on the Gray decision rendered by the District Court which was overturned *by the appellate court at the time of*

the ruling!

13) Religious discrimination in employment was a major issue in this case which the court incorrectly chose to totally ignore (see *Young v. Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975); *Compston v. Borden, Inc.*, 424 F.Supp. 157 (S.D. Ohio 1976); *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192 (6th Cir. 1978), cert denied, 441 U.S. 932 (1979); EEOC Dec. No. 71-1469, (1971) *Employment Practices Guide* (CCH) ¹ 6222; *EEOC* Dec. No. 72-0528, (1971) *Employment Practices Guide* (CCH) ¹6316; *EEOC* Dec. No. 72-1114, (1972) *Employment Practices Guide* (CCH) ¹6347 (same); *EEOC* Dec. No. 72-1301, (1972) *Employment Practices Guide* (CCH) ¹6338 (same)).

The long history of this case and the various motions, rulings, and the court's findings are briefly reviewed in the judge's ruling (R-79) and need not be repeated here except to challenge the erroneous conclusions and grossly ignoring of the law that occurred.