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## THE JUDICIAL TREND TOWARD STUDENT ACADEMIC FREEDOM

WILLIAM W. VAN ALSTYNE\*

The law that governs the prerogatives of college students and the powers of universities consists of rising tiers of authority. From ad hoc administrative and faculty rules, the layers progress upward to the supreme law of the Constitution. This brief discussion, however, concerns only one part of this uppermost tier — the fourteenth amendment (plus portions of the Bill of Rights to the extent they have been absorbed into the fourteenth amendment and made applicable to publicly-supported colleges). Additionally, not even all of the fourteenth amendment shall be considered, but only two of its several clauses in the first of its five sections.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virtually every significant change affecting student prerogatives and college powers made within the past ten years has resulted from an authoritative interpretation of the fourteenth amendment. Thus, a fairly responsible review of trends in the law of student prerogatives and college powers may confine itself to an examination of judicial trends under the fourteenth amendment and the Bill of Rights.

The fourteenth amendment is, of course, only a limitation on college power. That is, college rules do not derive their authority from the fourteenth amendment, and no college need show that its rule-making power is authorized by the fourteenth amendment.<sup>1</sup> The point is mild and self-evident, but extremely important; those who would seek to displace or invalidate a college rule by reliance upon the fourteenth amendment must sustain the burden of showing in what manner a given college rule or action is forbidden by or conflicts with the ultimate norms of the fourteenth amendment.

Still another preliminary observation needs to be made in narrowing the field of our discussion. The amendment provides only that no "State" shall deny due process or equal protection. Thus, while state colleges and state universities are readily subject to its strictures the amendment would not appear to address itself to private colleges and universities. These, it may be suggested, can operate freely without observing due process or equal protection. In this sense, the fourteenth amendment does not establish a "right" to due process or to equal protection; rather, it merely provides a limited "immunity" — an immunity from *state* denials of due process or equal protection.

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1. The affirmative source of rule-making power is to be sought in articles of incorporation, charters, state delegation of legislative prerogatives, subdelegations by boards of trustees, et cetera.

In a larger and highly practical way, however, this preliminary observation is substantially false and our discussion is in fact relevant to many colleges that regard themselves as private institutions. The concept of "state action" has so far expanded, and the presence of government has so far penetrated, that very few colleges are today wholly "private" in the sense of being altogether immune to the fourteenth amendment and the Bill of Rights (the latter applying to instrumentalities of the *federal* government and thus, to a variable extent, to colleges with substantial federal involvements). The majority of new college building programs even at "private" colleges are currently underwritten by federal loans and insurance. Large numbers of fellowships, scholarships, and loans at "private" colleges are supplied with federal money. Government research contracts represent a rapidly growing percentage of college budgets, and local, state, and federal tax-exempt status indirectly aid most colleges. As a consequence, the following dictum by the Supreme Court becomes significant:<sup>2</sup>

[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

Additionally, education itself has become increasingly regarded as a "public function," just as a larger percentage of students currently attend publicly-supported institutions than ever before. We can no longer ignore the complex of federal court decisions that brings colleges and universities within range of the fourteenth amendment.<sup>3</sup> These decisions equally emphasize the

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2. *American Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

3. *See, e.g., Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966) (quasi-public nature of park plus continuation of some maintenance brings private trustees of the park under the equal protection clause); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (privately-operated restaurant under arms-length lease with public parking authority subject to equal protection clause. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (county-wide private association's preprimary elections held subject to fifteenth amendment. "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes."); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (mere state judicial enforcement of racially restrictive private property covenant violates equal protection clause. "Nor is the Amendment ineffective simply because the particular pattern of discrimination which the State has enforced, was defined initially by the terms of a private agreement."); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (privately-owned company town subject to first amendment. "We do not agree that the corporation's property interests settle the question. . . . The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."); *Eaton v. Grubb*, 329 F.2d 710 (4th Cir. 1964) (private hospital receiving federal aid and performing "public function" subject to fourteenth amendment); *Commonwealth of Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa.), *aff'd*, 373 F.2d 771 (3d Cir. 1967) (orphans' school operated by private trustees but subject to some state regulation held subject to fourteenth amendment); *Guillory v. Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962) (private university with state charter, some tax exemption, and three public officials nominally on governing board subject to fourteenth amendment); *Cf. Green v. Howard Univ.*, 271 F. Supp. 609, 611 (D.D.C. 1967). The *Green* case is of doubtful

“significant involvement” of government in formerly private educational enterprises and the “public function” of education itself. It is important therefore, to note that many more colleges may be bound by constitutional norms than are commonly regarded as being so bound. The subject having now been put in focus, we move to an examination of recent judicial trends.

#### GENERAL TRENDS RESPECTING STUDENT STATUS

In 1925, the Florida Supreme Court reflected the perspective of courts across the country in generously deferring to the autonomy and supposed expertise of college administrations. In reversing a judgment secured against Stetson University and its president by a girl indefinitely suspended following a brief interrogation by the president who rather summarily determined that the girl had created disturbances in a dormitory, the court observed:<sup>4</sup>

As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose . . . .  
[In the case of a private institution,] it is not incumbent on the institution to prefer charges and prove them at trial before dismissing permanently or temporarily a student regarded by it as undesirable.

An increasing number of state and federal courts have modified this perspective substantially since 1961. The analogy of *in loco parentis* has been rejected, the importance of a student's interest in his academic status has been upgraded, the definition of a “private” institution has been narrowed, and the role of constitutional limitations has been expanded. Reviewing recent federal court decisions last year, a California court of appeals observed:<sup>5</sup>

The more recent federal cases stress the importance of education to the individual and conclude that attendance in a state university is no longer considered a privilege . . . . but is now regarded as an important benefit . . . .

In the Dixon and Knight cases, it was held that procedural due process required a hearing before students who participated in demonstrations violating laws concerning the separation of the races in public places could be dismissed or suspended from the state university. As

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authority for any of its asserted propositions in view of the fact that the court of appeals ordered reinstatement of the ousted students pending a hearing on the merits, subject to the holding of an orderly hearing within the college.); *Green v. Howard Univ.*, Civil No. 1949 (D.C. Cir. 1967); *Parsons College v. North Central Ass'n of Colleges & Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962); *University of Miami v. Militana*, 184 So. 2d 701, 704 (3d D.C.A. Fla. 1966). See also A. S. MILLER, *RACIAL DISCRIMINATION AND PRIVATE EDUCATION* (1957); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 28-36 (1961); Note, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); Comment, *Racial Discrimination in “Private” Schools*, 9 WM. & MARY L. REV. 39 (1967).

4. *Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1925).

5. *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463, 469 (Cal. App. 1967) (emphasis added).

stated in *Dixon*: "The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." The court noted in *Knight* that: "Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training. Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth."

*For constitutional purposes, the better approach, as indicated in Dixon, recognizes that state universities should no longer stand in loco parentis in relation to their students.*

The *Dixon* case referred to in the California opinion, incidentally, is a decision from the federal Court of Appeals for the Fifth Circuit, which has appellate jurisdiction over federal cases and controversies arising in the southeast, including Florida.<sup>6</sup>

There is nothing especially startling in the judicial determination to upgrade the students' claim in preserving their educational opportunity and nothing startling in applying the constitutional norms in behalf of persons under twenty-one years of age. In 1954, the Supreme Court observed: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of a public education."<sup>7</sup>

Similarly, those under twenty-one years of age, including even those in secondary schools, are not excepted from the protection of the fourteenth amendment. In voiding a compulsory flag salute as applied to school children religiously opposed to such a state ceremony, Mr. Justice Jackson observed in 1943:<sup>8</sup>

*The Fourteenth Amendment, as now applied to the states, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.*

6. The case is *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

7. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); *cf. Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance."); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 634 (1819) ("That education is an object of national concern . . . all admit.").

8. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (emphasis added).

## SPECIFIC JUDICIAL TRENDS

*Procedural Due Process*<sup>9</sup>

Even minors cannot be disciplined in a manner affecting their substantial interests without the observance of procedural due process. This proposition received fresh support from the Supreme Court only last year. In prospectively requiring juvenile courts to improve the judicial nature of their proceedings, the Court declared:<sup>10</sup>

Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.

....

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.

The jettisoning of *in loco parentis* was, it may be suggested, long overdue in any case. For one thing, the mean age of American college students is more than twenty-one years and there are, in fact, more students over the age of thirty than younger than the age of eighteen.<sup>11</sup> Even in Blackstone's time, the doctrine did not apply to persons over twenty-one.<sup>12</sup> For another thing, it is unrealistic to assume that relatively impersonal and large-scale institutions can act in each case with the same degree of solicitous concern as a parent reflects in the intimacy of his own home. The parent is doubtless restrained in tempering discipline with parental love and concern. The institution, however, cannot hope to reflect the same intense degree of emotional identification with those in attendance, no matter how well it may intend otherwise. The institution is also subject to different practical concerns — to keep its eye on reaction by the local press, disgruntlement among alumni, dis-

9. Further discussion of this subject can be found in Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344 (1964); Moneypenny, *University Purpose, Discipline and Due Process*, 43 N.D.L. REV. 739 (1967); Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368 (1968); Note, *Academic Freedom*, 81 HARV. L. REV. 1045, 1128 et seq. (1968); Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME LAW. 174 (1963); Note, *College Disciplinary Proceedings*, 18 VAND. L. REV. 819 (1965); Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); Comment, *School Expulsions and Due Process*, 14 KAN. L. REV. 108 (1965); Comment, *The Constitutional Rights of Students*, 40 PHIL. L.J. 587 (1966); Comment, *The College Student and Due Process in Disciplinary Proceedings*, 13 S.D.L. REV. 87 (1968).

10. *In re Gault*, 387 U.S. 1, 19-20, 27-28 (1967).

11. U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports, Population Characteristics, ser. P-20, No. 110, at 12 (1961).

12. BLACKSTONE, COMMENTARIES 782-84 (8th ed. 1890).

satisfaction among benefactors and others whose practical influences combine to bring about an administrative perspective less loving and more divided than a mother has for her own son or daughter. It simply blinks at reality to treat the mother and the college as one and the same in drawing legal analogies, no matter how frequently one refers to his alma mater for other purposes. Finally, a parent's disciplinary authority does not extend to the power literally to expel a dependent minor from his own home, but to lesser penalties only. Yet, the typical sanction imposed by the alleged surrogate parent, a college, is the sanction of expulsion itself—with all the serious consequences to the student's future already noted above. As the analogy of *in loco parentis* is several times false in fact, we need not be surprised nor alarmed that it is now being discarded. Large scale collegiate operations, the heterogeneity of their student bodies, the varying ages of their students, the irreducible impersonality of their operation, and the grave consequences of their disciplinary proceedings, all support the heightened requirements of greater procedural fair play in their treatment of alleged violators of their rules.

The immediate, practical, and constitutional result of these phenomena is this: colleges and universities may no longer enforce their rules through sanctions seriously jeopardizing a student's career in the absence of procedures that are fundamentally fair. The essential elements of fair procedure include (but may not be limited to) the following requirements:

(1). Serious disciplinary action may not be taken in the absence of published rules that: (a) are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application;"<sup>13</sup> and (b) do not depend upon the unqualified discretion of a particular administrator for their application.<sup>14</sup>

(2). Where the rules are reasonably clear and their application does not depend upon uncontrolled discretion, a student still may not be seriously disciplined (as by suspension) unless: (a) the student charged with an infraction has been furnished with a written statement of the charge adequately in advance of a hearing to enable him to prepare his defense (for example, ten days);<sup>15</sup> (b) the student thus charged "shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing";<sup>16</sup> (c) the student is "permitted to have counsel present . . . at the hearing to advise [him]";<sup>17</sup> (d) the student is "permitted to hear the evidence presented against

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13. *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968). See also *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967). But see *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968).

14. Applied in *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967).

15. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

16. *Id.* at 651.

17. *Id.*; *Madera v. Board of Educ. of City of N.Y.*, 267 F. Supp. 356 (S.D.N.Y. 1967), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967); *Goldwyn v. Allen*, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

him"<sup>18</sup> or at least "the student should be given the names of witnesses against him and an oral or written report on the facts to which each witness testifies";<sup>19</sup> (e) the student "(not his attorney) may question at the hearing any witness who gives evidence against him";<sup>20</sup> (f) those who hear the case "shall determine the facts of each case solely on the evidence presented at the hearing. . . .";<sup>21</sup> (g) "the results and findings of the hearing should be presented in a report open to the student's inspection";<sup>22</sup> (h) "either side may, at its own expense, make a record of the events at the hearing."<sup>23</sup>

These procedural safeguards roughly parallel some of the standards required of criminal courts in their disposition of offenses punishable by fine or short-term imprisonment. The comparison is not fortuitous because it is now evident that expulsion or exclusion from college may, in the long run, disadvantage an individual at least as much as a single infraction of a criminal statute. There should be no surprise, therefore, that students are entitled at least to the same degree of due process as a suspected pickpocket. Indeed, the requisites of due process still evolving from federal decisions are substantially less than standards already recommended by professional educational associations. The Association of American Colleges (representing administrations of nearly 900 colleges), The American Association of University Professors (representing about 86,000 full-time faculty at accredited institutions), the National Student Association, the National Association of Student Personnel Administrators, the National Association of Women Deans and Counsellors, and the American Association of Higher Education have recently approved a Joint Statement on Rights and Freedoms of Students, which goes considerably beyond the requirements suggested in court decisions.<sup>24</sup>

18. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

19. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

20. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 653 (W.D. Mo. 1967).

21. *Id.* at 652.

22. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

23. *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 652 (W.D. Mo. 1967). *See also* for particular treatments of these various requisites, *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Woody v. Burns*, 188 So. 2d 56 (1st D.C.A. Fla. 1966). *See also* the extraordinarily circumspect procedure used by the University of California and approved by the state court in *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (1967). *Cf.* the lesser standards held to be sufficient in *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Wright v. Texas So. Univ.*, 277 F. Supp. 110 (S.D. Texas 1967); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963). *See also* *Butting v. Smily*, No. C-666 (D. Colo. Feb. 2, 1968) (opinion by Arraj, J.); *Soglin v. Kauffman*, No. 67-6-141 (W.D. Wis. Dec. 11, 1967) (opinion by Doyle, J.).

24. *See* Appendix. *See also* the earlier ACLU statement, which the Joint Statement parallels, A.C.L.U. Academic Freedom and Civil Liberties of Students in Colleges and Universities (rev. ed. 1965). The University of California, Berkeley, appears to provide greater procedural safeguards than the Joint Statement. *See* REPORT OF THE STUDY COMMIS-



The late (and judicially conservative) Mr. Justice Frankfurter once observed that "[T]he history of liberty has largely been the history of observance of procedural safeguards."<sup>25</sup> So it is with students, as with others.

Somewhat anticlimactically, however, it is necessary to note a few additional matters in rendering out treatment of student procedural due process with fuller accuracy:

(1). The federal cases involving procedural due process for students have been disposed of by courts below the level of the United States Supreme Court and thus their utterances on this subject are not necessarily the last word. Indeed, a number of federal courts disagree among themselves respecting the requisite degree of college due process.<sup>26</sup>

(2). On the other hand, it is reasonable to expect that additional safeguards may be imposed by the courts if it appears that complete fairness is still not being observed. For instance, it is foreseeable that random and unannounced searching of student rooms may be forbidden, that students may not be coerced into admissions of misdeeds, and that some greater degree of cross-sectional representation on hearing boards may eventually be required.

(3). A clear distinction will probably continue to be made, however respecting campus offenses carrying such relatively insubstantial penalties (for example, social probation, minor fines, loss of auto privileges) that formal due process is not demanded and may well be dispensed with in the interest of administrative convenience.

(4). A distinction will probably continue to be made in instances where students face the prospect of being dropped due to inadequate grades. It is true, of course, that dismissal for academic deficiency may be as serious to the student's educational career as dismissal for disciplinary reasons, but quasi-judicial procedures are generally inadequate as means of determining whether, for instance, an essay examination should have been graded as a "C" rather than a "D." A lay panel may ordinarily lack the competence of second-guessing grades. Only where the student's complaint alleges egregious and almost willfully biased grading may the college be required to provide some means of review, and even then the review would presumably involve a panel of professors familiar with the subject matter of the examination and who would follow a different procedure than in a disciplinary case.<sup>27</sup>

(5). Finally, disciplinary proceedings are different from counselling proceedings where the student does not stand in jeopardy of a penalty.<sup>28</sup> So long as the counsellor is required to respect the confidentiality of his relationship and acts without power to impose punishment, no reason exists to import an adversary or quasi-judicial procedure that would undermine the counsellor's essential functions.

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SION ON UNIVERSITY GOVERNANCE, THE CULTURE OF THE UNIVERSITY: GOVERNANCE AND EDUCATION (1968). For similar institutional developments, see REPORT OF THE FACULTY COMMITTEE ON STUDENT AFFAIRS TO THE ACADEMIC COUNCIL, MICH. STATE UNIV., ACADEMIC FREEDOM FOR STUDENTS (1967); REPORT OF THE COMMISSION OF THE INTERDEPENDENCE OF UNIVERSITY REGULATIONS AND LOCAL, STATE, AND FEDERAL LAW (1967).

25. *McNabb v. United States*, 318 U.S. 332, 347 (1943). See also *Irwin v. Doud*, 366 U.S. 717, 729 (1961); similar statements by Frankfurter in *Malinski v. New York*, 324 U.S. 401, 414 (1945).

26. See cases cited note 23 *supra*.

27. See, e.g., *Connelly v. University of Vt.*, 244 F. Supp. 156 (D. Vt. 1965).

28. See, e.g., *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967); *Cosme v. Board of Educ.*, 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966).

*Political Freedoms*<sup>29</sup>

Second only to their concern with procedural due process, an increasing number of courts have moved to circumscribe college power over political freedoms that are constitutionally reserved to all persons including students. There are two aspects of student political freedom that are especially topical just now: (1) rules that regulate forms of expression or political activity by the students themselves, on campus; (2) rules that regulate students in terms of whom they may invite to hear on campus.

The first amendment explicitly provides protection for "freedom of speech, of the press," the right "peaceably to assemble, and to petition the government for a redress of grievances." This protection extends to those who are otherwise properly on a college or university campus, which is sufficiently "public" to be subject to the first or fourteenth amendment. It operates as a limitation on college rule-making power to protect political expression and organizational activity by students, whether the subject of that expression is directed to alleged grievances within the college itself or whether the subject is an issue not especially related to the college itself. In order to withstand criticism anchored in a claim of constitutional right, college rules curtailing forms of political expression must generally satisfy the following standards:

- (1). They must be clear and specific, and free of such ambiguity that their uncertain scope and application are so doubtful as themselves to chill the exercise of orderly political expression;<sup>30</sup>

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29. Further discussions of this subject can be found in Pollitt, *Campus Censorship: Statutes Barring Speakers from State Educational Institutions*, 42 N.C.L. REV. 179 (1963); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1 (1965); Note, *Academic Freedom*, 81 HARV. L. REV. 1045, 1128 (1968); Note, *State's Right To Abrogate First Amendment Guarantees in Regulation of State University Speaker Programs*, 42 TULANE L. REV. 394 (1968); Note, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); Comment, *Mississippi's Campus Speaker Ban: Constitutional Considerations and the Academic Freedom of Students*, 38 MISS. L. REV. 488 (1967).

30. See cases cited note 13 *supra*. See also *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (faculty disclaimer oath void for vagueness); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) ("Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."); *Id.* at 200 (footnotes omitted); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (faculty disclaimer oath void for vagueness); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961) (Florida teachers' oath void for vagueness); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 695 (1959) (concurring opinion) ("The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society."). *But see Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (Cal. App. 1967).

(2). They must confine themselves to restrictions that go no further than to: (a) forbid modes of conduct that are manifestly unreasonable in terms of time, place, or manner;<sup>31</sup> (b) forbid incitements made under such circumstances as to create a clear and present danger of precipitating a serious violation of law.<sup>32</sup>

Thus, a rule that broadly forbids "any student . . . [to engage on campus] in any public demonstrations without prior approval of the College administration," is void on its face. It is a prior restraint devoid of proper standards restricting its application to assemblies held at a time, place, or in such a manner as to disrupt the school.<sup>33</sup> Nor may a student editor be denied registration for "insubordination" in failing to submit totally to censorship of an editorial critical of the state legislature and for refusing to print in its stead a canned story about "Raising Dogs in North Carolina" as demanded by the college president.<sup>34</sup> As the court declared in such a case:<sup>35</sup>

A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution. State school officials cannot infringe on their students' right of free and unrestricted expression . . . where the exercise of such right does not "materially and substantially interfere with requirements of appropriate discipline in the operation of the school." The defendants in this case cannot punish Gary Clinton Dickey for his exercise of this constitutionally guaranteed right by cloaking his expulsion or suspension in the robe of "insubordination."

Similarly, students expressing a political view by wearing "freedom buttons" cannot be suspended on the pretense that such things must be forbidden to preserve discipline where in fact there has been no evidence of any physical disorder.<sup>36</sup>

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31. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (restriction on "raucous" volume from sound trucks in business district upheld); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (purely provocative epithets at captive listener may be forbidden); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (parade permit requirement upheld where issuance is mandatory and applicant need supply only minimum information); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) (intimidation of fellow students to join student protest may be forbidden); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal. Rptr. 463 (Cal. App. 1967) (noisy broadcast of obscene expressions in public on-campus places may be forbidden). Cf. *New York Times v. Sullivan*, 376 U.S. 254 (1964) (use of libel insufficient even for civil restraint in absence of actual malice and in context of political expression); *Schneider v. State*, 308 U.S. 147 (1939) (possibility of litter insufficient to justify ban on political handbill distribution).

32. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Bridges v. California*, 314 U.S. 252 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schenck v. United States*, 249 U.S. 47 (1919).

33. *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967).

34. *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967).

35. *Id.*, at 618; *Zander v. Louisiana State Bd. of Educ.*, Civ. Action No. 13,427 (W.D. La. March 8, 1968) (expulsion of students who seized control of facilities to demonstrate grievances upheld).

36. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). Cf. *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966); *Goldberg v. Regents of Univ. of Cal.*, 57 Cal.

Assemblies that are staged so as to congest access or passage, demonstrations that become disruptive because of their noise, and expression that is imposed on a semi-captive audience or offensively upon unwilling third parties, however, so clearly interfere with the reciprocal rights of others that they may appropriately be forbidden under regulations neutrally limiting even political expression according to reasonable time, place, and manner.<sup>37</sup> Indeed, the administrative inconvenience of having to accommodate ad hoc demonstrations in certain locations (for example, the president's office or inside a classroom building), may justify a rule placing some facilities entirely off limits as a political forum, even though a given demonstration might itself not happen to be disruptive.<sup>38</sup>

One other point is also well established and presumably applies on campuses as well. In regulating political expression, college authorities may not formulate or apply rules that discriminate against competing points of view. If placards or handbills favoring a given governmental policy may be distributed, a discriminatory ban on placards and handbills opposing that policy will fall as a denial of equal protection. If an assembly is permitted where students and faculty may comment on the evils of drug use, no curtain can be drawn on others holding an opposing view. In short, the publicly-supported college can no more engage in partisan censorship than government itself. The view of Mr. Justice Holmes has been accepted on this matter:<sup>39</sup>

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [our] wishes safely can be carried out. That at any rate is the theory of our Constitution.

The constitutional law on this matter follows the observation of John Stuart Mill in his *Essay on Liberty*:<sup>40</sup>

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Rptr. 463 (Cal. App. 1967); *In re Bacon*, 49 Cal. Rptr. 322, 240 Cal. App. 2d 34 (Cal. App. 1966). *Burnside v. Byars* was expressly not followed in *Tinker v. Des Moines Independent Community School Dist.*, 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd by equally divided court*, 383 F.2d 988 (8th Cir.), *cert. granted*, ..... U.S. ...., 88 S. Ct. 1050 (1968) (ban on wearing black arm bands to protest Viet Nam policy upheld) and the two cases are well worth comparing. *Burnside*, a fifth circuit decision, is controlling in the southeastern United States.

37. See cases cited note 21 *supra*.

38. *Cameron v. Johnson*, 36 U.S.L.W. 4319 (U.S. April 22, 1968); *Adderley v. Florida*, 385 U.S. 39 (1966) (trespass statute applied to curtilage of jailhouse against scarcely disruptive demonstrators upheld); *Cox v. Louisiana*, 379 U.S. 559 (1965) (dictum that demonstrations on courthouse steps may be wholly forbidden). *But see Brown v. Louisiana*, 383 U.S. 131 (1966) (breach of peace conviction for quietly standing in anteroom of public library without evidence of interference with others and to protest library segregation practices reversed). See also *Jeanette Rankin Brigade v. Chief of Capitol Police*, 278 F. Supp. 233 (1968), which is difficult to reconcile with *Edwards v. South Carolina*, 372 U.S. 229 (1963).

39. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

40. J. S. Mill, *On Liberty, Representative Government, The Subjection of Women*, in *THE WORLD'S CLASSICS* (1966).

Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.

It is in this context that the Supreme Court has suggested:<sup>41</sup>

The essentiality of freedom in the community of American universities is almost self-evident. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

....

*[E]ducation, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.*

Here again, however, the courts have provided no greater protection for students than that which has already been accepted by a significant number of educational associations. Thus, the Joint Statement on Student Rights and Freedoms provides:

Students and student organizations should be free to examine and to discuss all questions of interest to them, and to express opinions publicly and privately. They should always be free to support causes by orderly means which do not disrupt the regular and essential operation of the institution. At the same time, it should be clear to the academic and the larger community that in their public expressions or demonstrations students or student organizations speak only for themselves.

On the related political freedom — the rights of students to invite and to hear guest speakers on campus — the trend of judicial decision closely parallels the trend with respect to the students' own freedom of expression on campus. The courts have come to recognize that an individual cannot be made to relinquish those rights which he holds as a citizen (including the right to hear) as a condition of attending college. The college may generally regulate the appearance of invited guest speakers only to an equivalent extent as may a civil polity regulate public facilities that are otherwise suitable as meeting places. It may establish neutral priorities (for example, giving preference to a regular academic event over an invitation to a guest speaker sought to be scheduled for the same time). It may require that sponsoring organizations submit sufficient information to enable university officials an orderly means of allocating facilities. It may oblige the speaker to assume full

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41. First quotation is from *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Second quotation is from *West Virginia Bd. of Educ. v. Barnett*, 319 U.S. 624, 637 (1943). See also dicta on academic freedom in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and discussion in text *infra*, regarding the same problem with respect to discrimination among guest speakers on campus.

responsibility for any violation of law involved in his own conduct. It probably may require a statement that the views presented are not necessarily those of the institution or of the sponsoring group. But it may neither proceed by rules that are vague or that reserve unchecked discretion to censor, nor may it screen speakers according to their political affiliation, their subject matter, or their point of view. Nor will the answer be allowed that speakers can be banned without violating anyone's freedom to hear on the ground that the college's own faculty already adequately considers all points of view in class. As Mill pointed out:<sup>42</sup>

Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutation. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never possess himself of the portion of truth which meets and removes that difficulty.

Recent case illustrations of these conclusions are at hand. A 1965 North Carolina statute requiring the trustees of the consolidated state university system to adopt special rules governing the appearance of "known members of the Communist Party" was declared void for vagueness by a federal court only this year.<sup>43</sup> Similarly, a rule permitting use of a college auditorium by outside organizations "insofar as these are determined to be compatible with the aims of Hunter College as a public institution of higher learning," was held to be void for vagueness.<sup>44</sup>

Even where the regulation may be clear, it may deny equal protection where it bars speakers according to their political affiliation, the popularity of their views, or some other standard that goes to the background of the speaker rather than the legality of the manner in which he proposes to speak.

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42. J. S. MILL, *supra* note 40, at 47.

43. *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968). There are additional holdings of considerable importance that do not appear in the opinion but which are implicit in the court's disposition of the case. In reaching the merits and holding in favor of the plaintiffs, the court necessarily held (a) that the students and speakers had standing, (b) that the issue had not become moot merely because the particular date for which the speakers had been scheduled had passed, (c) that the abstention doctrine did not apply. All of these issues were tendered by defendants' various motions to dismiss. The treatment of these issues appears to have been correct. *See, e.g., Zwickler v. Koota*, 88 S. Ct. 391 (1968); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (addressee of mail has standing to contest conditions imposed on mail); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (abstention held inappropriate); *East Meadow Community Concerts Ass'n v. Board of Educ.*, 19 N.Y.2d 605, 278 N.Y.S.2d 393 (1967) (action for declaratory judgment not moot where court has jurisdiction, dispute of recurring nature, parties adverse, free speech the issue, and rule challenged on its face).

44. *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

Thus, the California Supreme Court has struck down a ban against "subversive elements" on grounds of equal protection (rather than on vagueness alone):<sup>45</sup>

It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable.

The New York and California courts were, in this regard, merely following standards established years earlier by the United States Supreme Court:<sup>46</sup>

The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

On the same analysis precisely, speaker bans in Mississippi and Louisiana were recently set aside.<sup>47</sup>

Again, however, the Constitution has been interpreted as requiring no more than professional associations have themselves recommended. The Joint Statement provides in this respect:

Students should be allowed to invite and to hear any person of their own choosing. Those routine procedures required by an institution before a guest speaker is invited to appear on campus should be designed only to insure that there is orderly scheduling of facilities and adequate preparation for the event, and that the occasion is conducted in a manner appropriate to an academic community. The institutional

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45. *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885, 892 (1946). Same ground used as alternative holding in *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

46. *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

47. See *Stacy v. Williams*, Cause No. WC 6725 (N.D. Miss., June 30, 1967) (temporary restraining order issued July 7, 1967). (The statute is discussed in Comment, *Mississippi's Campus Speaker Ban: Constitutional Considerations and the Academic Freedom of Students*, 38 Miss. L. Rev. 488 (1967)). *Student Liberal Federation v. Louisiana State Univ.* at New Orleans, Civ. Action No. 68-300 (E.D. La., Feb. 13, 1968) (temporary restraining order issued Feb. 15, 1968, Heebe, J.). (The statute is discussed in Note, *State's Right To Abrogate First Amendment Guarantees in Regulation of State University Speaker Programs*, 42 TULANE L. REV. 394 (1968)). For cases ruling against litigants seeking to ban speakers on campus see *Cannon v. Towner*, 138 Misc. 955, 70 N.Y.S.2d 303 (Sup. Ct. 1947); *Egan v. Moore*, 20 App. Div. 2d 150, 245 N.Y.S.2d 622 (1963), *aff'd*, 14 N.Y.2d 775, 199 N.E.2d 842, 250 N.Y.S.2d 809 (1964); *Donato v. Board of Educ.*, N.Y. Sup. Ct., Westchester Co., Jan. 30, 1967.

control of campus facilities should not be used as a device of censorship. It should be made clear to the academic and larger community that sponsorship of guest speakers does not necessarily imply approval or endorsement of the views expressed, either by the sponsoring group or the institutions.

In closing this brief article, I want to emphasize again that we have been discussing judicial *trends* rather than legal certainties. The Supreme Court has not definitely considered the scope of student political freedom on campus or the scope of student procedural due process, and a number of state courts as well as some federal courts would not necessarily reach the results reported in this article. Nonetheless, it is correct to state that a trend is evident, and I believe it to be a fair prophecy that the trend will continue. I should hope, however, that the abrasive last resort of unwelcome litigation may be avoided and that the principles we have discussed will gather voluntary support on the basis that they reflect sound and enlightened educational policy. Wholly apart from the legal compulsion which may support them, these principles are surely no more than those that self-respecting institutions of higher learning should freely desire to secure as worthwhile in themselves.



## APPENDIX

THE JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS provides in part:

B. *Investigation of Student Conduct.*

(1). Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed.

(2). Students detected or arrested in the course of serious violations of institutional regulations, or infractions of ordinary law, should be informed of their rights. No form of harassment should be used by institutional representatives to coerce admissions of guilt or information about conduct of other suspected persons.

C. *Status of Student Pending Final Action.* Pending action on the charges, the status of a student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property.

D. *Hearing Committee Procedures.* When the misconduct may result in serious penalties and if the student questions the fairness of disciplinary action taken against him, he should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality:

(1). The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.

(2). The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to insure opportunity to prepare for the hearing.

(3). The student appearing before the hearing committee should have the right to be assisted in his defense by an adviser of his choice.

(4). The burden of proof should rest upon the officials bringing the charge.

(5). The student should be given an opportunity to testify and to present evidence and witnesses. He should have an opportunity to hear and question adverse witnesses. In no case should the committee consider statements against him unless he has been advised of their content and of the names of those who made them, and unless he has been given an opportunity to rebut unfavorable inferences which might otherwise be drawn.

(6). All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matter. Improperly acquired evidence should not be admitted.

(7). In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.

(8). The decision of the hearing committee should be final, subject only to the student's right of appeal to the President or ultimately to the governing board of the institution.