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THE UNIVERSITY OF OKLAHOMA

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# CONSTITUTIONAL RIGHTS OF COLLEGE STUDENTS

## --A STUDY IN CASE LAW

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CONSTITUTIONAL RIGHTS OF COLLEGE STUDENTS

--A STUDY IN CASE LAW

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## INTRODUCTION

On August 4, 1961, the United States Court of Appeals, Fifth Circuit, delivered a two-to-one opinion in the case of Dixon v. Alabama State Board of Education[1] which declared in essence that "due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct." In finding for the expelled appellants, six Negro students, and against the state of Alabama, the court laid the foundation for a new body of case law in the federal courts. For the first time, students in their relationships with tax-supported institutions of higher learning, were held to come under the aegis of the fourteenth amendment's ban on arbitrary state action directed at individuals.

Charles Alan Wright, Professor of Law at the University of Texas, has pointed out that the Dixon decision marked a rare 180-degree turn in the law.[2] This turn was dramatized by the fact that the Fifth Circuit handed down its opinion in Dixon less than two years after the Second Circuit had sustained a decision that federal courts lack jurisdiction in college-discipline cases.[3] The Fifth

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[1] 294 F.2d 150 (5th Cir.) cert denied, 368 U. S. 930 (1961).

[2] "The Constitution on the Campus," 22 Vanderbilt Law Review 1027 (October, 1969).

[3] Steier v. N. Y. State Ed. Comm'r., 271 F.2d (2d Cir. 1959) cert denied, 381 U. S. 966 (1960).

Circuit not only accepted jurisdiction, but found for the plaintiffs while issuing a general caveat of procedural safeguards due college students in expulsion cases.

Dixon was born of the Negro-rights demonstrations which were flaring up throughout much of the country in 1961. But the classification addressed by the Fifth Circuit's sweeping opinion was not the American Negro. It was the American college student.

The significance of the Fifth Circuit's decision can be viewed from a number of different perspectives. Of undeniable primary importance is the fact that it created a new legal relationship between the American college student and the tax-supported institution--at least insofar as disciplinary action is concerned, replacing the predominant in loco parentis and contractual concepts with a broad concept of constitutional rights for college students.

As will be seen in Chapters IV and V, Dixon is most noted for its declarations that (1) students at tax-supported colleges have a property right in their status--a right which they cannot be arbitrarily denied; and (2) included under the penumbra of the fourteenth amendment, students at tax-supported colleges may not be required to surrender constitutional rights at the campus gate. This new rationale terminated the legal legitimacy of the predominant in loco parentis and contract concepts of the status of students at public colleges.

Eight years after the Fifth Circuit handed down its opinion in Dixon, that case remained the controlling precedent for challenge to arbitrary expulsions of college students. Moreover, the constitutional-rights rationale of the student-college relationship had been effectively

expanded into the arena of substantive rights for college students,[1] and the Dixon precedent was being used to protect high school students against the arbitrary actions of school administrators.[2] After eight years in the field, Dixon was not only being sustained as the leading precedent,[3] but had been substantially expanded by subsequent decisions which followed its authority.[4]

Dixon and subsequent decisions relying on its precedent have attracted much scholarly attention to the subject of student rights from the ranks of American legal writers. Legal journals probably published as many articles on the subject of student rights in the seven years following Dixon as they had published during the preceding four decades.[5] Of significance, too, is the tone of the literature, sometimes seemingly based on an a priori of a shameless

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[1]See Chapter VII, infra. The highly litigious state of student rights promptly gave birth to a monthly publication, the College Law Bulletin, issued monthly by the United States National Student Association.

[2]See Chapter VII, infra.

[3]See esp. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W. D. Mo. 1967), in which the court prescribed ten days' notice and rights to legal counsel, cross-examination and hearing record.

[4]Shepardizing Dixon establishes that no court has denied its authority.

[5]The Index to Legal Periodicals reflects no interest in the subject of student rights by legal writers prior to the case of Anthony v. Syracuse University (1927), which attracted notes in the University of Pennsylvania Law Review, New York University Law Review, Tennessee Law Review, Harvard Law Review, and Michigan Law Review. Aside from case notes, it would appear that the first indexed scholarly treatment of the general subject was Warren A. Seavey's "Dismissal of Students: 'Due Process,'"70 Harvard Law Review 1406 (1957). The Columbia Law Review did publish in 1935 "Expulsion of Students from Private Educational Institutions" (35:898); and M. M. Chambers' "Legal Right of a Student to a Diploma or a Degree" appeared in Educational Law and Administration in January, 1936.

denial of basic fairness in disciplinary proceedings conducted on college campuses and an almost shocked realization that a citadel of freedom in the United States--the college campus--had timidly succumbed in a disquieting number of cases to the pressures of public opinion and administrative expediency in an aura of judicial self-restraint.

If recent developments in procedural rights for college students have constituted something of a revolution, then one might wish to grant the same status to gains scored in the area of substantive rights on the college campus. The simple truth is that college students have won impressive judicial support for their rejection of much of the paternalism that has characterized the administration of tax-supported higher education in the United States. The first amendment means much more to the college student today than it did a decade ago. Nonetheless, paternalism remains on campus. In 1967, six years after Dixon, Phillip Monypenny, Professor of Political Science at the University of Illinois, observed that, "The traditional opinion is that for the student's own protection he needs to be controlled in his choice of residences, including closing hours for women, his use of liquor, possible departures from sexual abstinence, his published expressions, the organizations he forms and joins . . . ."[1] If one judges by the number of cases reaching the courts which represent paternalism, one is forced to wonder if the judicial demise federal courts have written for the in loco parentis

[1] "University Purpose, Discipline and Due Process," 43 North Dakota Law Review 739, 742 (1967).

doctrine was not prematurely noted. For, regardless of how the courts view the college-student relationship, it remains apparent that many college administrators cling to the discredited in loco parentis view of that relationship.

And what does Professor Monypenny consider an appropriate remedy for the situation he has described? "Regulations must start," he says, "with the premise that the student body is a body of relatively mature people with an inherent right to self direction so long as they do not seriously interfere with others."

Can it be assumed that Professor Monypenny yielded to rhetoric and overstated the case? A survey of the literature indicates otherwise. For example, Roy Lucas, Assistant Professor of Law at the University of Alabama, observed in 1968 that, "universities have a vested interest in avoiding the wrath of conservative alumni and, where the institution is public, the legislators."[1] Reflecting on the effects of such pressures in his state of Alabama and in the Deep South, Lucas added that "students have too little freedom and are seldom, if ever, encouraged to participate in movements to improve society." He points out that in Alabama, "where the plague of government corruption, poverty, and crude racism reign, these topics are still taboo at institutions which regard themselves as the most progressive in the region."[2]

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[1] "Comment," 45 Denver Law Journal 582, 625 (Summer, 1968).

[2] Ibid., p. 640.

Reflecting on the same sort of non-academic campus regulations which attracted Professor Monypenny's attention, William W. Van Alstyne, Professor of Law at Duke University, has decried campus rules, "which do not so much cultivate a high academic life style as they communicate to our students a degree of peevishness, thin-skinned intolerance, and staid prejudice enforced by supererogatory regulations." Van Alstyne bemoans "the teaching of John Stuart Mill in the classroom, but the preachments of Anthony Comstock in our rules."[1]

The Harvard Law Review has acknowledged a legislative reluctance to meddle with affairs interior to the operation of state colleges and universities "to preserve the freedom of the academic community." "Yet," the author adds, "even though such freedom should be safeguarded primarily as a means for furthering the freedom of individual scholars, including students, institutional autonomy has generally allowed the repression of individuals within the community."[2]

Professor Van Alstyne has published results of a survey he made of seventy-two major universities to determine their procedural practices in disciplinary cases. He concluded that 43 per cent did not provide students with a reasonably clear description of misconduct subject to discipline; 53 per cent did not provide students with written statements of the particular misconduct charged; 16 per cent did not provide hearings when the students disputed charges or contested

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[1] "The Student as University Resident," 45 Denver Law Journal 582, 605 (Summer, 1968).

[2] "Developments in the Law--Academic Freedom," 81 Harvard Law Review 1045, 1150 (1968).

the penalty; 47 per cent did not exclude students or administrators who appeared as witnesses or brought the charges from the disciplinary hearing board; 26 per cent did not allow accused students to cross-examine witnesses; 85 per cent permitted the hearing board to consider statements by witnesses not available for cross-examination; and 47 per cent permitted the hearing board to consider evidence "improperly" acquired.[1]

Commenting on the facts revealed by his survey, Van Alstyne noted that, "While the situation is brighter in some regards (ninety per cent provide for some type of appeal, typically to the dean of students or to the university president), it is obviously a far cry from what normally obtains in a court of law, and would seem to warrant some explanation."[2]

A number of explanations have been offered to justify the authoritarian role of colleges in relationships with students. Among these are the in loco parentis doctrine, which views the student as a legal infant and college authorities as fulfilling the role of parent. A second jusitification advanced is that college matriculation is a privilege, not a right,[3] and that the college student usually assumes a contractual relationship which justifies his arbitrary suspension or other arbitrary punishment as college officials deem it necessary. Van Alstyne points out that "less than ten per cent of the students

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[1] "Procedural Due Process and State University Students," 10 UCLA Law Review 368, 369-70 (1963).

[2] Ibid., p. 371.

[3] For an able exploration of this doctrine, see Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harvard Law Review 1439 (1968).

deny the misconduct with which they are charged, or take exception to the discipline imposed."[1]

A third argument is that providing procedural due process for student offenders would be unduly costly. A fourth most telling argument is that the colleges lack the necessary authority to conduct adversary-type hearings. Cross-examination, for example, is a vacuous right if witnesses cannot be compelled to appear at a hearing, and colleges are without the power to require appearance.

A fifth argument against the applicability of due process considerations to college disciplinary proceedings is the contention that disciplinary sanctions are intended to rehabilitate, rather than to punish. Due process requirements, it is proposed, apply only to punitive action of the state.[2] The United States District Court for the Western District of Missouri, en banc, added some legitimacy to this contention in an extraordinary set of college-controversy guidelines declaring, "The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound," and then added that, "federal processes of criminal law, . . . are far from perfect, and designed for circumstances and ends unrelated to the academic community."[3]

Yet a sixth argument against judicial intervention in college

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[1]"Procedural Due Process and State University Students," op. cit., p. 371.

[2]See, e. g., Thomas F. Brady and Laverne F. Snoxell, Student Discipline in Higher Education (Washington, D. C.: The American College Personnel Association, 1965).

[3]General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax Supported Institutions of Higher Education 45 F.R.D. 133, 142.

disciplinary matters is the traditional view that the college should be largely immune to political and judicial pressures. This injunction for judicial self-restraint has been articulated many times, perhaps most recently in the extraordinary guidelines cited above, which state that, "the courts should exercise caution when importuned to intervene in the important processes and functions of education."[1]

Reflecting on Van Alstyne's survey of seventy-two major universities, Robert S. Powell, Princeton student participant in a 1968 conference on student rights, observed, "It is ironic--and for students, enraging--that in America, one of the last of our institutions to reflect our national passion for justice and democratic processes is the university."[2]

It must be remembered that the United States Supreme Court has not ruled on the question of procedural rights for college students. One may make what he wishes of the fact that certiorari was denied in both Dixon and a Second Circuit decision which went roughly opposite to Dixon two years earlier. It is apparent that Dixon represents an unsettled legal rationale. However, two important facts would seem to lend dignity to Dixon's authority: (1) As previously indicated, during its first eight years in the field, its authority has not been directly denied by either a state or federal court; and (2) On at least one occasion, it has been cited favorably

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[1] Ibid., at 136.

[2] "Comment," 45 Denver Law Journal, 643 at 672.

by the United States Supreme Court.[1]

Regarding the extent of the Dixon ruling, in 1969, the American Civil Liberties Union could observe that:

> It seems that the extent of procedural rights required by courts will depend on the severity of the possible punishment, the nature of the substantive issue presented, and the actual fairness of the procedure adopted. It does not appear that any court has expressly disapproved Dixon . . ., however, some federal district courts have merely paid lip service to [its] authority.[2]

The purpose of this study is to survey and synthesize the more important court decisions and more conspicuous legal writing pertinent to procedural and substantive rights of college students in the United States, with emphasis on the years 1961-69, in effort to reflect the trend of judicial decisions on the subject. As a study in a nascent branch of case law, the study reflects an interest in social conditions only to the extent that they have had a direct influence on the law.

The study is thematically presented in eight parts, or chapters. Chapter I undertakes to explore the basic nature of the college in the United States vis-a-vis liberties accorded individual students, then examines six recent or current pressures on the student-college relationship which have altered the basic nature of that relationship and caused students to be more protective of their status as students--

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[1]Tinker v. Des Moines, 393 U. S. 503. This is a free-speech case which involved the wearing of arm bands by public school students. The court ruled that public school students have a right to hearing before disciplinary dismissal.

[2]Academic Freedom and Civil Liberties of Students in Colleges and Universities (New York: American Civil Liberties Union, 1969), Appendix B, p. 2.

an increasingly valuable status--against arbitrary threats. Chapter II examines seven legal theories which have been advanced from time to time in efforts to describe the legal relationship between college and student. Chapter III explores the historical background of the student--college relationship by reviewing two of the more prominent cases heard in state courts.

Chapter IV attempts to develop the neglected Negro-rights characteristics of Dixon and the new doctrine on constitutional right to due process in college dismissal cases. It would be difficult to overemphasize the importance of Dixon in expanding the procedural and substantive rights of students in all state-supported colleges, regardless of the fact that the case and the Fifth Circuit's opinion were inspired by a small group of incidents in the Negro-rights revolution.

Chapter V examines Dixon and related federal court cases against a background of legal comment aimed at interpretation. It attempts to get at the meaning of "due process" as it applies to college students. Chapter VI presents a discussion of other procedural considerations pertinent to the student-college relationship, and is primarily concerned with fourth- and fifth-amendment considerations. Chapter VII undertakes to summarize the cases and writings dealing with substantive rights of college students, with emphasis on the first-amendment rights of speech and press. Chapter VIII represents an effort to draw logical conclusions from the study.

Unless otherwise indicated, the words, "college," university,"

and "school" are used interchangeably throughout this study to denote any institution awarding degrees of the baccalaureate level or higher.

CONSTITUTIONAL RIGHTS OF COLLEGE STUDENTS

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# CHAPTER I

## HIGHER EDUCATION IN AMERICA: THE GREAT CHANGE

Historian Henry Steele Commager has observed that, "academic freedom was born seven centuries ago as student freedom." Professor Commager quickly adds that, "It is not the business of the university to go bustling around like some Aunt Polly, censoring a student newspaper here, cutting out indelicacies in a student play there, accepting this club or that, accepting or rejecting speakers invited by students, snooping . . ." "These matters," he declares, "are the responsibility of the students themselves."[1]

In these words Professor Commager addresses himself to an ideal--an ideal which he knows is far from realization in the American context. Or else he momentarily succumbed to the sentimental inclination of some college teachers to view themselves as the "Mr. Chips" of twentieth century America. The "Mr. Chips" syndrome would seek to project an image of the American college and university campus as a sanctuary for scholarship--a sequestered community in which kindly

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[1]"The Nature of Academic Freedom," Saturday Review, August 27, 1966, p. 14.

gray-haired professors and their dedicated and inquisitive students work together in an atmosphere of amity and co-operation in search of undiscovered truths, protected in this quest by a public tolerance which places scholarship, at least in some respects, above the law and immune to the ravages of public opinion.

Evidence abounds to support an observation that this is a view of higher education in America which has been inapposite, with perhaps some minor exceptions, throughout the nation's history. Jencks and Riesman, for example, have described nineteenth-century American colleges as "extremely authoritarian,"[1] and student-college relationships in twentieth-century America have been shrouded in a mantle of paternalism denominated in loco parentis with its forthright attribution of a child-like status to the college student.

Authoritarian treatment of college students by administrators--usually with the quiet acquiescence of faculties--was the rule in campus relationships generally upheld by the courts prior to 1961 and the landmark decision of the Fifth Circuit in Dixon. Higher education was a privilege, not a right, and a number of rationalizations were employed to deny arbitrarily that privilege to some students in both public and private colleges and universities.

"American educators," observe Jencks and Riesman, "have seldom been able to give coherent explanations for what they were doing.

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[1]Christopher Jencks and David Riesman, The Academic Revolution (Garden City, New York: Doubleday & Co., Inc., 1968), pp. 29-30.

Even when they did have a consistent theory, it often had little or no relationship to the actual results of their actions."[1] If one ties this observation to the same authors' statement that the nineteenth century "was a time when financial solvency was so precarious that colleges responded to even the smallest external pressures and had only the most limited ability to reshape the priorities established by their supporters,"[2] one begins to see an emerging picture of academic pragmatism inconsistent with the concept of the campus as a cloistered sanctuary for democratic co-operation and experimentation.

Apparently in general agreement with Professor Commager in his normative view of the status of students in a democratic society is Phillip Monypenny, Professor of Political Science at the University of Illinois. Says Monypenny, "Students are not only dependents in a paternalistic society. They are also citizens of a republic and as citizens have a fairly well defined and traditional role as critics of the social order and as activists in defending it or changing it."[3]

If the subordinate role of the college students has remained pretty much the same throughout a large part of American history, the role of the faculty in student discipline matters has nonetheless changed abruptly. Jencks and Riesman thus point out that there was a time when most college teachers saw themselves "as policemen whose

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[1] Ibid., p. xi.

[2] Ibid., p. 6.

[3] "University Purpose, Discipline and Due Process," 43 North Dakota Law Review 739, 746-47 (1967).

job it was to keep recalcitrant and benighted undergraduates in line, exacting a certain amount of work and imposing a measure of discipline." More often trained as clergymen than as scholars, some saw themselves as both. They were naturally inclined to view their work more in terms of improving the social and moral character of the young than of their intellectual growth. This cast them in "a quasi-parental role." Today's college faculty, they added, seldom sees itself that way.[1] Pointing to the experience at Harvard, they report:

> [D] uring the nineteenth century [student discipline] was handled by the full faculty and occupied most faculty meeting time. Eventually patience wore thin, and it was turned over to a committee, but this committee remained responsible to the full faculty. At Berkeley, on the other hand the Academic Senate decided before World War II that it wanted nothing to do with student discipline and handed the whole problem to the administration.[2]

In 1947, the President's Commission on Higher Education declared that, ". . . integration of democratic principles into the active life of a person and a people is not to be achieved merely by studying or discussing democracy. Classroom teaching of the American tradition, however excellent, will not weave its spirit into the innermost fiber of the students."[3] The commission report noted that, "Experience in the give and take of free men in a free society is equally necessary. Democracy must be lived to be understood."[4] Democracy, said the

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[1] The Academic Revolution, op. cit., p. 58.

[2] Ibid., p. 39.

[3] Higher Education for American Democracy (Washington, D. C.: U. S. Government Printing Office, 1947) Vol. I p. 14.

[4] Ibid.

Commission, "must become an established attitude or activity, not just a body of remote and abstract doctrines--a way for men to live and work harmoniously together, not just words in a textbook or a series of slogans."[1]

This was the Commission's proposal as to the ideal ideological context of higher education in the United States. Democracy must be lived. But did the Commission find that higher education in the United States had lived up to this standard? Apparently not, for in its next breath the Commission observed.

> To achieve such practice in democratic action the President's Commission recommends a careful review of administrative policies in institutions of higher education. Revision may be necessary to give students every possible experience in democratic processes within the college community. Young people cannot be expected to develop a firm allegiance to the democratic faith they are taught in the classroom if their campus life is carried on in an authoritarian atmosphere.[2]

In other words, the Commission did not think democratic processes were adequately observed in American higher education. "To achieve such practice," it recommended "careful review of administrative policies" in higher education. In a broader sense, the Commission paid tribute to the achievements of specialized education, but cautioned that the modern college graduate too often is "educated" in the sense that he has acquired competence in some particular occupation, "yet falls short of that human wholeness and civic conscience which the cooperative activities of citizenship require."[3]

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[1] Higher Education for American Democracy (Washington, D. C.: U. S. Government Printing Office, 1947) Vol. I p. 14.

[2] Ibid.

[3] Ibid., p. 48.

The Commission thus warns against the increasing "trade school" trend in higher education, at least insofar as it curtails "general education"--preparation for living life in a democratice society. If this, then is a major problem confronting higher education in twentieth-century America, what is the solution? For a partial answer to this question, the Commission returned to the topic of the ideological atmosphere on campus:

> To teach the meaning and processes of democracy, the college campus itself should be employed as a laboratory of the democratic way of life. Ideas and ideals become dynamic as they are lived, and the habit of cooperation in a common enterprise can be gained most surely in practice. But this learning cannot take place in institutions of higher education that are operated on authoritarian principles.[1]

In these words, the President's Commission stated the goals, or at least some of the ideal characteristics of higher education in a democratic society. Much similarity might be detected between the Commission's normative standards for student status in higher education and those expressed by Thomas Jefferson twelve decades earlier. Jefferson, a devoted advocate of tax-supported higher education and a defender of personal liberty, avid inspiration of the University of Virginia, wrote this poignant reflection on that campus in 1825:

> Our University goes on well. We have passed the limit of 100 students some time since. As yet it has been a model of order and good behavior, having never yet had occasion for the exercise of a single act of authority. We studiously avoid too much government. We treat them

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[1] Ibid., p. 51.

> as men and gentlemen, under the guidance mainly of their own discretion. They so condsider themselves and make it their pride to acquire that character for their institution.[1]

However, for all his dedication to individual liberty, and the foregoing statement would seem to indicate a large degree of it, Jefferson was not incapable of appreciating the value of order on a university campus. Less than two months after he wrote the description quoted above, he was constrained to write the same friend concerning the first disciplinary action taken on the university campus. Fourteen students, "animated with wine," he recorded, masked themselves and undertook a frolic which ended with their defying and throwing stones at some of the faculty members. Since their identities were unknown, they were asked to step forward. However, they responded with defiance, raising a petition bearing the signatures of fifty other students. When they were confronted by the Visitors, the culprits stepped forth, but denied that they had committed any trespass. As Jefferson recorded it:

> They were desired to appear before the Faculty, which they did. On the evidence resulting from this inquiry, three, the most culpable, were expelled; one of them, moreover, presented by the grand jury for criminal punishment (for it happened that the district court was then about to meet). The eleven other maskers were sentenced to suspensions or reprimands, and the fifty who had so gratuitously obtruded their names into the offensive paper retracted them, and so the matter ended.[2]

A month later Jefferson wrote, in a letter to the same personal

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[1]Letter to Ellen W. Coolidge, August 27, 1825, as quoted by "A Judicial Document on Student Discipline," in the United States District Court for the Western District of Missouri, en banc, 1968.

[2]Letter to Joseph Coolidge, Jr., October 13, 1825, Ibid.

friend, that, insofar as the goal of self-government was concerned, "With about three-fifths of them this did well, but there were about fifteen or twenty bad subjects who were disposed to try whether our indulgence was without limit." After the students had been confronted with a stern response from the faculty and board, Jefferson observed:

> It gave a shock and struck a terror, the most severe as it was less expected. It determined the well-disposed among them to frown upon everything of the kind hereafter, and the ill-disposed returned to order with fear, if not from better motives. A perfect subordination has succeeded, entire respect toward their professors, and industry, order and quiet the most exemplary, has prevailed ever since.[1]

This anecdote from the life of Thomas Jefferson would seem to be pregnant with points pertinent to the student-college relationship today. In the first place, it underscores a basic question confronting the head of any college administration: What is the optimum balance of liberty and authority on the college campus? Certainly it would be difficult to fault Thomas Jefferson as one committed to individual liberty and freedom from superfulous regulation. And yet, even he was driven to writing--seemingly with satisfaction--of the "shock" and the "terror" instilled in college students by a massive show of authority. If a man of Jefferson's libertarian convictions could so easily be driven to an authoritarian posture, can the often lesser men who head college administrations today be severally censured for eschewing campus democracy?

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[1]Letter to Ellen W. Coolidge, November 14, 1825, Ibid.

Secondly, even in the brief passages selected here from Jefferson's letters, one might infer that Jefferson was so utterly committed to the indispensable value of due process that he could conceive of no alternative. Perhaps this is reading too much into his words, but his casual mention in the second letter of the fact that the misbehavers appeared before the faculty for determination of their guilt and the nature of their punishment "On the evidence resulting from the enquiry," would seem to denote an impatience with arbitrariness or punishment without hearing. Significant, too, is the fact that three degrees of severity in penalty were meted out to the offending students: the most culpable was sent before the grand jury, the less culpable expelled, and the least culpable merely reprimanded.

The twentieth-century student of procedures might scoff at the nature of the "due process" afforded the Virginia students, but it would appear from Jefferson's account that some form of hearing was conducted, that the accused were permitted to confront their accusers, that punishment was based on the presentation of substantial evidence. One would not need to search long to discover instances of more summary treatment accorded students at American colleges in the twentieth century.

In the twentieth-century vernacular, one might observe that Jefferson's experience, as related in his letters, and his apparent retreat from a libertarian stance demonstrates "what it's all about" in the realm of college discipline today. The problem of authority versus freedom has apparently plagued the American campus throughout

a large part of its history. The President's Commission of 1947, as has been shown, elected to align itself with a quest for greater campus freedom in observing that, "learning cannot take place in institutions of higher education that are operated on authoritarian principles." And yet, an impressive number of scholars have reported in recent years that authoritarian principles predominate in student-college relationships, as will be demonstrated in the following chapters. At least one university president has added his voice to the scholarly chorus in so declaiming. Martin Meyerson, President of the University of New York and President-elect of the University of Pennsylvania, in 1965 reported that, "Most colleges are as authoritarian as high schools." President Meyerson elaborated in these words:

> . . . the college student is far less able to influence his relationships with teachers and administrators than he is able to retort and otherwise respond to his parents. Once the youth has made his choice of an institution of higher learning and of a field within it, he has few meaningful educational choices left. Students are on the fringe of the adult world, but not in it. They are in limbo. Many are grateful of the deferral because they can test themselves in different ways and so find their identity. Others are resentful of the deferral; they sense more keenly than they did in high school that students do not have inalienable rights, or, indeed, many rights at all.[1]

And what aspect of the authoritarian atmosphere on campus disturbs college students the most? Meyerson has an opinion on this subject, too. He writes:

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[1]"The Ethos of the American College Student: Beyond the Protests," Higher Education and Modern Democracy, (Robert A. Goldwin, ed.) (Chicago: Rand-McNally & Company, 1965) p. 7.

> What many students quarrel with most are the rules that infringe, they think, upon their personal dignity. These may include rules relating to appearance; to personal behavior, including the use of liquor and drugs; to living arrangements and the access of persons of the opposite sex to them; to entertainment, including what society might consider obscene; and to political expression, including the right to listen to and advocate radical views. Certain students feel that regulations on these matters are used only to control them, and are never used for their protection; some restrictions they regard as petty and inconsequential, and therefore completely unnecessary; others they regard as infringements on their liberties, and therefore intolerable.[1]

Jencks and Riesman were quoted earlier in this chapter as describing nineteenth-century American colleges as "extremely authoritarian." Among the scholars who decry twentieth-century campus authoritarianism is Alvin L. Goldman, Assistant Professor of Law at the University of Kentucky. In 1966 Goldman wrote in an article for the Kentucky Law Journal that, "The disciplinary power of a university is a force which every student has cause to fear. The exercise, or threat of exercise, of a school's disciplinary power is felt in every area of campus life." Goldman decries the invocation of university disciplinary powers "in such ludicrous cases as the failure of a co-ed to be a 'typical Syracuse girl.'" Nonetheless, he observes, "it is in the area of student expression and association that the university's disciplinary power poses its greatest potential threat to society, to the university itself and possible to the individual student.[2]

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[1] Ibid., p. 12.

[2] "The University and the Liberty of Its Students--A Fiduciary Theory," 54 Kentucky Law Journal 643 (1966).

Professor Goldman, then, views the university not at all as the sheltered sanctuary for the preservation and protection of fundamental freedoms from a philistine public, but as a guardian which has turned upon those very values it was assigned to protect. Its disciplinary standards are so "ludicrous" as to pose a "potential threat" to the society which created it and maintains it. He cites an example of students clearing a demonstration against racial segragation with the police, only to have a university spokesman announce that any student participant would be expelled. In another case, he reports, "four students were suspended indefinitely for publishing, in an off-campus magazine, an article which, though admittedly not obscene, was found by a committee of administrative personnel to be 'generally objectionable.'"[1]

Repression of a more general nature is reflected in Goldman's statement that, "On many campuses representatives of unpopular political philosophies are prohibited from addressing student groups." He also notes that one of the nations's leading universities confined the use of a course book on Soviet diplomatic policy to students enrolled in a course "in which the 'corrective influence' of a professor may be brought to bear."[2]

In 1957, nine years before Goldman wrote the remarks cited above, Warren A. Seavey, Bussey Professor of Law Emeritus at Harvard Law School, decried the lack of procedural safeguards for students

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[1] Ibid., p. 644.

[2] Ibid.

involved in college disciplinary actions. In an assualt on college discipline procedures which was to become a classic, Professor Seavey wrote:

> . . . our sense of justice should be outraged by denial to students of the norman safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that the court supports them in denying a student the protection given to a pickpocket.[1]

Professor Seavey took particular exception to the fact that students in disciplinary hearings were sometimes not allowed to cross-examine their accusers, indeed, on occasion were not told who their accusers were. He concluded:

> The fiduciary obligation of a school to its students not only should prevent it from seeking to hide the source of its information, but demands that it afford the student every means of rehabilitation. If it has not done so, this opportunity should be given by the courts.[2]

But who had ever said that a school had a fiduciary obligation to its students? Apparently this was Professor Seavey's invention, and it was not to go overlooked by other legal scholars or by the courts. Professor Seavey's "pickpocket" figure of speech was colorful enough to attract the attention of the Fifth Circuit, which was to borrow it four years later in Judge Rives' opinion in the Dixon case.

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[1]"Dismissal of Student; 'Due Process'," 70 Harvard Law Review 1406. 1407 (1957).

[2]Ibid., p. 1410.

Thomas E. Buess, a student leader at Harvard Law School, in 1968 presented a dismal picture of the historical disciplinary relationship between colleges and students. Writing for the Harvard Law Review, he pointed out that in 1897 a Massachusetts court refused to interfere with a college's expulsion of a student for visiting her parents on Sunday, when such conduct violated the school's regulations. "Courts today," Buess points out, "will allow universities to deal with students pretty much as they please, taking exceptions only when the action appears to be clearly arbitrary or unreasonable. He pointed out that the student facing severe disciplinary action may find "that the rights he can exert are only those which the university has deigned to confer on him." And that may mean, Buess pointed out, that he is not entitled to a hearing at all. Evaluating this situation, he remarked:

> This is anomalous when numerous steps are being taken to secure the rights of criminal defendants. Furthermore, the very insitution which is preparing students for entrance into a democratic society is exercising an arbitrary power, in flat denial of that society's liberties.[1]

Michael T. Johnson, Beaumont attorney who later joined the faculty of the University of Oklahoma College of Law, observed in a 1964 article for the Texas Law Review that:

> One of the highest aims of colleges and universities must be to instill in their students the ideals of the democratic way of life. It is indeed anomalous that many of these institutions accord the students accused of breaches of discipline few, if any, of the judicial safeguards.[2]

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[1] "A Step Toward Guaranteed Student Rights--The University as Agency," Student Lawyer Journal, May, 1968, p. 7.

[2] "The Constitutional Rights of College Students," 42 Texas Law Journal 344 (1964).

Professor Van Alstyne is probably the most prolific writer on the subject of student rights. In 1963, Professor Van Alstyne sketched a most undemocratic picture of the American college:

> Judging from the autocratic fashion in which many students are disciplined for alleged offenses . . . more attention [to fair treatment of students] or a different kind is needed. Many students who may be expelled from college and barred from their chosen profession frequently receive less protection today than does the most petty offender on trial in a state court.[1]

Five years later, in 1968, Professor Van Alstyne turned his attention from procedures to substantive rights of college students. He described many of the controversies gripping the campuses as "too foolish for serious consideration, disputes where the complaint of the students seems trivial and the concern of the college seems petty." While expressing no great sympathy for typical student causes, Van Alstyne at the same time expressed disdain for the college regulation which "serves no discernible important purpose and reduces the individual to another conforming cardboard cutout jigging up and down in a ticky-tacky college."[2]

Roy Lucas, Assistant Professor of Law at the University of Alabama, commenting on Van Alstyne's remarks from which the preceding quotation is taken, added this word about substantive rights on campus: "There can be no doubt that school officials would ask the state militia and national guard to protect students from the theft of their property.

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[1] "Procedural Due Process and State University Students," 10 UCLA Law Review 368 (1963).

[2] "The Student as University Resident," 45 Denver Law Journal 582, 603-604 (1968).

Yet the same officials are rarely outraged by the attempted 'theft' of the liberty of expression."[1] Noting the campus demonstrations and riots which have marked the present decade, Professor Lucas observed that, "where college officials themselves have contributed to disruptive conditions by systematically depriving students of their first amendment rights, a court could refuse to uphold expulsion until the officials have cleaned themselves of their own misconduct.[2]

Listing some of the specifics of student grievances, Robert S. Powell, Jr., University of North Carolina student body president, wrote in 1968 that, "Students will take a great many campus controversies into the courtroom, even if they recognize the probable futility of their efforts. But the merits of these issues can and will be actively and publicly debated as a result of the legal challenge." Listing the campus issues he had in mind, Powell included: "the right of the university to meddle in the private sex life of the student; the use of the campus police to search indiscriminately student dorm rooms without student consent; the right of students to hold demonstrations on campus property; the fairness of suspending students under vague and sweeping prohibitions that are generally clarified after the fact; and the whole area of procedural due process in disciplinary matters."[3]

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[1] "Comment," 45 Denver Law Journal 622, 631 (1968).

[2] Ibid., p. 632.

[3] "Comment," 45 Denver Law Journal 669, 672 (1968).

Altogether, these commentaries--all of quite recent vintage--would seem to constitute an indictment against those who run America's colleges and universities or against the social forces which influence them.

## Colleges and College Students

> The tragic failures of our culture that can be traced to the educational institutions are so gigantic and so compelling that we simply cannot disregard the challenges of university reform and move on to something less basic.[1]

Since the days of Jefferson and the 1825 student "riot" at the University of Virginia, many changes have come to pass on the college campus. Too many authoritative works have been published on the history of higher education in the United States to warrant a recapitulation of that history here. It should perhaps suffice to say that colleges and universities have changed, and changed radically, in their relationships with students during the past five, ten or fifteen decades.

Perhaps the key word to describe the major characteristic of that change is the word, impersonality. Impersonality on the college campus as elsewhere has been born of many factors--primary one of which may be growth. Martin Meyerson in 1965 gave this capsulated picture of the growth in college enrolments:

> A century ago there were about fifty thousand students enrolled for degrees in American institutions of higher education. The Morrill Act, supporting land-grant colleges, had been passed in 1862; the egalitarian principle of the frontier and its emphasis on advanced practical education as the opening to opportunity had begun to be felt. As the American dream was sketched in, the

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[1] Robert S. Powell, "Comment," 45 Denver Law Journal 669, 674 (1968).

> number of students enrolled for degrees rose five times to almost a quarter of a million by the turn of the century. By the end of World War I the figure had more than doubled; it doubled again by 1929 and more than doubled once more by the end of World War II and again since then.[1]

With this growth came computerization and the resultant impersonality. In spite of this growth, as numerous writers have observed, unrelated events nudged bona fide college professors increasingly out of the classroom as they devoted more and more of their time to research activities. Classroom teaching was shuffled downward in the American educational value system. Teaching was a chore assigned over more frequently to graduate assistants.

At the same time, the college and university institutional personality may have assumed corporate characteristics more than had previously been the case. The university became an entity of its own, possessed of its own drive for self-perpetuation and self-fulfilment. It has been noted that both academic and disciplinary decisions are often made on the American campus in terms of what is best for the institution, not necessarily what is best for the individual student. Jencks and Riesman cite the example of a university seeking endowment for a new chair. ". . . concern for the students," they observe, "is seldom the reason for seeking the chair. Rather, the college wants such a chair to enhance its academic reputation vis-a-vis other colleges, and to make local faculty feel their institution is 'with it.'"[2]

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[1] "The Ethos of the American College Student," op. cit., p. 3.

[2] The Academic Revolution, op. cit., p. 127.

Promoting the corporate theme in 1968, Neal R. Stamp, university counsel and secretary to the corporation, Cornell University, used the description, "special purpose corporation." He wrote that, "The university is in fact a corporation. It has a charter from the state and a set of by laws from which it draws its life and which, at the same time, prescribe and limit its purposes, powers, and function."[1]

In a similar sense, Jencks and Riesman acknowledged the corporate self-interest of the college when they observed that, "Despite the hopes of some of the best admissions officers, few colleges evaluate applicants in terms of what the college might do for the student. Almost all colleges with which we are familar ask, implicitly if not explicitly, what the student is likely to do for the college."[2]

In 1947, the President's Commission projected a collegiate image of specialization and auto-actuated self-perpetuation, when it reported that specialization, "in the more extreme instances . . . has made the liberal arts college little more than another vocational school, in which the aim of teaching is almost exclusively preparation for advanced study in one or another specialty."[3]

Robert B. McKay, Dean of the New York University School of Law, while acknowledging the corporate image of the university, has conceded that, "there is no entirely relevant model for the modern

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[1] "Comment," 45 Denver Law Journal 663, 665 (1968).

[2] The Academic Revolution, op. cit., p. 130.

[3] Higher Education for American Democracy, op. cit., p. 48.

university."[1]

At any rate, it is not too much to propose that the assumption of a corporate image by the modern American university has done some violence to the "alma mater" personality which once characterized higher education and the relationship between the college and its students. Vis-a-vis this personality change, one might feel confident in inferring that it was inevitable that higher education should have assumed a more litigious posture.

## The Litigious Students

Although, as will be seen in Chapter II, American college students have been disadvantaged generally and often discriminated against in a legal sense, several writers have noted the relatively small number of student legal challenges directed against campus authority.

Thus, William M. Beaney, Professor of Politics at Princeton University, was able to note in 1968 that, "The relatively small body of case law involving student challenges to expulsions or to refusals to grant degrees represents a very small number of isolated attacks on the system by offended individuals."[2] Striking a similar theme, Goldman wrote in 1966 that, "Although abuses of university power are often suffered in silence, some have been car-

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[1]"The Student as Private Citizen," 45 Denver Law Journal 558, 559 (1968).

[2]"Students, Higher Education, and the Law," 45 Denver Law Journal 511, 513-514 (1968).

ried to the courts. In the courts, results have seldom been favorable to students. . . ."[1]

Increasing litigation involving the exercise of campus authority has been noted by numerous writers, as will be seen in Chapter V. If a change in the personality of the university is accepted, as suggested above, as a reason for the increase in litigation, one must at the same time consider two other factors of prime importance: The changes in the law which have increased the justiciability of student causes, which is examined in Chapter V; and the changes which have taken place in the college clientele in the college milieu.

## Changes in the Clientele

Before the midpoint in the twentieth century, social pressures were beginning to mount which help explain the abrupt change in campus relationships. Prominent among these are six which can be tentatively identified: (1) the Negro-rights revolution, which focused on the college campus; (2) increasing value and importance attached to the college degree and to the status of the student in good standing; (3) the resultant demand for student status and the rapid growth of college enrolments; (4) court-enforced expansion of civil liberties across the board during recent decades; (5) increased maturity of college students; and (6) pressures of the military draft for an unpopular war, with student exemption, which for many college men have increased the value attributed to student status.

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[1]Alvin L. Goldman, "The University and the Liberty of Its Students--A Fiduciary Theory," 54 Kentucky Law Journal 643, 647 (1966).

The Negro-rights revolution will be examined in some detail in Chapter IV. The other five pressures on college students vis-a-vis their student status command attention at this point.

## Increasing Value of the Status

Much has been written on the question of whether a student attends a tax-supported college as a matter of "right" or as "privilege," and so far as the courts are concerned, the question is one which many judges would rather avoid. The Fifth Circuit boldly confronted the rights-privilege question and added to the erosion of the distinction which has progressed for many years.

The District Court's opinion had noted that, "The right to attend a public college or university is not in and of itself a constitutional right." For the Fifth Circuit, Judge Rives observed that this was "not enough to say." Then, in a telling blow at the rights-privilege distinction in the campus context, he wrote that, "the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to due process."[1] He quoted the Supreme Court's words in the case of Cafeteria and Restaurant Workers Union v. McElroy, "One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." As in that case, notes Judge Rives, "so here, it is

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[1]For a comprehensive discussion of this question, see William W. Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harvard Law Review 1439 (1968).

necessary to consider 'the nature both of the private interest which has been impaired and the governmental power which has been exercised.'"[1]

In 1968, Van Alstyne noted that, "we may well conclude that the right-privilege distinction has lost most of its significance in constitutional litigation."[2] O'Leary found a discussion of the subject "unrewarding."[3]

Nonetheless, in Dixon, the Fifth Circuit obliquely declared that a student does have a property right in his status as a student. In dicta, Judge Rives declared: "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 plaintiffs were students in good standing." (emphasis added)[4]

Thus the Fifth Circuit distinguished between the "right to attend" and the "right to remain," drawing an analogy with the legal status of aliens before and after entering the United States.

Acknowledging the increasing importance to the individual of higher education, the Fifth Circuit in Dixon stated its property-right concept in these words:

> 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

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[1] 294 F. 2d 150, 156.

[2] Van Alstyne, "Right-Privilege Distinction," op. cit. p. 1458.

[3] Richard E. O'Leary, "The College Student and Due Process in Disciplinary Proceedings," 1962 University of Illinois Law Forum 438, 462 (1962).

[4] 294 F. 2d 150, 157.

> earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.[1]

In the nineteenth century and early twentieth century, less stress and less value were placed on education. College entrance was available to practically any student who met the technical requirements. But with the progressively growing emphasis placed on higher education as a prerequisite for career opportunities, the United States Supreme Court was able to observe in 1954 that, "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."[2]

When Syracuse University in 1926 dismissed Beatrice O. Anthony, a fourth-year student, because she was not a "typical Syracuse girl," Justice Sears of the Appellate Division of the Supreme Court of the State of New York, rejected the student's appeal for reinstatement, as will be related in Chapter III, by declaring that attendance at the university was a privilege and not a right.[3] One might imagine that Miss Anthony met little difficulty in finding another New York university which would accept her. Three decades later, in Dixon, Judge Rives viewed the plight of dismissed students in these terms:

> There is no offer to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course of

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[1] Ibid., p. 157.

[2] Brown v. Board of Education, 347 U. S. 483, 493 (1954).

[3] Anthony v. Syracuse University, 231 N. Y. Supp. 435, 438 (1928).

> study in mid-term. It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution.[1]

## The Crowded College Campus

In the United States an educational phenomenon of the twentieth century has been the rapid growth of college enrolments. The number of students enrolled for degree credit in American colleges in 1899-1900 was 237,000, a number which more than doubled to 597,000 in the first two decades of the century, nearly doubled again in the next decade, which ended with 1929-30. From a 1929-30 enrolment of 1,100,000, campus population roughly trebled in the following three decades, to a total of 3,215,000 in 1959-60. By 1963, the figure had topped four million.[2] In the fall of 1967, enrolment in United States higher educational institutions passed 6.9 million.[3]

At the same time, the cost of higher education had risen so dramatically that some writers found it clumsy to continue speaking in terms of millions of dollars, preferring to speak in terms of percentage of the gross national product. Thus, Jencks and Riesman report that higher education today, "is a growth industry, consuming

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[1] 294 F.2d 150, 157.

[2] Standard Education Almanac--1968 (Los Angeles, California: Academic Media, Inc., 1968).

[3] The 1969 World Almanac and Book of Facts (Cleveland, Ohio: Newspaper Enterprise Association, Inc., 1968), p. 344.

about 2 per cent of the GNP and exercising an indirect effect on the whole of the society."[1]

The impact which spiraling enrolments have had on college curricula, standards, and entrance requirements has been recorded by Hofstadter and other writers.[2] This is of no interest here. What is of interest here is the fact that this "democratization" of higher education did occur and the fact that it tended to change college admission of an individual student from a casual occurrence to an event weighted with much importance. Hofstadter and Hardy report that per capita enrolment in 1840 was only about one tenth of what it was in 1952, adding that, "Although college training was an advantage, it was not necessary in the early nineteenth century to go to college to become a doctor, lawyer, or even a teacher, much less a successful politician or businessman. . . ."[3]

In 1954, J. A. Perkins, President of the University of Delaware, wrote of the "crisis" posed by the "heavy load about to fall on public, state-supported higher education."[4] He pointed out that, "Every twenty years since 1900 has witnessed a doubling of the percentage of young people going to college."[5]

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[1]The Academic Revolution, op. cit., p. 13.

[2]See, e. g., Richard Hofstadter and C. DeWitt Hardy, The Development and Scope of Higher Education in the United States (New York: Columbia University Press, 1952).

[3]Ibid., p. 21.

[4]"Soaring College Enrollments: a Critical Problem for the States," State Government, October, 1954, p. 201.

[5]Ibid., p. 200.

An upshot in the rapid growth of campus populations has been a race by the public agencies of support--primarily the states--to keep building programs abreast of increasing demands for educational facilities. The race has not always been won by the states and the custodians of the campuses.

Consequently, many students have been unable to gain admission to the colleges they would have preferred to attend. As every admissions officer knows, many students apply for admission to three or four colleges, hoping to gain admission to at least one. Thus, in the vernacular of business, the law of supply and demand has converted higher education into a seller's market. At the same time, admission to college has become a matter of grave concern to the students, and loss of student status might mean that one has been crowded out of higher education altogether. This fact first received judicial notice in the Fifth Circuit's Dixon opinion.

## Expanding Civil Liberties

If American political historians should ever need a convenient label for the first half of the twentieth-century, it is not at all unlikely that they will name it "The Era of Expanding Liberties." For, despite the fact that twentieth-century America has been largely dominated by an upsurgence of militarism, including two global wars, a nebulous "Cold War," a perennial state of "preparedness," and exceptional exploits of demagoguery, procedural and substantive guarantees of individual rights nonetheless made significant gains in the first five decades since the nineteenth century.

The exact time span to which these gains should be ascribed is largely arbitrary. Some would argue, not without reason, that the first two decades of the present century constituted a civil liberties hiatus. Melvin L. Wulf, Legal Director for the American Civil Liberties Union, would join some constitutional scholars in singling out "the era of the Warren Court" as the decade and a half in which the great strides were made toward expansion of civil liberties. Thus, Wulf could write in August, 1969:

> The end of the Warren Court marks the end of the most expensive period in judicial protection of First Amendment freedoms, defendants' rights in criminal cases and the rights of America's black minority. Not that the Warren Court decided every case as the ACLU would have liked. But given the vagaries of the individual justices and the self-imposed limitations on the Court as a political institution, one must acknowledge the Warren Court's very substantial contribution to political and civil rights.
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> Admirers and detractors agree that the Court's most significant decisions were those extending the protection of persons caught up in the criminal process, particularly the decisions that attempted to achieve some degree of equality between the poor and the rich and those that were designed--perhaps futilely--to end the worst kinds of illegal police practices.[1]

It must be conceded that the years of the Warren Court, 1954-1969, provided the high-water mark in the progression of civil liberties in all American history. Writing in 1966, Milton R. Konvitz observed that, "In the United States in the last twenty-five years, progress in civil liberties and civil rights has been made at an unprecedented pace." He continued:

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[1]"The End of an Era: The Last Warren Court Term," Civil Liberties, August, 1969. p. 3.

> On numerous fronts--including the right of even men and women in our prisons and our mental institutions, migrant laborers, Indians on reservations--those who are "the least" among us--the government and the nation have taken steps to implement or broaden the reach of the Bill of Rights, and even to go beyond the plain compulsions of the Constitution to new ideals of freedom.[1]

Professor Konvitz, who describes himself as a civil libertarian, but as a civil rights pessimist, observes that, "The test of civilization will be . . . the degree to which any group, no matter how small or weak, is excluded from full participation in life, society, work, and ideals of a common community." In spite of his enthusiasm, reflected above, for the "unprecedented pace" of progress in civil liberties, one must remember that he was writing even before the Warren Court had rendered its landmark decisions in such important criminal-justice cases as Miranda v. Arizona[2] and In re Gault,[3] both of which substantially expanded procedural protections for "the least" in American society. By 1970 it would seem to be beyond dispute that civil liberties as normally conceived have expanded--and expanded rather rapidly--in the United States during the twentieth century. Both procedural and substantive rights of the individual in the United States were considerably greater in 1940 than in 1920, in 1960 than in 1940, in 1970 than in 1960. The federal courts, and the United States Supreme Court in particular, have been the trailblazers in the discovery of new liberties for the individual.

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[1] Expanding Liberties (New York: The Viking Press, 1966) p. xiii.

[2] 384 U. S. 436 (1966).

[3] 387 U. S. 1 (1967).

Is it too much to propose that the entire federal court system felt the liberalizing effects of this trend? One might easily infer that the general spirit of expanded civil liberties touched every element of the American society and that college students, as well as union pickets and religious nonconformists, should have been expected to declare their rights in dealing with the Old Order.

## Greater Maturity of Students

Van Alstyne has noted that the mean age of American college students is more than twenty-one years and that more college students in the United States are over the age of thirty than below the age of eighteen.[1] Comparing this fact with student data from an earlier era, Jencks and Riesman declare that, "Whether one looks at the books they read, their attitudes toward the opposite sex, their allergy to Mickey Mouse extra-curricular (or curricular) make-work, or their general coolness, today's entering freshmen seem older than those of the 1920s and 1930s."[2] Even high school students, they observe, "seem to feel that they are more on their own and that their fate depends more and more on what they do and less on what their parents do for them."[3] Extending this comparison farther back in time, Jencks and Riesman wrote that, "During the eighteenth and nineteenth centuries many students presented themselves for admission to college during early adolescence--though

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[1] "The Judicial Trend Toward Student Academic Freedom," 20 University of Florida Law Review 290, 292 (1963).

[2] The Academic Revolution, op. cit., p. 28.

[3] Ibid., p. 41.

Cotton Mather was unusual in graduating from Harvard at fifteen."[1]

All this points to a possible explanation, or a partial explanation, of the widely heralded "generation gap" so commonly touted in the American tabloid, and to a plausible explanation, or partial explanation, of why mid-twentieth-century college students in the United States grew restive under the yoke of their in loco parentis legal status on campus. One might reasonably suspect that they refused to be retarded by their elders, who, perhaps like most elders, seek to delay the maturation of the younger generation.

Jencks and Riesman take this into account, too, when they observe that a "likely source of trouble for the academic imperium is generational conflict." They add that:

> The first and less dangerous problem will be direct attacks on the universities by their students. . . . many young people raised on television and permissiveness now enter college cynical about the adult world of business, politics, and expertise.[2]

They do not expect the generational revolt to achieve "victory" in the same sense that the Algerian revolt did, but believe that, "Neither legislators nor trustees are ready to haul down the banner of adult responsibility and turn over regulation of student affairs to the students themselves."[3]

Within the educational community, Joseph F. Kauffman, consult ant to the American Council on Education, a national alliance of

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[1] Ibid., p. 28.

[2] Ibid., p. 540.

[3] Ibid., p. 57.

more than one thousand educational organizations and institutions, has found a cause for students' insistence on their rights growing out of the family-social milieu in which many of today's college students are raised. Writing for the Educational Record in 1964, Kauffman proposed that:

> A postwar period of general prosperity, mobility, and redefinition of values brings to the campus many young people who have been free of all but a minimum of family or community restraints. They are often beyond parental control and sophisticated in social experience far beyond their age group of two decades ago.[1]

Similarly, two educational researchers have described the mature approach followed by college students seeking campus reforms. Joseph Katz and Nevitt Sanford[2] in 1966 wrote of students as a new fourth power on campus.

Although it is well established that today's college students are advanced in maturity beyond those of the nineteenth century, Jencks and Riesman have noted an anomaly in the situation when they observed that, "many parents and professors are likely to share the conviction that a 16-year-old boy is too young for college, at least emotionally, even though he may be more mature in every relevant way than boys in an earlier generation were at 18."[3]

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[1]"The New Climate of Student Freedom and Rights," Educational Record, Fall, 1964, p. 360.

[2]Sanford is director and Katz is research co-ordinator of the Stanford University Institute for the Study of Human Problems. Katz is directing a five-year study of students at Stanford and the University of California at Berkeley. Sanford was editor of the 1,000-page study, The American College, published in 1962.

[3]"The Viability of the American College," Nevitt Sanford (ed.), The American College (New York: John Wiley & Sons, Inc., 1962), p. 126.

One might reasonably propose, then, that the increasing maturity of college students has contributed in an important way to their readiness to challenge authority, and especially arbitrary authority--whether it be the authority of their parents or of college administrators acting in the fictional role of their legal parents.

## The Military Draft

Anyone who has spent even a few years on the college campus--whether as student or faculty member--cannot but be impressed with the great importance, the great threat, posed by the military draft to a significant number of male students. Idealism feeding on the unpopularity of the military commitment in Vietnam would seem to fuse with a fear of the unknown and a contempt for the military regimen to make civilian status of a matter of extreme importance to many college men.

Student deferment has placed an extremely dear worth on the student status of men. The more idealistic college men may consider the "2-S" classification as an inherently unfair class advantage, but most have demonstrated a willingness to accept the advantage and defend it with all reasonable exertions. In their dormitories, college men may joke about transferring to "Vietnam Community College," or about receiving a "McNamara scholarship," but the military draft is no joking matter to a majority of college men.

Many college professors have objected to the student deferment, and especially to the use of academic standing as a guide to validating student deferments, but the system persists. Harvard Sociologist David Riesman finds "something morally questionable" in

student deferments, and Aaron Wildovsky, Associate Professor of Political Science at the University of California's Berkeley campus, spoke for many academics when he played a leading role in urging a random, lottery-like selection of draftees.[1] But The New York Times was able to report in 1966 that draft avoidance had become a fact of life for undergraduates. Not only did the student stand to lose his favored 2-S status if he ceased to be a student, but he stood to lose it if his grades lagged below an established level. This situation led to the bizarre spectacle of a full-page advertisement in The Michigan Daily, University of Michigan student newspaper, urging coeds to purposely make low grades and thereby raise the relative class standing of their 2-S male colleagues.[2]

It would of course be impossible to determine how many, and to what extent, college men were using the campus as a haven from the military draft. But there can be no doubt that draft deferment has increased the value and importance of student status for thousands of male students.

This increased value and importance of the student status, then, would naturally inspire a student to exert greater efforts to avoid expulsion, loss of student status, loss of deferment and, in the campus vernacular, compulsory transfer to "Vietnam Community College."

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[1] "Life & Death Grades," Time, March 25, 1966, p. 70.

[2] "Michael Levitas, "2-S--Too Smart to Fight?" New York Times Magazine, April 24, 1966, p. 27.

As for the unpopularity of military service in the Vietnam conflict, some college students elected to go to prison rather than go to the military service, and the American Civil Liberties Union felt constrained in 1968, after deferments for graduate students were discontinued, to issue an appeal against academic reprisals against students who are "moved to refuse induction into the armed forces and go to prison rather than participate in a war they feel is morally indefensible."[1]

## Summary

Recent decades have witnessed a discernible change in the status relationship between the college student and the college administration. Since the Negro-rights revolution is central to that changed relationship, it will be discussed in a separate chapter. Five contributing factors have been: (1) development of a property vestment in the student status; (2) dramatic growth in college enrolments which has narrowed the academic choices of high school graduates and increased the importance of college acceptance; (3) court-ordered expansion of civil liberties across the board in the American society; (4) greater maturity of college students today; and (5) the military draft, which has provided a deferment sanctuary for students in good standing.

It might be well argued that the factors enumerated here reflect to some degree both the causes and the effects of a change

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[1] School & Society, October 12, 1968, p. 350.

which has embraced the college clientele, but not necessarily the colleges themselves. The response of the colleges will be made apparent in subsequent chapters.

## CHAPTER II

## STUDENTS AND INSTITUTIONS: THE THEORETICAL CONTEXT

The great change which took place in the status relationship between college students and college administrations in the first six decades of the twentieth century was not accompanied by a corresponding change in the legal relationship between the colleges and their clientele. College student bodies became older in years and more mature in learning and behavior, but they were still often considered legal infants by the courts--and, all too often, by college administrators.

### Predominant Theories Before Dixon

Before the Fifth Circuit utilized Dixon in 1961 to admit college disciplinary appeals to federal jurisdiction and to assure college students that they were not without constitutional rights in disciplinary proceedings, the few challenges to college disciplinary discretion were heard in state courts. So it was from state courts that the predominant theories of student-college relationships emerged. The two most broadly applied theories were heard in state courts. So it was from courts that the predominant theories were the contract concept and the in loco parentis rationale. Three lesser theories identified and distinguished by legal scholars were referred to as: (1) the status concept; (2)

the trust theory; and (3) the statutory rationale. The primary purpose of this chapter is to explore these five concepts, with emphasis on the contract and in loco parentis theories.

First off, it must be observed that the two prevailing theories, contract and in loco parentis, although occasionally both relied on in one decision,[1] must be viewed logically to constitute a legal nullity. Contract presumes that the student enrolling at a college enters into a legally binding agreement to abide by all the rules of the institution, while not exacting any guarantee of minimal performance from the college; in loco parentis presumes that the enrolling student is a legal infant. It is quite likely that no court relying on both theories has undertaken to explain how a legal infant may enter into a binding contract on his own behalf.

In a word, the status theory presumes an inherent role for both students and colleges, a status relationship growing out of custom, tradition and usage. The trust theory views the student as a beneficiary of the trustee college or university. The statutory theory holds that the relationship between college and student is implicit in the statutory provisions authorizing the founding and operation of a college.

As indicated earlier, the most-often-applied of these theories during the past half century has been the contract theory, although in loco parentis overtones were sometimes present. These two

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[1]See, e. g., Anthony v. Syracuse University, 231 N. Y. S. 435 (1928).

theories--although logically incompatible--existed side by side, and occasionally in the same opinion one could find them interwoven. Distinctive characteristics of each of the five theories will bear examination.

## The Contract Theory

The courts have often looked to contract law--or at least a semblance of it--to rationalize decisions growing out of campus conflicts. The courts were disposed to find that provisions of the student-college contract were to be found in all statements contained in such documents as the student's application for admission, the registration form, the college catalogue and formal statements of college rules and regulations. Professor Goldman has observed that, "The rather obvious questions to be raised to this approach under the Status of Frauds and parol evidence rule are ignored in the decisions, probably because litigants failed to raise them"[1]

Inconspicuous in the catalogue or registration form or student handbook of most universities is a blanket statement to the effect that the school reserves the right to cancel the student's registration, refuse to award academic credits or deny a certificate or degree without having to state a reason for the action. Contract, with its broad implication of property-like rights, falls within the ready comprehension of any court. The concept has often been seized, given broad construction, and enforced by the courts to which it was addressed.

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[1] "The University and the Liberty of Its Students--A Fiduciary Theory," op. cit., pp. 651-652.

A bromide in the literature of college rights in the case of Anthony v. Syracuse University.[1] Symbolizing judicial application of the contract theory, Anthony represents a case in which a fourth-year home-economics student, Beatrice O. Anthony, signed a registration card which stated:

> I agree to honor and comply with the regulations and requirements of Syracuse University and to cooperate with the university authorities and my fellow students in maintaining high standards of conduct and scholarship and in promoting the general welfare of the university. It is understood that I accept registration as a student at Syracuse University subject to the rule as to continuance therein found . . .[on a specified page] of the university catalogue.[2]

The catalogue rule referred to on the registration card which Miss Anthony signed stated:

> Attendance at the University is a privilege and not a right . . . . The University reserves the right and the student concedes to the University the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given.[3]

On October 6, 1926, Miss Anthony was dismissed from the university. Although she demanded to be told the reason for her dismissal and an opportunity to be heard, she was told only that university officials had heard rumors about her, that officials had discussed her with several coeds in her sorority house. She was told that although she had done nothing lately, she had caused considerable trouble in the past, and that officials did not think she was "a typical Syracuse girl."

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[1] 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).

[2] Clark Byse, "Procedure in Student Dismissal Proceedings: Law and Policy," Journal of College Student Personnel, March, 1963, p. 134.

[3] Seavey, op. cit., p. 1409n.

Miss Anthony's suit to enjoin the university to reinstate her drew the expected response. University officials responded that because of the statement on the registration card and the waiver in the college catalogue, Miss Anthony was bound in a contractual relationship which authorized the university to dismiss her without a statement of cause. The trial judge rejected the university's argument and ordered Miss Anthony's reinstatement, holding that the rule on which the university based its case was contrary to public policy. The university appealed, and the trial court was reversed in a rhetoric which was to buttress the contract theory for a period of more than three decades.

Justice Sears, who wrote the opinion for the appellate court, reasoned that the parties had voluntarily entered into the contract. A student is not required to enter the university, his rationale continued, and could withdraw without reason at any time. The university had been under no compulsion to admit the student in the first place. It could, therefore, "retain the position of contractual freedom in which it stood before the student's course was entered upon." This might be done by express agreement. There was no reason why the student could not agree that the university may terminate the relationship. Although the university must have a reason for the dismissal which relates to either scholarship or moral atmosphere, it need not state this reason. On the student, then, falls the burden of proof that dismissal was not within terms of the regulation contractually accepted. This places the student in the anomalous position of disproving an allegation which has not

been revealed to him. Nevertheless, the judgment of the lower court was reversed because Miss Anthony had not sustained that improbable burden.

The sharp difference in findings of the trial court from those of the appellate court is only partially explained by the fact that the trial court relied on the status theory to find the university had violated certain minimum rights inherent in the student status, and the appellate bench relied on contract law to reverse.[1]

This should not, however, be interpreted to mean that students have consistently fared better whenever courts have applied the status theory than when they applied the contract theory. The reverse was true in a 1902 New York case. Here, a student was expelled from New York Law School for denying that he had passed an innocuous note to a female student. Drawing on the basic principle of contract law, the trial court ridiculed the notion that the school, one party to the contract for education, could constitute itself a tribunal to decide when the student had breached the contract and forfeited his right to education. The question of breach was for the courts, it was held. On appeal, this decision was reversed, with the appellate court holding that status, rather than contract law, governed. It followed that the school's inherent power to decide questions of student conduct and expulsion had been

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[1]"Private Government on Campus--Judicial Review of University Expulsions," 72 Yale Law Journal 1362, 1376 (1963).

properly exercised. The appellate decision compelled denial of reinstatement.[1]

In an angry and significant article for the Harvard Law Review, Professor Seavey observed that, " . . . the courts depart from the usual rule of contracts which requires one terminating a contract for breach to justify his action." Embracing a subject which was to win him a following and establish a prop for the Dixon opinion four years later, Professor Seavey went on to say:

> Bearing in mind that a university and its instructors are subject to fiduciary duties in dealing with their students, a university should at least be under a duty to explain to a student the sweeping nature of his waiver [of rights against the university].[2]

In 1963 the Yale Law Journal added its voice to Seavey's by noting that the student's freedom to contract is in fact "only freedom to adhere," urging judicial evaluation of school-student disputes, because:

> . . . satisfactory legislative solutions are not to be expected. Students have small political influence, because they may be out-of-staters, transients, or minors. Universities, on the other hand, have established legislative channels of contact, and political power as employers, landowners, and investors. Consequently the legislative process will probably reflect the imbalance of power and failure to establish protections for the weaker party, the non-voting students, whose weakness is the cause of their need for governmental protections. Therefore, the courts may properly apply to the university-student situation the principle that the court's constituency consists of those not represented in the political branches--that it represents the otherwise helpless, an

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[1]Goldstein v. New York University, 38 Misc. 93 (1902).

[2]Seavey, op. cit., p. 1410.

idea as old as the chancellor's equitable jurisdiction to protect minors.[1]

On the same subject and in the same article, the Yale Law Journal observed that, ". . . once the court has seized upon the contract analogy, it acts as if it were driven to finding for the college."[2] The Harvard Law Review has joined in with the observation that the contract theory, "as it has heretofore been applied--unduly favors the institution and is of limited effectiveness in conferring rights upon students."[3] Professor Goldman outlines circumstances which put the student in a "weak bargaining position," and points out that, "The law of contracts is not an appropriate basis for deciding student-university disputes. Contract rules were made to deal with the hard bargains made by self-interested persons operating in a commercial setting." He points out that courts have neglected to apply the multitude of devices developed by the bench in recognition of the fact that the farther a bargain is removed from the environment of the open market, the more sensitive courts should be to the demands of fair and honest conduct."[4]

Van Alstyne points out that, "The free market contract model of comparison is especially attractive because it . . . provides an an answer to those who would criticize the fairness and not merely the legality of campus rules." Rejecting the proposed validity of

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[1]"Private Government on Campus," op. cit., p. 1390.

[2]Ibid., p. 1377.

[3]"Developments in the Law--Academic Freedom," 81 Harvard Law Review 1048, 1146 (1968).

[4]Goldman, op. cit., p. 653.

the contract theory, Van Alstyne wrote in 1968:

> The rules which a student "contracts" to observe are altogether non-negotiable, and there is in fact an absence of bargaining. The majority of "sellers" uniformly employ a self-serving clause reserving the right to terminate the relation at will according to standards they unilaterally determine pursuant to a vague "good conduct" rule. Thus the non-negotiability of terms is compounded by the real lack of shopping alternatives, the inequality of the parties in fixing terms, parallel practices among sellers, and the impotency of individual applicants to affect terms. The contracts are purely on a take-it-or-leave-it basis. Frequently the student has little idea of the terms of his contract in advance of matriculating, as he more often than not becomes enrolled before being presented with any sort of handbook at all. Its provisions are typically subject to change at the sole pleasure of the college. Moreover, the student may be a minor when he enrols, and while he thus may avoid the contract based on his own capacity, he may also be unable to enforce it until he becomes of age.[1]

Although several writers have observed that assumption of the contract theory of student-college relationships usually militates against the student, it has not always been so. For example, the Yale Law Journal pointed out in 1963 that the New York Court of Appeals employed the "implied contract" theory to provide relief to a medical student who was excluded from final examinations after finishing his course.[2] Responding to the college's claim that it had exercised legal discretion, the court said, "It is nothing but a willful violation of the duties which they have assumed. Such a position could never receive the sanction of a court in which a semblance of justice was attempted to be administered."[3]

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[1]"The Student as University Resident," 45 Denver Law Journal 582, 584 (1968).

[2]"Private Government on Campus," op. cit., p. 1371.

[3]People ex rel Cecil v. Bellevue Hospital Medical College, 60 Hun 107, 14 N. Y. Supp. 490.

In a more general sense, the Yale journal summed up institutional responsibilities under the contract concept in these terms:

> When the implied contractual terms of a student-school relationship are supplemented by specific documents, the contract analysis is no less a source of limits to the school's authority. Courts have rejected interpretations of the contract authorizing an absolute power to expel, in situations where the contract waiver clauses reserved the right to expel only for specific reasons.[1]

After surveying the literature, one cannot avoid the conclusion that the contract theory is inapposite to student-college relationships, and that it has been misused to distinguish between citizen and student, so as to deny the latter the dignity and many rights routinely accorded the former. In general agreement with this statement, the Harvard Law Review in 1968 nonetheless held out some hope for applicability of real contract principles when it noted:

> A rigorously followed contract theory could provide a means for creating and preserving student rights. For example, the burden of proof would always be on the institution. The putative misconduct of the student is, after all, an alleged breach of contract; the imposition of sanctions by the institution should, therefore, be regarded as attempted rescission or as a penalty set forth in the contract. Otherwise, putting the burden of proof on the student forces him to prove a negative fact, that his conduct in no way violated the university's regulations. Likewise, since the terms of the contract are dictated, the law of contracts of adhesion would provide the proper standard for interpretation. Accordingly the burden of clarity as well as the burden of proof would be on the institution.[2]

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[1] "Developments in the Law--Academic Freedom," op. cit., p. 1152.

[2] "Developments in the Law--Academic Freedom," op. cit., p. 1156.

## The *In Loco Parentis* Theory

*In loco parentis* identifies the theory that the college or university stands in the position of the parent in its relationship with students. It follows that the student is a legal infant, with no more "rights" against the school than he has against his parents. This relationship might be unobjectionable if the courts were to require that a school assuming to act in the place of a parent act as a wise and enlightened one. But such would be beyond judicial determination.

While *in loco parentis* might be said to be improperly applied to campus relationships today--and most legal writers rejoiced in its demise as a legal doctrine affecting college students--the *Harvard Law Review* has nonetheless suggested an area of potential legitimacy for the concept when it observed:

> It can be argued that the ghetto school, especially, must assume a parental role to prevent the student from entrapment in a vicious circle created by the limited expectations of his actual parents. In any case, the theory has the virtue of emphasizing the need for the school to participate in the process of rearing the child.[1]

However, the ghetto school is far removed from the conventional American college scene. *In loco parentis* would at least have something to be said for it if it were consistently applied. The fact that it has not been consistently applied is well known. In such instances as it has been applied, it has scarcely reflected the degree of familial attachment which might be expected of a

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[1] *Ibid.*, p. 1144.

parent. Like the contract theory, it would seem to have utilized in a unilateral application scarcely characteristic of filial relationships. The "parent" has been more stern than loving, more vindictive than understanding.

It has been suggested that in loco parentis is significant more as the college administrator's view of his role than as a judicial view of the student-college relationship. To the extent that this is true, in loco parentis might be labeled more of an administrative theory than a legal theory of campus relationships. However, it is a theory which has won judicial acquiescence and espousal often enough to be viewed seriously in a study of student-college relations.

Since in loco parentis rests upon a traditional relationship between parent and child, its close relationship to the status theory of student-college relations has attracted occasional attention. Thus Professor Goldman has observed that, "Although the loco parentis theory is inapplicable to student-university cases, the fact that courts have on occasion turned to this concept for guidance suggests acknowledgement by the bench that these disputes involve the law of status, not the law of contracts."[1]

Perhaps as well as any other legal rationalization, the doctrine of in loco parentis exemplifies the extremities of distortion which can occur over a period of several decades in a legal system based on the principle of stare decisis. William M. Beanery,

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[1]Goldman, op. cit., p. 651n.

Professor of Politics at Princeton University, has pointed out that the doctrine developed from the judicial reaction in the nineteenth century to criminal and civil actions by parents against private tutors who were responsible for the imposition of physical punishment on their students.[1]

Gott v. Berea College[2] is often cited as the 1913 case which infused the college-oriented in loco parentis doctrine into American case law. Professor Beaney points out that, "cases of an earlier vintage can be found,"[3] but nonetheless, Professor O'Leary views as "regrettable" the Kentucky court opinion in Berea that, "college authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils." O'Leary adds that, "this unfortunate characterization of the school-student relationship has been adopted by university administrators who seemingly lack any clear definition of their role, as well as by students who find themselves in need of a 'popular' whipping post."[4] Professor O'Leary places the doctrine in its proper legal perspective when he observes that, "All cases discovered that defer to the phrase, three in number, cite only Gott v. Berea for authority."

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[1]"Students, Higher Education, and the Law," 45 Denver Law Journal 511, 514 (1968).

[2]156 Ky. 376, 161 S. W. 204 (1913).

[3]"Students, Higher Education, and the Law," 45 Denver Law Journal 511, 514 (1968).

[4]"The College Student and Due Process in Disciplinary Proceedings," op. cit., p. 1145.

Several facts would seem to distinguish Gott v. Berea. These facts have been lost to college administrators seeking to embrace in loco parentis as a means of exercising broad powers over the academic and private lives of their students. In the first place, Berea College was a private institution, not a public-supported school falling within the limitations exacted by the fourteenth amendment. Secondly, the action itself was for damages allegedly suffered by a restaurateur whose establishment had been placed off-limits by the college administration which was intent on feeding its own students. Coupled with this was an equity action to enjoin the college from further enforcement of its rule. Further distinctions lie in the fact that the college had a paternalistic goal, clearly stated of educating "inexperienced country, mountain boys and girls of very little means at the lowest possible cost . . . from rural districts and unused to the ways of even a college the size of Berea." The court also takes note of the public-health rationale involved in the college's restriction of places where students could eat.[1]

The Harvard Law Review in 1968 joined a chorus of critics of the in loco parentis doctrine as unrealistic when applied to college students. It observed:

> . . . the courts, and too often the schools, have interpreted the in loco parentis doctrine as conferring upon the school the powers of the parent without accompanying responsibilities. Furthermore, the types of restraint on student behavior which the courts have sustained under this theory--rules seeking to inculcate the moral values

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[1]161 S. W. 204, 206 (1913).

> of thrift and industriousness or regulations of dress and appearance--bear little relation to the function of the school at the higher levels of education . . . [A]s a standard of review, it seems to condone excessive regulation.[1]

Major exceptions to the in loco parentis doctrine at the college level include the argument that many students are not juveniles and are not at all subject to the will of their parents, with Professor Van Alstyne pointing out that, "the mean age of American college students is more than 21 years, and there are, in fact, more students over the age of 30 than younger than the age of 18. Even in Blackstone's time, the doctrine did not apply to persons over 21."[2]

Professor Goldman summarizes the commonest objection among legal writers when he writes:

> It does not explain the school's power to regulate student conduct when the student acts with his parent's consent. Nor does it explain the basis of authority over an emancipated pupil or one who has reached majority. Finally, it has been noted that the parent may not lawfully do the very act which the university frequently tries to accomplish in asserting its purported loco parentis authority--sever all ties.[3]

Ira Michael Heyman, University of California Professor of Law, finds in this doctrine that, "the thrust of discipline is toward helping the offender become rule-abiding, much as parents seek to channel the behavior of their children." He acknowledges that still penalties for major transgressions, such as cheating, are imposed, and adds, "The familial notion leads to nonspecific rules

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[1] "Developments in the Law--Academic Freedom," op. cit., p. 1145.

[2] "The Student as University Resident, op. cit., p. 591.

[3] Goldman, op. cit., pp. 650-651.

and informal procedures. Strict legalities are eschewed because they create a wrong tone. Facts are to be determine by administrators' inquiries, not by courtroom combat."[1]

It must be conceded, however, that "informal procedures" constitute an open door to arbitrary conduct by those vested with power. Informal procedures in juvenile courts made it possible for a fifteen-year-old boy to be sentenced to serve six years in a correctional institution for an alleged telephone prank without ever having met his accuser.[2] On the campus scene, "informal procedures" were to be used by the white establishment in Alabama to suspend a group of Negro students from college without benefit of the legal protections which formal procedures have made manifest.

One might find good reason for maintaining that the expression, informal procedures can be equated with denial of due process.

## The Status Theory

While the contract theory and in loco parentis concept of student-college relationships have won predominant consideration in state courts, the status concept has emerged occasionally and has the lone basis for the decision in a student-college disciplinary conflict, the status theory has attracted little attention, but it has been detected at times in cases turning primarily on the contract theory.

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[1] "Some Thoughts on University Disciplinary Proceedings," 54 California Law Review 73, 75 (1966).

[2] In re Gault, 378 U. S. 1 (1967).

The status theory is based on the concept that the rights and duties of students and colleges are inherent in the status of the parties and that they have developed through custom, tradition, and usage.[1]

In the case of Anthony v. Syracuse University, discussed above, it was seen that the trial court relied on the status theory to hold for Miss Anthony, only to be reversed by an appellate court which relied on the contract rationale. The trial court was free to select the doctrinal basis for its decision and to hold for either party on the basis of that assumption. It by no means ignored the contract theory or the in loco parentis doctrine. But it felt the inherent role of the university was being abandoned in quest of the "arbitrary power not only to destroy the career of a student, but also to injure his reputation."[2]

The 1901 case of Koblitz v. Western Reserve University[3] showed how the contract and status theories are interrelated. The case involved a law student who had not been allowed to re-enter the school after he had been the subject of criminal prosecutions. Notice and an opportunity for a hearing had been provided by the school. His action to gain readmittance was dismissed, with the court saying:

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[1] Stephen R. Knapp, "The Nature of 'Procedural Due Process' as Between the University and the Student," The College Counsel, 25 (No. 1, 1968).

[2] Ibid.

[3] 21 Ohio C. C. R. 144, 11 Ohio C. C. Dec. 515 (1901).

> Custom, again, has established the rule. That rule is so uniform that it has become a rule of law; and if the plaintiff had a contract with the university, he agreed to abide by that rule of law, and that rule of law is this: That in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated every fair opportunity of showing his innocence. They should be careful in receiving evidence against him; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood of all surrounding circumstances as to who is right, and then act upon it as jurors with calmness.[1]

However, it is interesting to observe that the status theory, like the contract theory, has reflected relatively little concern with whether a student has received notice and hearing. For example, in a 1924 Michigan case[2] a student was denied mandamus to compel readmission, when the court found that the school had not abused its discretion in denying readmission after the student had been seen smoking in public and riding in a car on a young man's lap. The court held that the college had the inherent power to regulate discipline in such manner as it deemed proper, so long as its rules violated neither divine nor human law. As in this case, the status theory often appears in the terminology of "inherent" powers.

New York recognized the status theory in 1921.[3] Here the court declined to compel the readmittance of an expelled law student because there had been an exercise of discretion by the dean.

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[1] Ibid. at 157.

[2] Tanton v. McKenney, 226 Mich. 245, 197 N. W. 510 (Michigan 1924).

[3] Goldenkoff v. Albany Law School, 198 A. D. 460, 191 N. Y. S. 549 (New York 1921).

It was held that he acted within the scope of his authority in determining that a student's socialistic views and offensive propaganda made him undesirable to the school.

Knapp observes, however, that in at least one decision following the status theory, it has been pointed out that notice and hearing are important to a finding of no abuse of discretion.[1] His example is the Tennessee case of State ex rel Sherman v. Hyman,[2] where it was held that mandamus would not lie to compel the readmittance of students expelled from the University of Tennessee for selling examination questions. In this case, it was apparent that expulsion had been preceded by a fair hearing, hence no abuse of discretion by the university authorities. Indicating the shape of things to come, the court said that the hearing required in such circumstances did not require all the formalities of a trial, but did require notice of charges, names of witnesses, opportunity to make a defense, and information in the nature of evidence against the student.

In 1963 the Yale Law Journal succinctly summarized the applicability of the status theory in these words:

> When courts use status rather than contract relationship as a source of authority . . . the only motive for punishment held proper is regard for the welfare of the child punished or, more broadly, the welfare of the children of the school. Painful punishment is authorized by law only when it is in the best interests of the child.[3]

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[1] State ex rel Sherman v. Hyman, 180 Tenn. 99, 171 S. W. 2d 822 (Tennessee 1942), cert. denied 319 U. S. 748 (1943).

[2] Ibid.

[3] "Developments in the Law--Academic Freedom," op. cit., p. 1144.

## The Trust Theory

A theory of student-college relationships which has been advanced in at least two cases, only to be rejected on both occasions, is the trust theory. But the dicta of these two decisions indicate a belief that the nature of the relationship is one of trust. One of these cases involved the refusal of the Ohio Supreme Court to grant mandamus to a petitioner seeking entrance to the university. The court suggested that, once enrolled, the student would be in the role of beneficiary to the trustee university.[1] Similarly the trial court in Anthony v. Syracuse University[2] described the dismissed student as the beneficiary of a trust.

In Koblitz v. Western Reserve University,[3] it was argued that the state could compel readmittance of a student, where his expulsion thwarted the purposes of an endowment. "Presumably," comments Knapp, "it is a breach of a fiduciary duty to deprive a beneficiary student of his interest arbitrarily." The court held that there had been no abuse of discretion and no arbitrary denial of readmittance which might have constituted a breach of trust.

## The Statutory Theory

The statutory concept is another theory which has won limited judicial acceptance. It poses a potential judicial interest in

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[1] Koblitz v. Western Reserve University, 21 Ohio C.C.R. 144, 11 Ohio C.C. Dec. 515 (1901).

[2] 130 Misc. 249, 231 N. Y. Supp. 435 (1928).

[3] Ibid.

situations where the source of the institution's disciplinary power is declared to be statutory. Knapp has pointed out that:

> For instance, in Matter of Lesser v. Board of Education, 18 A.D.2d 388 (1963), a case involving Brooklyn College in New York City which is run by the Board of Education of the City of New York, it was held that the board's powers to prescribe conditions of admission were discretionary and as such they had to be exercised fairly, equally, and in accordance with reasonable standards. Such powers as the board possessed were not the product of status, contract, or trust, but were rather granted specifically by statute.[1]

## The Constitutional Theory

Although a detailed discussion of the constitutional or due process legal rationale describing the relationship between students and colleges is the substance of Chapter V, it is of immediate interest to examine the relationship of this new concept growing out of the federal courts with the concepts described above which have issued from state courts.

An arguable position would be that the new constitutional rationale supplants all other theoretical inventions in describing the legal relationship between student and institution. Certainly it is manifest in the opinion of Judge Rives of the Fifth Circuit in Dixon that the student-college relationship is a citizen-state relationship in the case of tax-supported colleges, with students entitled to procedural protections accorded other citizens in their relations with the state. In substantive rights, it would appear that the students have also achieved equality, with Wright,

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[1] Knapp, op. cit., p. 29.

for example, noting that, "The first amendment applies with full vigor on the campus of a public university"[1] and the United States Supreme Court declaring that, "it can hardly be argued that either students or professors shed their constitutional rights to freedom of speech or expression at the campus gate."[2] The preponderance of legal opinion, as will be seen in Chapter V, is that the same rule will be made to apply to relations between students and private colleges.

If one should undertake to demonstrate that the constitutional rationale is an expansion of the status theory, still the students would be no worse off for the effort. But the status accorded students under the new theory is the status of citizens, rather than the anomalous status of students.

The contract theory of student-college relationships, with its characteristic waiver of students' procedural rights, would seem to be demolished by the Fifth Circuit's sweeping dicta, when it observed that, "the state cannot condition even the granting of a privilege upon the renunciation of the constitutional right to due process."[3]

If this rationale demolishes the contract concept of relationships between student and college in expulsion proceedings, it would seem to do no less damage to the in loco parentis doctrine. For certainly, in the familial context, the child enjoys no constitutional

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[1] Charles Alan Wright, "The Constitution on the Campus," 22 Vanderbilt Law Review 1027, 1037 (1969).

[2] Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 507 (1969).

[3] 294 F.2d 150, 156 (1961).

rights in his relationship with his parents. Insofar as procedural rights are concerned, the statutory theory would seem to have been rendered inapposite by Dixon, since any statute must remain subordinate to constitutional considerations. The trust theory would seem to lose its limited pertinence in the dim shadow of the constitutional rationale. In short, Dixon has laid to rest all the conventional, time-honored theories of how a student stands in legal relationship to his university. One could probably never establish with any certainty exactly how it came about that students were denied constitutional rights in the very first instance, but since Dixon, it has been possible to observe in the vernacular that, "It's a brand new ball game," insofar as the legal status of students is concerned. It remains to be seen what compatabability lies between the constitutional concept and another new-born, but untried, rationalization of campus relationships, the fiduciary theory.

## The Fiduciary Theory

It was in 1957 that Professor Seavey wrote his article for the Harvard Law Review in which he condemned the customary denial to students of meaningful protection against arbitrary disciplinary treatment by college administrators. Seavey's central complaint was the contract theory of student-college relationships and its characteristic waiver by students of the rights to notice and hearing. The remedy Professor Seavey proposed was acceptance of a new theory of student-college relations--the fiduciary theory.

Professor Seavey found the contract theory unacceptable because, "the courts depart from the usual rule of contracts which requires one terminating a contract for breach to justify his action."[1]

Ancillary to Professor Seavey's argument was his proposal that in college disciplinary actions students were being penalized arbitrarily in the absence of procedural rights they had waived at the time of enrolment without understanding the waiver. "Bearing in mind," he said, "that a university and its instructors are subject to fiduciary duties in dealing with their students, a university should at least be under a duty to explain to the student the sweeping nature of the waiver."[2] He was also offended by the fact that in a university's disciplinary dismissal of a student, the burden of proof lay on the student--and, even so, the student was denied "the opportunity for rebuttal by meeting the witnesses."

Professor Seavey was protesting against the apparent injustice growing out of the case of Bluett v. Board of Trustees,[3] in which an Illinois appellate court refused mandamus to a medical student who was dismissed without hearing for allegedly submitting examination papers written by another person. Seavey's espousal of the fiduciary theory was not to go unheard. It was to be picked up and carried forth by other legal writers--prominent among

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[1] Seavey, op. cit., p. 1407.

[2] Ibid., p. 1409.

[3] 10 Ill. App.2d 207, 134 N.E.2d 634 (1956).

them his Kentucky colleague, Alvin L. Goldman, Assistant Professor of Law at the University of Kentucky.

Goldman, decrying the weak bargaining position of the student within the context of the contract theory, as well as other apparent weaknesses of that doctrine, views the fiduciary theory as a rationale providing a much-needed springboard from which to overcome the bench's usual deference to the decisions of educators in areas within the academic domain.

Describing the fiduciary theory as a status concept, Professor Goldman observes that, "a fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."[1] Quoting the Restatement of Torts, Goldman observes that the fiduciary relationship is characterized by the confidence existing between two parties. Confidence lacking, he adds, a fiduciary relationship exists where one party dominates another. "The fiduciary's dominance or influence gives him a high degree of effective control over the entrusting or 'dominated' party's conduct. Actual inferiority or weakness of the entrusting party is immaterial."[2] But what would the fiduciary theory mean in the campus setting? This can be read generally into Goldman's statement that:

> . . . the courts hold that in a suit involving the beneficiary, the fiduciary has the burden of proving the validity of any transaction involving the subject matter

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[1]Goldman, op. cit., p. 668.

[2]Goldman, op. cit., p. 670.

> of the confidence. The fiduciary also carries the burden of showing that the transaction was fair, just, open and reasonable . . . . the fiduciary must show that the confidence was not betrayed, that he carried out his function conscientiously and in good faith and that he has not obtained any undue advantage as a result of the relationship.[1]

Goldman claims the advantage for this theory that it would be equally applicable to both private and public universities. Three primary reasons, he says, explain why the courts have failed to apply the law of fiduciary relations to student-university disputes: (1) Lawyers have failed to pursue this approach; (2) Case law in the area developed in large part during the closing days of laissez faire jurisprudence--1900 to 1930--when courts were reluctant to interfere with relationships based on contract; and (3) Only in recent years has the need for higher education assumed the importance of other socially recognized needs.

Professor Seavey visualized the fiduciary relationship on campus when he wrote that:

> A fiduciary is one whose function is to act for the benefit of another as to matters relevant to the relation between them. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students. One of the duties of the fiduciary is to make full disclosure of all relevant facts in the transaction between them . . . . The dismissal of a student comes within this rule.[2]

The fiduciary and constitutional concepts have in common a quest for greater procedural rights for college students and a sense of

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[1] Ibid., pp. 670-671.

[2] Seavey, op. cit., p. 1407.

fair play which would necessarily come with procedural guarantees. Indeed, the fiduciary concept would seem to be a concept devoted to procedures. Judge Rives, speaking for the Fifth Circuit in Dixon, acknowledged the Seavey article and borrowed from it.

Since the constitutional and fiduciary concepts of student rights in disciplinary proceedings seemingly are aimed at the same general objective, it would seem that the basic pragmatic difference would be that the fiduciary concept could seemingly be made applicable to private schools sooner than the constitutional theory is likely to be stretched to that extent. The fiduciary theory would elevate the role of the student through what might be considered a novel legal arrangement, while the consitutional rationale would elevate the status of the student to a par with the status of citizen or person, in the language of the fourteenth amendment.

The Fifth Circuit in Dixon carefully limited the constitutional rationalization to tax-supported colleges, whereas the fiduciary theory, as Goldman points out, would be immediately applicable to both public and private colleges.

It must be remembered, of course, that application of the constitutional principle to college disciplinary proceedings does not mean that all the other theories necessarily will have run their course. Many non-disciplinary relationships persist between students and colleges. In the academic realm these relationships presumably will still require some theoretical rationalization

which seems unlikely to grow out of the constitutional assumption embracing major disciplinary actions.

## Summary

A study of student rights before the courts of justice may lead one to the conclusion that the various theories advanced to describe the student-college relationship have served as vehicles to rationalize the control or suppression of college students, who perhaps are viewed as posing a threat to the established order of society.

Where the college student was bound by contract, one is hard put to understand why the institution was not also uniformly bound by the same contract. If the college student was found to be a legal infant, one is similarly at a loss to understand why the institution was not uniformly accorded the responsibilities inherent in parenthood. In any case, it seems apparent that society has been motivated by a strong determination to give short rein to the American college student, and has utilized the courts with their various theoretical rationalizations to enforce a tight social control. How mysterious it is that the bar could remain silent in the face of such legal logic!

With the state courts using the various legal theories--of which five have been mentioned here--throughout the years to establish the nature of the institutional powers and the college-student relationship, the results have been only slightly inconsistent. Generally speaking, those few students who have approached the

bench have fared poorly. Goldman has summed it up in the passage:

> . . . under the existing body of law governing student-university conflicts the courts have sanctioned autocratic interference with, and suppression of, the intellectual, social and political liberty of the students. Academic freedom has been undermined and fair process frequently denied. The responsibility for this lies, of course, primarily on university administrators for engaging in such conduct. In addition, faculties, students and alumni groups have often been guilty of callous disregard for the cause of preserving the university as a citadel of liberty, open mindedness and critical inquiry. But the blame lies with the bar for failing to recognize that student-university conflicts should be resolved by the law of status rather than the law of contracts.[1]

It is well to remember that student-university litigation constitutes a small and immature body of case law. Thomas E. Buess in 1968 wrote of the unsettled state of its development:

> As in any developing area of law, the cases are confused, revealing no consistent characterization of universities. But since the court's theory regarding the position the university should occupy in relation to the student will naturally affect the balancing of respective rights and liabilities, we should examine the various theories which courts have used as their bases for decision. We should also examine these theories critically in order to see if fact will justify them.[2]

In summary, it must be said that insofar as the courts are concerned, Dixon and the constitutional theory which it produced have in all probability laid to rest all other legal theories of the student-college relationship, at least insofar as tax-supported colleges are concerned. Only time and experience can reveal whether the aegis of the United States Constitution will be extended to protect students in college which are not tax-supported.

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[1]Goldman, op. cit., p. 665.

[2]"A Step Toward Guaranteed Student Rights--The University as Agency," op. cit., p. 9.

## CHAPTER III

## SCHOLARS IN COURT--SOME EARLY CASES

Clark Byse, Harvard Law Professor, has proposed that two state-court decisions mark the polar extremities in judicial efforts to define the procedural requirements in student dismissal proceedings.[1] These decisions were the 1887 case of Hill v. McCauley[2] and the 1928 case of Anthony v. Syracuse University, which was discussed in Chapter II. The purpose of this chapter is to examine Hill v. McCauley and a number of other state-court decisions, along with one King's Bench case often cited, for the purpose of providing a backdrop and contrast against which the Dixon decision might be compared. Other objectives are to explain how the scholarly estate managed to get its views written into law and to demonstrate the impact of the judicial process on the institution.

In the 1887 case, a court of common pleas in Cumberland County, Pennsylvania, pointedly rejected Dickinson College's espousal of the in loco parentis rationale and invalidated the dismissal of a student who was not given "such a trial as he was entitled to under the laws" of the state. The Hill decision was to be largely ignored

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[1] "Procedure in Student Dismissal Proceedings: Law and Policy," Journal of College Student Personnel, March, 1963, pp. 140-143.

[2] 3 Pa. C.C. Rep. 77 (C.P. Cumberland Cy. 1887).

until resurrected by the Fifth Circuit three-quarters of a century later in Dixon. During this seventy-five year lapse, the contract analogy of Anthony was to be utilized by state courts in search of a rationalization in support of college disciplinary actions.

Although the number of reported decisions growing out of state-court challenges to college dismissals is relatively small, they reflect a broad range of judicial viewpoints concerning the law's requirements in student dismissal proceedings. It is necessary to turn to these decisions to find a backdrop against which to project recent decisions issued by federal courts.

## Representatative State-Court Decisions

### Hill v. McCauley

The state-court case often cited by Byse and other American legal writers as constituting one extreme in this judicial spectrum is Commonwealth ex rel. Hill v. McCauley, an early Pennsylvania case involving Dickinson College. Dickinson College was exempt from taxation and from time to time had received financial aid from the state. Its charter vested in the faculty the disciplinary authority, "giving them power to censure, suspend, dismiss, or expel students who shall be disobedient or refractory, or shall have violated any by-law of the institution, to whose violation such penalty is annexed, and forbids appeal to the trustees, except in the case of expulsion."[1]

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[1] 3 Pa. C.C. Rep. 77 (C.P. Cumberland Cy. 1887) at 79.

John M. Hill enrolled in the college in September, 1885. He enrolled for his second and final year in September, 1886. On the evening of November 9, 1886, while the faculty was meeting, a disturbance occurred near the meeting room. President McCauley later was to describe the disturbance as characterized by "hooting, singing, making noises, throwing stones against the front window, and a large one through the back window with great force which passed through both rooms, and in close proximity to some of the faculty, and out the front one."

A witness testified he had seen Hill rushing from the scene of the disturbance under circumstances which made Hill highly suspect. Hill was called before the faculty, where President McCauley addressed him in a statement which had been agreed upon by the faculty: "Mr. Hill, the faculty are satisfied that you are connected with the riotous conduct of Tuesday night, the 9th of November, and they have asked you to come in that you might make any statement in regard to the matter you might wish, if any." Hill then asked what was meant by riotous conduct, and was told that "it was singing, hooting, and throwing stones." Hill denied throwing any stones. He said he had been studying in his room when he heard the noise and had come down to where it was. Asked if he had "anything further to say," he repeated the denial that he had thrown any stones. Hill testified that he had left the faculty thinking that he was clear in the matter.[1]

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[1] Ibid., at 81.

After Hill's withdrawal, the faculty discussed the matter and took action which was recorded in their minutes in these words: "The connection of Mr. Hill with the disorders of last Tuesday night was considered, and whereas he was found connected with the said disorder in different ways: Resolved, that his further continuance in the college would be prejudicial to the order of the college and to the best interests of the students, and that he therefore be dismissed from the college and required to leave Carlisle within twenty-four hours, mem. con."[1]

Hill was advised of this action the following day. He applied to the college treasurer for a refund of a proportionate share of the fees he had paid for the semester. His fees were refunded. Five days later, Hill wrote to President McCauley, requesting reinstatement, adding, "I am fully prepared, if necessary, to prove my innocence in a court of law, but cannot imperil my case by a trial before a body already prejudiced to a certain course by their former action."[2]

When he received no reply within the time limit expressed in the letter, Hill filed a petition for a writ of mandamus.

Judge Sadler of the Court of Common Pleas of Cumberland County apparently found a nightmare of procedural inadequacy in the circumstances of Hill's dismissal. He was sharply critical of the faculty's

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[1] Ibid., at 82.

[2] Ibid., at 79.

action against Hill. "This form of procedure," he declared, "was condemned in England a hundred years ago."[1] Elsewhere, he observed:

> Investigations such as this ought to be carried out in such a way as the experience of mankind has shown is most conducive to a just determination of the guilt or innocence of the party charged. Had the by-laws of the college indicated a method of procedure, not inconsistent with the principles of justice, they would have been followed on the trial of Hill, but, as no form of procedures was so fixed, then the proceedings on the trial should have been conducted in accordance with the principles of natural justice and the laws of the land.[2]

Procedural safeguards Hill was entitled to, but did not receive, according to Judge Sadler, included: (1) notice of the charge against him in such detail that he would have realized its gravity; (2) the testimony against him should have been given in his presence; (3) he should have had opportunity to question witnesses against him; and (4) he was entitled to call witnesses in his own defense.

Judge Sadler was also critical of the proceeding and thought it defective because when Hill was brought before the faculty he was informed that the faculty was satisfied or convinced of his connection with the riotous disturbance, thus depriving Hill of the "legal presumption in favor of innocence. This, he said, placed the burden of proof on Hill, rather than on his accusers.

The court firmly rejected the proposed in loco parentis concept urged upon it by the college, observing: "It can never be safely admitted that the rights of so large and mostly so worthy

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[1]Ibid., at 85.

[2]Ibid., at 84.

a body of our citizens, in whose welfare society has such a deep and abiding interest, shall be utterly deprived in this respect of the protection of the law through its ordinary tribunals."

Although Dickinson was not a state school in the purest sense, Judge Sadler declared that youths "have the right of admission to its halls when properly qualified and well behaved, and it would be absurd, therefore, to hold that they can be excluded except for due cause, properly determined."

The college argued that if the court overruled the faculty, it would end the faculty's disciplinary control of the students, and the courts would be overwhelmed by a new and innumerable class of suitors. Judge Sadler responded:

> There need be no apprehension of such direful results from the declaration of the doctrine that the dismissal of students from colleges should be in accordance with those principles of justice which existed even in Pagan times, before the dawn of Christianity . . .

Judge Sadler, of course, concluded that since Hill was not given an adequate trial his dismissal from the college was invalid.

Anthony v. Syracuse University

The appellate court decision of Judge Sears in the Anthony case was examined in Chapter II and need not be repeated here. Judge Sears' opinion is what Professor Byse had in mind as constituting the other end of the spectrum, opposed to Judge Sadler's opinion in Hill. However, the account of Anthony v. Syracuse University would be incomplete if it failed to note the trial court opinion of Judge Smith.

In an exhaustive opinion for the trial court, Judge Smith demolished most of the arguments advanced by the defendant, Syracuse University. He started off with an examination of the legal status of the university and concluded that, ". . . it would be absurd to say that such an institution does not at least take on a quasi-public character so as to be affected by considerations of public policy."[1] He arrived at this conclusion from an examination of the university's charter, granted by the New York State legislature. Foreshadowing the United States Supreme Court's opinion a quarter of a century later in Brown v Board of Education[2] and the Fifth Circuit's opinion in Dixon, he noted that, ". . . the subject of public education has been, is, and of necessity must remain to be a matter of the highest public concern." He acknowledged that Syracuse was not supported directly by taxation, but observed that it had received its charter by special grant from the state, was exempt from taxation, was subject to visitation by the State Regents, was endowed with the power to confer degrees and had "the power during attendance at the university to regulate [students'] conduct and their courses of study."[3]

In the reasoning reflected here, one might conclude that Judge Smith was at least four decades ahead of his time. He was to be vindicated by the Fifth Circuit in Dixon. As will be seen in

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[1] 130 Misc. 249, 25.

[2] 347 U.S. 483 (1954).

[3] 130 Misc. 249, 251.

Chapter V, his reasoning parallels in many respects that advanced by legal writers in the late 1960's. He conceded the existence of a contract between Miss Anthony and the university, but insisted that in such a contract:

> . . . the university . . . agrees that, in the event student successfully pursues the course of study prescribed and complies during his attendance at the institution with the disciplinary rules and regulations of it, he will receive . . . a certificate or diploma.[1]

Judge Smith attached to the experience of college life "values which are very great and which cannot be measured in dollars," and concludes that "dismissal is pregnant with consequences which may spell the ruination of a life."[2] Here, again, he expressed values and reasoning which were to be paralleled thirty-four years later by Judge Rives for the Fifth Circuit in Dixon.

In support of his bilateral interpretation of the contract relationship between student and university, Judge Smith cites Ruling Case Law, infra; People ex rel. Cecil v. Bellevue Hospital.[3] infra; Corpus Juris,[4] infra; and Goldstein v. New York University,[5] infra. From these sources he quoted convincing legal language. For example, from Ruling Case Law, he quotes, "One who is admitted

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[1] Ibid., at 253.

[2] Ibid., citing 27 R.C.L. 144.

[3] 60 Hun. 107, affd., 128 N.Y. 621. (1891)

[4] 130 Misc. 249, 251, citing 11 Corpus Juris, 984, 997.

[5] 76 App. Div. 80, 78 N.Y. Supp. 739 (1902)

to college and pays the fees for the first year's instruction has a contract right to be permitted to continue as a student until he, in regular course, attains the diploma and degree which he seeks . . . he cannot be arbitrarily dismissed . . ."[1]

Citing the 1891 opinion in the case of People ex rel Cecil v. Bellevue Medical College, Judge Smith quoted this language: "It seems clear that [a claimed right to discipline arbitrarily] cannot for a moment be entertained. With obvious approval, he quoted further, language to the effect that arbitrary disciplinary discretion, "is nothing but a willful violation of the duties" which the college had assumed. "Such a position," he further quoted, "could never receive the sanction of a court in which even the semblance of justice was attempted to be administered."[2]

Judge Smith cited the 1902 decision in the case of Goldstein v. New York University,[3] in which the court's opinion declared that, "The relation existing between the university and a matriculated student thereof is contractual, and the law will protect the student against an unauthorized or unjustified expulsion."[4]

Authorities thus cited, Judge Smith declared, are sufficient "to show not only that the relationship between a student and a

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[1]130 Misc. 249, 251, citing 76 App. Div. 80 (sic).

[2]130 Misc. 249, 254-255.

[3]60 Hun. 107, affd., 128 N.Y. 621 (1891).

[4]Ibid., at 255.

university is contractual, but also that the action of a university or college in arbitrarily dismissing a student is subject to review by the courts. It is obvious that the courts are loath to interfere with the exercise of discretion by the governing body of institution of learning upon an established state of facts." Judge Smith added that, "wide latitude, indeed, of necessity, must be given; but that is far from saying that arbitrary action, or action motivated by prejudice or false information ought to be tolerated."[1]

Having thus affirmed the justiciability of the question before his court, the judge then returned to considering the rights, in general, of the parties before the bench. Quoting Corpus Juris, he declared, "A college cannot arbitrarily and without cause refuse examination and degree to a student who has complied with all the conditions entitling him thereto,"[2] and "A college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence."[3]

Judge Smith then turned his attention to the in loco parentis concept:

> So far as infants are concerned, university and college authorities "stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and to that end they may make any rule or regulation for the government or betterment of their

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[1] Ibid.

[2] 130 Misc. 249, 255, quoting "Colleges and Universities," 11 Corpus Juris 984.

[3] 130 Misc. 249, 256, quoting "Colleges and Universities," 11 Corpus Juris 997.

> pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities, and in the exercise of that discretion the courts are not disposed to interfere unless the rules and aims are unlawful or against public policy."[1]

Judge Smith elected to say no more about in loco parentis, returning instead to the presumption of a contract between Miss Anthony and the university, concluding that, "the court has not only the power but it would be its duty, in view of the arbitrary character of the act of dismissal, to decree a reinstatement of the plaintiff."

After thus finding for Miss Anthony, Judge Smith devoted more than five additional pages of his opinion to discussing contractual relationships in general, the peculiar applicability of the contractual relationship to the student-university situation, and the specific nature of the contractual relationship between Miss Anthony and Syracuse University. He found especially inviting to attack the Syracuse statement that, "Attendance at the University is a privilege and not a right." If this be a valid provision, he observes, "Syracuse University has by its own declaration placed itself outside the realm of the law of contracts."[2] The university clearly has a right to refuse matriculation to any applicant for admission. But this rule relates to attendance after admission.

"Sound public policy is offended by this part of the rule,"

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[1] 130 Misc. 249, 256, quoting 27 Ruling Case Law 141.

[2] 130 Misc. 249, at 258.

the judge reiterated. He added:

> The obvious effect of this rule is to reserve to this institution the arbitrary power not only to destroy the career of a student but also to injure his reputation, not by reason of anything which he may have done, but by the very act of the University itself, because the purpose of a dismissal under the rule is "to safeguard those ideals of scholarship and that moral atmosphere," etc. No arbitrary act can be taken under this provision which by force of the declared purpose does not cast a blight upon the reputation as to ideals of scholarship or as to moral standing, or both, of the student against whom its provisions are invoked.[1]

"The regulation," wrote Judge Smith, "as operative in the instant case creates an intolerable and unconscionable situation, and the action of the University under it is arbitrary, unreasonable, and in a high degree contravenes a true conception of sound public policy." He acknowledged that the rule "has in it salutary features" in that it might serve to protect the student from unfavorable publicity. But when a student demands to know the reason for his dismissal:

> that student is entitled to the elementary right of notice and opportunity to be heard. This element of notice lies at the very basis of the right of condemnation of property; and much more inherently does it lie at the basis of what is tantamount to an impairment of reputation.[2]

In the foregoing passage, Judge Smith once more implies a property characteristic in the status of the college student. As will be seen in Chapter V, the Fifth Circuit a quarter of a century later was to invent the property concept as a vehicle for

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[1] Ibid.

[2] Ibid., at 259.

including the student status within the penumbra of the Fourteenth Amendment's due process clause. A more apparent similarity between the Smith and Rives opinions, of course, is the finding in both cases that the student is entitled to notice and hearing before being subjected to severe disciplinary action.

Judge Smith observed that the state legislature "was itself without power" to grant Syracuse University the power it sought to exercise against Miss Anthony. In another passage, he described the contested Syracuse rule as "a rule which strikes the conscience as unjust, unrighteous and intolerable.

Judge Smith apparently viewed the contract as a bilateral obligation, for he returned to Ruling Case Law to again quote:

> Where the contract contains an extraordinary provision, one which, as a matter of law, renders the contract obnoxious to every sense of fairness, honesty and right, and is such as to make its enforcement clearly unconscionable, the court is justified in believing that the parties sought to be charged did not know of the presence of such provision, or did not have any comprehension of its significance.[1]

However, the invalidity of the contract as the university sought to apply it "does not defeat the duty on the part of the defendant to perform its part" of the agreement.

Judge Smith's opinion warranted a two-paragraph report in The New York Times, where it was particularly noted that he had described a private college as a quasi-public institution.[2]

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[1] Ibid., at 261, citing 6 Ruling Case Law 626.

[2] August 20, 1927, p. 3.

Appeal and Reversal -- As was noted in Chapter II, Syracuse University carried its cause to the Appellate Division, where five judges heard it reargued. In spite of the strong language and weighty argument advanced by Judge Smith in finding for Miss Anthony, the Appellate Division, fourth department, reversed the trial court and set an important precedent in the history of contract law which was to bind college students. Judge Sears delivered the opinion of the court.[1]

Judge Sears employed a tight system of logic to support the court's reversal. He dismissed Miss Anthony's legal infancy as "not material." Then he continued:

> The regulation, in my judgment, does not reserve to the defendant an absolute right to dismiss the plaintiff for any cause whatever. Its right to dismiss is limited, for the regulation must be read as a whole. The University may only dismiss a student for reasons falling within two classes, one in connection with safeguarding the University's ideals of scholarship, and the other in connection with safeguarding the University's moral atmosphere. When dismissing a student, no reason for dismissing need be given. The University must, however, have a reason, and that reason must fall within one of the two classes mentioned above. Of course, the University authorities have wide discretion in determining what situation does and what does not fall within the classes mentioned, and the courts would be slow indeed in disturbing any decision of the University authorities in this respect.
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> When the plaintiff comes into court and alleges a breach of contract the burden rests upon her to establish such a breach.[2]

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[1] 231 N.Y.S. 435.

[2] Ibid., at 440.

In other words, the burden of proof was on the student to disprove a charge which was being kept secret from her. In essence, Judge Sears said: The parties had voluntarily entered into a binding contract. A student is not required to enter a university and could withdraw without reason at any time. A university is under no compulsion to accept as a student one desiring to become one. "It may, therefore, limit the effect of such acceptance by express agreement and thus retain the position of contractual freedom in which it stood before the student's course was entered upon." Judge Sears saw no reason why a student could not agree that the institution may terminate the relationship between them. "The contract between an institution and a student does not differ in this respect from contracts of employment." To Judge Sears, then, the only significant question in the case was what were the terms of the contract. He found the contract not to constitute "an absolute right to dismiss. . . for any reason whatever." The university could dismiss only for reasons relating to safeguarding the university's "ideals of scholarship" or "moral atmosphere." The university, then, must have a reason for dismissal which relates either to scholarship or atmosphere. But it need not state the reason. The student was dealt the burden of proving that the reason for her dismissal was not within the terms of the regulation. Miss Anthony did not sustain that burden. Her failure was fatal to her cause. To Judge Sears it apparently was extraneous circumstance that Miss Anthony was not notified by the

university of the nature of her infraction.

In all likelihood, a careful search would lead one to numerous cases reflecting a greater absence of equity, but Judge Sears' opinion must be recognized for what it is: the game of, "I'm thinking of a number between one and ten."

Significance -- What is the significance of Hill and Anthony today? Byse approached an answer to this question when he observed:

> Judge Sadler's early clarion call has been muffled by a cacophony of opposing voices. Although no court seems to have followed the literal approach of Anthony v. Syracuse University, the case has not been overruled, nor has its reasoning been explicitly rejected by any court. Those courts that have ruled that the student should be given notice and opportunity to defend himself have not agreed with Judge Sadler concerning the nature of the hearing. Not even Judge Rives, whose opinion in the Dixon case is clearly the most able and impressive of all those written in this century, would require an opportunity for confrontation and cross-examination; in addition, Judge Rives was most explicit in confining his holding and opinion to "public" institutions which are subject to constraints of the Fourteenth Amendment . . .[1]

## Other Cases

The "cacophony of opposing voices" which have come from the state courts have, indeed, muffled Judge Sadler's "clarion call." Since Hill and Anthony would seem to represent, as Byse noted, polar opinions in the area, it follows that all other opinions issuing from state courts have fallen between these two extremities.

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[1]"Procedure in Student Dismissal Proceedings," op. cit., pp. 311-312.

In this wide breach, they have fallen in no distinguishable pattern. However, the generalization by Goldman would seem justified when he observed that, ". . . the overall impact of adjudication in student-university controversies has been characterized by judicial reluctance to interfere with the action of the university."[1] The courts have occasionally given specific expression to this deferential attitude in their opinions.

Goldman believes the judicial self-restraint which has characterized cases in the area has sometimes been "unjustifiable." At the same time, he cites two areas of student-university disputes which obviously warrant great deference to the university's expertise: "(a) those involving the application of academic standards of performance, and (b) those involving the design of curriculum." He cites as an example of the former the case of a doctoral candidate who was dismissed from Columbia University because he refused to revise his rejected dissertation. The student brought action for reinstatement and lost. The New York court said that the university had justifiable grounds for insisting on revision of the dissertation, and the bench would not attempt to substitute its opinion of the merits of the work for that of the educators.[2]

In 1917 a New York court declined to order reinstatement of

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[1] "The University and the Liberty of Its Students--A Fiduciary Theory," op. cit., p. 654.

[2] Edde v. Columbia University, 8 Misc.2d 795, 168 N.Y.S.2d 643 (N. Y. Sup. Ct. 1957), aff'd mem., 5 N.Y.2d 777, 154 N.E.2d 558, cert denied, 359 U. S. 956 (1959), as cited by Goldman, op. cit., p. 655.

a student expelled for academic reasons, holding that the bench could not compose a competent examination of the academic quality of the student's work.[1] Some courts, however, have staked out limits to judicial deference to academic expertise. A California court, for example, ruled in 1902 that a pupil dismissed for mental incompetence should be reinstated in the absence of firm evidence of incompetence, especially when the student had passed all his examinations.[2]

It might be noted here that at least one federal district court has proclaimed its own doctrine of deference in student-college disputes. This came not in a formal opinion resolving a particular case, but in a judicial document on student discipline issued in 1969 by the United States District Court for the Western District of Missouri, en banc. Two years after it had handed down an important student-rights decision.[3] the court seized upon an extraordinary publication to declare that, "the courts should exercise caution when importuned to intervene in the important processes and functions of education. A court should never intervene in the processes of education without understanding the nature of education."[4] This was not, however,

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[1] People ex rel Pacilla v. Bennett Medical College, 205 Ill. App. 324 (1917); People ex rel Jones v. New York Homeopathic Medical College, 20 N.Y. Supp. 379 (Super Ct. 1892), as cited by ibid.

[2] Miller v. Dailery, 136 Cal. 212, 68 Pac. 1029 (1902), as cited by ibid.

[3] Estaban v. Central Missouri State College, 277 F. Supp. 649 (W. D. Mo. 1967).

[4] "A Judicial Document on Student Discipline," Educational Record, Winter, 1969, p. 2.

the adoption of an absolute hands-off policy toward higher education.

The court carefully distinguished its statement as applying to "tax-supported" higher education, declaring that, "Only where the erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational process."[1]

The U. S. District Court for the Western District of Missouri would seem to have neutralized the right-privilege question surrounding tax-supported higher education. On this subject, which was broached in Chapter II, the court declared "The federal constitution protects the equality of opportunity of all qualified persons to attend [a public university]." Whether this protected opportunity be called a qualified "right" or "privilege" is unimportant. It is optional and voluntary." (emphasis added)[2]

"Reasonableness" creeps into the District Court's standard when the judges declare that:

> So long as there is no invidious discrimination, no deprival of due process, no abridgement of a right protected in the circumstances and no capricious, clearly unreasonable or unlawful action employed, the institution may discipline students to secure compliance with these higher obligations [of students] as a teaching method or to sever the student from the academic community.[3]

However, the due process accorded students in this statement is

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[1] Ibid., p. 3.

[2] Ibid., p. 4.

[3] Ibid.

not the same as criminal due process, because, "The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound."[1]

This statement of judicial standards will be examined further in Chapter VI, but its implications are so broad that it cannot be overlooked as a standard of comparison between what state courts have held in student-college disputes and what the law was to become four decades after Anthony.

Goldman cites an 1866 Illinois case in which the judge stated that the court can no more control a college's disciplinary actions than "control the domestic discipline of a father in his family."[2]

Probably the earliest instance of a court overturning an administrative decision of a university was in a 1732 mandamus action before the King's Bench. One Richard Bentley had been deprived of academic degrees without notice or hearing. The court condemned the procedure as being contrary to natural justice.[3]

In 1908 the University of Minnesota was directed to reinstate a student because of abuse of administrative discretion and denial of notice and hearing.[4]

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[1] Ibid.

[2] "The University and the Liberty of Its Students--A Fiduciary Theory," op. cit., p. 655, citing People ex rel Pratt v. Wheaton College, 40 Ill. 186, 187 (1866).

[3] The King v. Chancellor of the University of Cambridge, 6 T.R. 89, 10 Eng. Rep. 451 (K.B. 1732).

[4] Gleason v. University of Minnesota, 104 Minn. 359, 116 N. W. 650 (1908).

More commonly, however, state courts have found against petitioning students, while the federal courts have not been open to them. Of particular interest to some writers because it is often cited as admitting the in loco parentis concept into American case law concerning the student-college relationship is the 1913 case of Gott v. Berea College.[1] Although this decision by the Court of Appeals of Kentucky had a profound influence on student-college relationships for more than half a century, the case itself involved students only indirectly. Action was brought by one J. S. Gott, proprietor of a restaurant across the street from the premises of Berea College. Gott claimed his business was damaged after the Berea faculty adopted a rule which, in effect, placed his restaurant off limits for Berea students.

Judge Nunn took judicial note of the fact that, "the institution aims to furnish an education to inexperienced country, mountain boys and girls of very little means at the lowest possible cost," that "there must be the fullest co-operation on the part of the students," and declared that the college stood in loco parentis to the students to justify the rule "as a safeguard against disease infection . . . ."[2]

Law students, as might be expected, have figured disproportionately in student challenges of university authority. An early such case was Koblitz v. Western Reserve University[3] in 1901, heard

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[1]156 Ky. 376, 161 S.W. 204 (1913).

[2]161 S.W. 204, 207.

[3]21 Ohio C.C.R. 144, 157.

by the Cuyahoga County, Ohio, Circuit Court. Involved was a student dismissed after his first year in law school. During the year he had been twice arrested on criminal charges, had not been successful in passing his examinations, and had been abusive toward other students. Judge Caldwell's opinion draws much of its importance from its discussion of distinctions between public and private institutions. But, of interest, too, is his concept of procedural fairness in the case of university expulsion. After discussing the nature of the hearing to which the student is entitled, the court generalized in these words:

> The only requirement necessary, so far as concerns a review of the matter in a court of justice, is that it shall not be so unreasonable as to leave the conclusion of unfairness on the part of the teachers. It matters not whether we call this arrangement between the pupils and authorities over the school a contract or license.[1]

State courts have commonly restrained the power of state universities to reject applicants for admission.[2] It is well established that the state may not arbitrarily reject a university applicant because of race, religion, or other unreasonable considerations. However, nothing exists to compel a state university to accept a student on his own terms, as Professor O'Leary has pointed out.[3] If the relationship between student and university is a contractual one, it remains nonetheless true that terms of the contract

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[1] Ibid.

[2] See, e. g., Stallard v. White, 82 Ind. 278 (1882).

[3] Richard E. O'Leary, "The College Student and Due Process in Disciplinary Proceedings," 1962 University of Illinois Law Forum 438, 441.

are not individually negotiated, but are established by state policy for the education of the whole citizenry. But what terms may the university, as agency of the state, establish in its contract with students? Different courts in different states have supplied various answers to this question.

The Illinois Supreme Court has said that the university charter:

> gives to the trustees and faculty the power "to adopt and enforce such rules as may be deemed expedient for the government of the institution," a power which they would have possessed without such express grant, because incident to the very object of their incorporation, and indispensible to the successful management of the college.[1]

In 1947 an Illinois appellate court took the questionable position that the "State through the legislature has no power to take from or interfere with the power of the University to make such rules as are necessary to conduct the University's business."[2] In 1924 the Michigan Supreme Court, in Tanton v. McKenney,[3] took a sweeping view of the authority of universities to set the terms of the student contract when it said:

> Inherently the managing officers have the power to maintain such discipline as will effectuate the purposes of the institution . . . . That in the absence of an abuse shall prescribe the proper disciplinary measures . . . is settled by the text writers and the adjudicated cases.

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[1] Pratt v Wheaton College, 40 Ill. 186, 187 (1866), as quoted by O'Leary, op. cit., p. 441.

[2] Turkioff v. Northwestern University, 333 Ill. App. 224, 231, 77 N.E.2d 345, 349 (1947), cert. denied, 335 U. S. 829, 69 Sup. Ct. 37 (1948), as quoted by O'Leary, op. cit. p. 441.

[3] 226 Mich. 245, 248, 197 N.W. 510, 511 (1924).

As to the cases where the facts will prompt the courts to interfere with administrative discretion, O'Leary has compiled the following summation from state cases:

> . . . the courts have variously characterized them as "palpably unreasonable," Stetson Univ. [v.] Hunt, 88 Fla. 510, 102 So. 637 (1924); "against the common right," Stallard v. White, 82 Ind. 278 (1882); "unauthorized," ibid.; "unreasonably oppressive," Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144 (1901); "unlawful" and "against the public policy," Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); and, with reference to the acts of officials charged with applying the regulations, "arbitrary," Booker v. Grand Rapids Medical Center, 156 Mich. 95, 120 N.W. 589 (1909); "fraudulent," Stetson v. Hunt; . . . "without any cause whatsoever," Koblitz v. Western Reserve Univ., supra; "lack of impartiality," Koblitz, supra; "lack of good faith," Robinson v. Univ. of Miami, Fla., 100 So.2d 442 (1958) cert denied, Fla. 104 So.2d 595 (1958); "with malice," McCormick v. Burt, 95 Ill. 362 (1880); "without sufficient reason," Anthony v. Syracuse Univ. 224 App. Div. 487, 239 N.Y. Supp. 435 (1928); "capriciously," Frank v. Marquette Univ., 209 Wisc. 372, 245 N.W. 125 (1932); "no exercise of discretion," Goldenkoff v. Albany Law School 198 App. Div. 460, 191 N.Y. Supp. 349 (1921); not "within the scope of their jurisdiction," ibid.; and a "clear abuse of discretion," Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928). But see Barker v. Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923), where the court went so far as to declare itself without power to intercede.[1]

An expulsion opinion which was to prove of considerable significance was handed down by the Appellate Court of Illinois, First Division, in the case of Bluett v. Trustees of the University of Illinois.[2] This 1956 case was a mandamus action brought by Patricia Bluett, a former medical student at the University of Illinois, who

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[1] O'Leary, op. cit., p. 433n82.

[2] 134 N.E.2d 635 (1956).

sought to vacate an order by the university trustees which expelled her from the medical school.

Particulars of the case do not make it unique. Briefly, Miss Bluett was a student at the University of Illinois Medical School from October 1, 1949, until May, 1953, when she was suspended and prohibited from further continuing her course at the university. She was not told of the cause of her suspension until June 15, 1954. On the latter date, she and her attorney appeared before a Committee on Policy and Discipline and were advised by counsel for the university that she had been suspended for attempting to turn in an examination paper which had been written by a Doctor Wong, and that she had previously submitted other examination papers which had been written by Doctor Wong. Judge Niemeyer for the appellate court took note of the fact that, "No witnesses were produced at the meeting to support the charges and no other evidence was heard than the testimony of the plaintiff, not under oath, denying the charges."[1]

The Committee, "after having given careful and thorough consideration to all the evidence before it . . . ." unanimously found her guilty and changed her status as a student under suspension to that of one expelled from the medical college and recommended to the dean of the college that she be given failing grades in the three courses in which she had allegedly cheated. Miss Bluett's appeal for reconsideration of the committee action was rejected, and her repeated demands for reinstatement were denied.

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[1] Ibid., at 636.

The plaintiff conceded that the right of the committee to expel a student for cheating or attempting to cheat on examinations, and conceded further that the court should not attempt to control the exercise of that power unless it were substantially abused. Miss Bluett's exception was based on the absence of notice and hearing at which she might have been confronted with accusing witnesses and have been given an opportunity to cross-examine them. Her counsel based his case largely on the trial court's opinion in Anthony and on 11 Corpus Juris, "Colleges and Universities," to the effect that a student cannot be dismissed from a college "except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses and to rebut the evidence."[1]

Judge Niemeyer was hearing a different drummer. He pointed out that the trial court in Anthony had been reversed and that the positive statement in 11 Corpus Juris "is not repeated in 14 C.J.S. Colleges and Universities, in treating of the same subject."[2] He then utilized an assortment of state-court opinions which rejected the claimed right of notice and hearing. He thus applied the coup de grace to Miss Bluett's contention.

The significance of Bluett, however, lies less in the particulars of the case than in the fact that the decision keenly disturbed

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[1] Ibid., at 637.

[2] Ibid.

the late Professor Seavey, driving him to compose at the age of seventy-seven a short article for the Harvard Law Review which was to prove a landmark in the literature of college disciplinary proceedings.[1] Professor Seavey's article, previously cited, began with the opening summation of the procedural rights of college students before Illinois courts in dismissal proceedings:

> A woman student in a medical school of a state university was accused of cheating, which she denied. Though she was given a hearing prior to her dismissal, she was not told what evidence there was against her or the identity of her accusers; nor, in the proceeding for mandamus which she brought, was she permitted to give evidence of her innocence. Mandamus was denied on the authority of an earlier case in which the complainant had claimed to be ignorant of the evidence upon which dismissal had been based. Apparently all the Illinois courts require in proceedings resulting in the expulsion of a student, as was expressed in the earlier case, is that the institution's authorities should have heard "some evidence." The student is left with the impossible task of proving that the academic judges have acted wantonly or corruptly without having the information from which evidence to support his charges can be found.[2]

## How It Came To Be

One is confronted with a project of considerable speculation when he undertakes to document an explanation of how the colleges were able to get their values so consistently written into the case law. From the viewpoint of the nineteenth century and its broad application of civil liberties concepts, one might easily view the pre-Dixon history of student-college relationships as a dark age

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[1] "Dismissal of Students: 'Due Process,'" op. cit.

[2] Ibid., at 1406. The earlier case referred to by Seavey is Smith v. Board of Education, 182 Ill App. 342 (1913), which Seavey footnoted as a case in which a "student expelled from high school for membership in a fraternity had his claim dismissed even on the assumption that he had been denied the opportunity to prove that he had not joined the fraternity."

of unconscionable repression of college students.

How did it come about in the first place that college students were denied individual rights which they would have retained outside the academic world? Why would the college, the symbol of democratic values in a democracy, undertake to deny democratic prerogatives to its student clientele? And why would the state courts go along with the peevishness of the academic community? Projected answers to these questions lie beyond the realm of conclusive proof. Indeed, the literature on higher education would seem to offer little discussion on these seemingly basic questions. However, some speculation would seem to be warranted.

Undoubtedly many possible reasons could be advanced to help explain the paternalism which confronted college students prior to Dixon, and which confronts them even today in many institutions. Four possible contributing causes of the development of this paternalism and judicial support for it are: (1) the ecclesiastical background of American higher education and the consequent concern for the morality of college students; (2) political boards of control; (3) the pragmatic concerns of college presidents; and (4) the property orientation of American judiciary until recent decades.

Ecclesiastical Background

Jencks and Riesman have pointed out that American colleges prior to the twentieth century were "conceived and operated as pillars of the locally established church, political order, and

social conventions." The faculty were "more often trained as clergymen than as scholars." and consequently were more interested in improving the moral character than the minds of their students.[1] This cast the instructor in a quasi-parental role with a natural concern for the private life of the student and a parental interest in seeing to it that the students did not depart from accepted conventions.

Political Boards of Control

Probably no more anachronistic agency plagues higher education today than the lay board of control, commonly subject to political appointment. Jencks and Riesman describe the nineteenth century as "an era when self-confident trustees tended to intervene in college affairs far more often and more disasterously than is usual today."[2] The trustee's most important job is to select a college president, and choices of nineteenth century boards "tended to be far more domineering than [college presidents] are today."[3] Early in the twentieth century, Veblen could declare that the college boards of control "are of no material use in any connection," and that "they have ceased to exercise any function other than a bootless meddling with academic matters which they do not understand."[4] If this was the

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[1] The Academic Revolution, op. cit., p. 1.

[2] Ibid., p. 6.

[3] Ibid.

[4] Thorstein Veblen, The Higher Learning in America (New York: Sagamore Press, Inc., 1957), p. 48.

case in Veblen's time, it is probably no less true today, as indicated by a 1969 survey by the Educational Testing Service of Princeton, New Jersey. This survey of 5,000 trustees at 536 colleges and universities concluded that "trustees do not read--indeed have generally never even heard of the more relevant higher education books and journals."[1]

But the point to be made here is that the lay board of control has throughout American academic history served as an instrument to facilitate the imposition of non-academic values on the academic community. One might propose a priori that non-academic values directed toward the academy are, and have long been, paternalistic values. This was well and good before Dixon, but cannot stand the light of legal examination today.

College Presidents

Veblen refers to college and university presidents as "captains of erudition," and characterizes them as businessmen appointed by business-oriented boards for the purpose of conducting an academic enterprise on a business-like basis.[2] If he is thus too harsh in his treatment of educational executives, his cynicism is perhaps more than compensated for by Jencks and Riesman, who could declare that, "What is perhaps unusual about the academic world is the extent to which top management, while nominally

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[1]Commonweal, January 31, 1969, p. 544.

[2]Veblen, op. cit., esp. pp. 62-98.

acting in the interests of the board, actually represents the interests of "middle management (i. e., the faculty) both to the board and to the world."[1]

The point to be made here is a simple one. Conceding, as Jencks and Riesman do, that college administrators serve well in their roles as scapegoats to the frustrated faculty members, the commonest position of the tax-supported college president is an impossible one, if democratic ideals are to preserved on campus. The college president is caught in the middle of the impossible triangle constituted by the faculty, students, and board. In the best academic theory, he should serve all three of these publics. But he serves at the pleasure of the board alone. Board members "share the upper middle-class allergy to 'trouble' of whatever sort."[2] It is perhaps as sure as anything which cannot be proved that democracy and due process on campus will create what appears to board members as "trouble." Thus the college president, often a man of academic orientation, would seem to be cast in the either-or position of being true to the board at the risk of offending the faculty and the students. How often can a man be expected to be so great as to represent principle in the face of personal sacrifice? It is reasonably certain that this caught-in-the-middle posture of the college and university president has mitigated against the concept of

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[1] The Academic Revolution, op. cit., p. 17.

[2] Ibid., p. 16.

student rights on campus and will continue to do so until the president is given greater security.

An apparent solution to this dilemma would be powerful representation on the board to the two unrepresented publics--students and faculty--or else giving students and faculty a veto over board decisions in the hiring and firing of college presidents.

Property Orientation of the Courts

Property and contract have always been two major concerns of the law. An indication of this is evidenced in the fact that when Morris R. and Felix S. Cohen compiled a book of readings in jurisprudence, the first hundred pages appeared under the heading, "Property," and the second hundred under the heading, "Contracts."[1] Bentham emphasized the relationship between property and law when he wrote, "The better to understand the advantages of law, let us endeavor to form a clear idea of property. We shall see that there is no such thing as natural property, and that it is entirely the work of law."[2]

Whether one turns to Grotius in the seventeenth century or Blackstone in the nineteenth century, he will find background for Cohen's statement in the twentieth century that, "when we consider police power, its essence is the interpretation of property."[3] And the role of the judiciary in the United States historically

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[1] Readings in Jurisprudence and Legal Philosophy (New York: Prentice-Hall, Inc., 1951).

[2] Ibid., p. 8, quoting "Principles of the Civil Code," Part I ("Objects of the Civil Law"), pp. 111-113, Dumont ed., Hildreth trans. (1864).

[3] "Readings in Jurisprudence," op. cit., p. 15.

has been primarily the protection of property. Thus, in 1969, Abraham could write what many other scholars have observed about the United States Supreme Court, that, "Even a cursory glance at the Court's history proves that the economic-proprietarian sphere was very much in the focus of the Court's work prior to the New Deal, . . . ."[1]

Since institutions--including colleges--are historically identified to some degree with property, and students--as legal infants--have scarcely been identified at all with property, one finds little difficulty in understanding how the scholarly estate was so successful in getting its value written into the law. Indeed, the property concept would seem to be so important to the American judicial scheme that the about-turn in the law marked by Dixon involved the sudden discovery that the student had property interests on his side, too, and a serious weighing of equities ensued.

Further, the students were forced to await two historical developments before they could have their day in court free of such myths as the unilateral contract obligation. They were forced to await the development of a broad judicial interpretation of the fourteenth amendment's due process clause--one aspect of what has been called "universalism," that is, an increasing extension of principles like equality . . . to all groups within the

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[1]Henry J. Abraham, The Judiciary (Boston: Allyn and Bacon, 1969), p. 38.

society . . . ."[1]

## Impact of Dixon on the Institution

The United States Supreme Court declared racial segregation in the public schools unconstitutional in 1954. After sixteen years, this decree had not been fully complied with, in the sense that racial integration in the public schools had not been fully achieved. The school integration decision was a 180-degree reversal in the law, just as Dixon amounted to a 180-degree reversal in the law. One might assume that more time will be required for full compliance with Dixon than is being required for full compliance with the Brown decision for the simple fact that the Fifth Circuit's opinion attracted much less publicity than the Supreme Court's decision.

Probably the most ready compliance with the new rationale of Dixon has been among the larger universities, where legal staffs and law school faculty members could not have missed the abundance of law-journal articles dealing with the newly won consitutional status of college students. For example, John P. Holloway, resident legal counsel for the University of Colorado, has written extensively of that university's rather extreme compliance with and beyond the Dixon rationale.[2] Yet, judging by the number of

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[1]Kenneth Keniston, "The Sources of Student Dissent," Walt Anderson, (ed.) The Age of Protest (Pacific Palisades, Calif.: Goodyear Publishing Co., 1969), p. 239.

[2]See, e. g., "The School in Court," Grace W. Holmes, (ed.) Student Protest and the Law (Ann Arbor, Mich.: The Institute of Continuing Legal Education, 1969), p. 83.

cases still entering the federal courts, where the facts indicate a lack of understanding of the new student status, a period of several decades might be expected to elapse before full compliance or even general compliance will be realized.

The Forces of Publicity

While the law journals perhaps reflected the greatest interest in Dixon and its new direction of the law, educational organizations and journals have by no means remained silent or inactive. The Joint Statement on Rights and Freedoms of Students, inspired by the American Association of University Professors and adopted by numerous other professional organizations, will be discussed in subsequent chapters. But it should be observed here that the Joint Statement is one of the brighter developments in recent efforts to publicize the fact that college students now enjoy a new legal status. As will be shown later, the Joint Statement makes recommendations which go beyond what the courts have decreed as minimal student rights.

The United States National Student Association has exerted an aggressive publicity force behind the new developments in student legal rights. A monthly newsletter, the College Law Bulletin, issued by USNSA, reports latest case-law developments without editorial comment. The USNSA has also published a number of booklets on the subject of student rights.[1] The American Civil

[1]The USNSA publications list includes: Elimination of Social Rules, Student Conduct and Social Freedom, Procedural Due Process and State University Students, Political Speakers at State Universities: Some Constitutional Considerations, Private Government on the Campus: Judicial Review of University Expulsions, and others.

Liberties Union has given enthusiastic coverage to case-law developments in the area in its monthly publication, Civil Liberties, and has issued several booklets on the subject of student rights. A private monthly newsletter, The Education Court Digest, covers the same area, but extends beyond student-rights considerations and embraces the public schools as well as the colleges.

Relatively little notice of the new legal direction broached by Dixon and subsequent cases is found in the standard indexed educational journals. What has appeared is generally fair in tone. However, an unfortunate display of editorial bias appeared in the summer, 1969, issue of the Journal of Teacher Education.[1] Edward T. Ladd, Director of the Division of Educational Studies, Emory University, was author of an enthusiastic commentary on the ACLU's publication, Academic Freedom in the Secondary Schools.[2] Ladd points out that 20,000 copies of the new ACLU statement were bought in the first four months following its publication, and observes that, "One has only to read Friedenberg's Coming of Age in America, Herndon's The Way It Spozed To Be, or even Jackson's Life in Classrooms to be reminded how far removed is present school practice from what the ACLU proposes."[3] Ladd makes this further observation:

> Alan Westin, the distinguished professor of public law and government at Columbia, has offered some summer institutes for teachers and administrators dealing with

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[1] XX, 2.

[2] New York: ACLU, 1968.

[3] Ibid., at p. 139.

> American liberties and their bearing on school practice. On a visit to the most recent of these, I was struck with the naivete that some of the participating teachers and other school personnel showed regarding relationships between freedom and order, liberty and authority, democracy and leadership. But I was also struck by their enthusiasm for what they were studying, including a firsthand experience in "participatory democracy," by the rapidity with which they seemed to be learning. . . ."[1]

All in all, Ladd's article was an enthusiastic endorsement of the ACLU position on rights for students. The editor's values were revealed, however, in the title over the article, "Civil Liberties: Yet Another Piece of Baggage for Teacher Education?"

Joseph Katz and Nevitt Sanford of Stanford University wrote in an article for the April, 1966, Phi Delta Kappan that, "Perhaps administrators ought to relax and realize that they simply cannot control much of the behavior they might like to control," and, "Many deans seem to have an exaggerated conception of the amount of deviance that would result once rules were relaxed. Our own research, as well as that of others, has shown that, in the matter of sex, for instance, students exercise a high degree of responsibility."

Joseph F. Kauffman, Consultant for the American Council on Education, wrote an article for the Fall, 1964, issue of the Educational Record, endorsing the ASLU's statement on Academic Freedoms and Civil Liberties of Students in Colleges and Universities, which will be discussed in later chapters. Far from being antagonistic, he declares that, "I do not mean to imply that colleges and uni-

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[1]"Civil Liberties: Yet Another Piece of Baggage for Teacher Education?" Journal of Teacher Education, Summer, 1969, XX 2, p. 139.

versities are innocent bystanders. We know all too well that arbitrary punishment, invasion of privacy, and noneducational pressures have provided students in some institutions with legitimate cause for complaint."[1]

Ralph Thompson and Samuel P. Kelly of the education faculty at Western Washington State College were able to declare that, "Men of reason must demand for students the same range of civil rights as other citizens enjoy," in an article for the Fall, 1969, Educational Record.[2]

Although a few articles[3] in the educational journals have undertaken to clarify the meanings of some of the legal precedents issuing from the courts, non-legal educational writers in general seem more inclined to urge recognition of student rights on moral grounds than to cite legal precedent.

Speaking of campus protest in 1969, Kenneth Keniston wrote that, "Admittedly, a sudden increase in the administrative wisdom in college deans and presidents could reduce the number of available 'on-campus' issues; but such a growth in wisdom does not seem imminent."[4]

A report of the Illinois Legislative Council, February 18, 1969, prepared by James T. Mooney, Research Co-ordinator, closed with this

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[1] p. 360.

[2] "In Loco Parentis and the Academic Enclave," p. 449.

[3] E. g., Richard D. Strahan, "School Board Authority and Behavioral Codes for Students," Texas School Board Journal, March, 1970, p. 9 (although Strahan, President of Lee College, is a member of the Texas Bar); and "What the Courts Are Saying About Student Rights," NEA Research Bulletin, October, 1969, p. 86.

[4] "The Sources of Student Dissent, Walt Anderson (ed.), The Age of Protest, op. cit., p. 242.

admonition:

> There are those who would argue that a politics of confrontation, of violence and counter-violence can best be avoided by entrusting to college and university authorities the responsibility of keeping open to students the channels of legitimate protest and of introducing a greater measure of democracy into university affairs than now exists.[1]

Meanwhile members of college boards of control seem to have remained relatively unmoved by the changed legal status of the college student. In the study referred to above, the opinion survey of more than 5,000 trustees at 536 colleges and universities by Educational Testing Service, these stark facts emerged:

> Most trustees feel that the administration should control the content of student newspapers; well over a third believe it reasonable to require loyalty oaths from faculty members, and a similar number hold that students punished for off-campus behavior should also be disciplined by the college.
>
> A fourth of the trustees would screen campus speakers, and deny to faculty members, "the right to free expression of opinions."[1]

Educational Testing Service concluded from its study that:

> "To the extent that ideological differences among [trustees, students, and faculty] remain (or increase), we might expect greater conflict and disruption of academic programs, a deeper entrenchment of the ideas of competing factions, and, worst of all, an aimless, confusing collegiate experience, where the student's program is a result of arbitration rather than mutual determination of goals and purposes.[2]

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[1] Student Protest and the Law, op. cit., p. 66.

[2] Commonweal, January 31, 1969. p. 544.

[3] Ibid.

Perhaps an opinion or a series of opinions from the United States Supreme Court broadly proclaiming the constitutional rights of college students would speed up the process of nationwide acceptance of laborious contention in the lower courts will be the prelude to universal acceptance of the new law. Meanwhile, students who are arbitrarily denied their constitutional rights can take some comfort in the fact that they are on the safe side of the angels.

## CHAPTER IV

## NEGRO RIGHTS AND PRESSURE ON THE COURTS

To those civil libertarians who take the view that liberties cannot be neatly compartmentalized along group lines, that no sub-culture can gain rights without expanding the liberties of the general culture of which it is a part, the Dixon case provides a strong supportive argument. For Dixon presents a case of Negro students, discriminated against as Negroes, suing as Negroes, but winning their cause as students.

It is quite likely that long after the Negro passive-resistance movement of the 1960's has passed from the topical American scene into the quiet pages of modern history, students of any race will still be upheld in the quest of procedural fairness by the Fifth Circuit's decision in Dixon, a decision growing out of the heat of the Negro rights revolution of its time. True, the Dixon precedent was to be used by other groups of southern Negroes to fend off efforts at official reprisal for their participation in Negro-rights demonstrations,[1] but when the Negro-rights movement appeared to be waning in 1969, the Fifth Circuit's 1961 decision had become of less importance as a bulwark against racial discrimination.

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[1] E. g., Knight v. State Board of Education, 200 F.Supp. 174 (USDC MD Tenn. 1961) and Due v. Florida A & M University, 233 F.Supp. 196 (USDC Fla. 1963).

Elaborating opinions from the trial courts, however, had increased the importance of Judge Rives' opinion as a barrier against arbitrary treatment of college students.

The purpose of this chapter is to trace the major judicial victories for the Negro cause in the past two decades, sketch the beginning of the Negro movement of passive protest, and place Dixon within this context.

## The Judicial Background

Milton R. Konvitz draws a contrasting comparison between the means utilized by American Negroes in pressing their long-range campaign for civil rights and those employed earlier by organized labor to win the rights of self-organization and collective bargaining.[1] Briefly put, labor followed the legislative route in the face of a hostile judiciary, whereas the Negroes followed the executive and judicial routes in the face of an unresponsive national legislature.[2]

Because of the reams of literature which have been written on the subject, it is unnecessary to repeat here the story of the long judicial trek which led Negro rights advocates to the ultimate judicial victory represented by the United States Supreme Court's decision in the case of Brown v. Board of Education.[3]

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[1] Expanding Liberties (New York: The Viking Press, 1966). See esp. Ch. VI.

[2] Ibid., p. 266.

[3] 347 U. S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1956).

For the same reason, it is unnecessary to undertake a detailed account of the counter measures employed by southern whites in efforts to nullify the legal victory won by the blacks in Brown or the story of the passive resistance movement adopted by American Negroes, primarily in the South, under the leadership of the late Dr. Martin Luther King, Jr.

Rather, it will suffice to note that the Negroes did win what might be denominated "ultimate" victory in their judicial quest for equal status in education, and that in the face of white harassment they did undertake numerous displays of passive resistance characterized by economic boycotts of white merchants and "sit-ins" at segregated lunch counters. Such demonstrations form an important background for the development of the Dixon case. The demonstrations were indigenous student affairs. The organizations were to take over later. But it was in the setting of the indigenous demonstration that the opening scene of Dixon v. Alabama was to be staged.

## Dixon v. Alabama

In 1963, Van Alstyne observed that, "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, any effort to review the trends in the law of student prerogatives and college powers must of necessity show considerable deference to the fourteenth amendment and the Bill of Rights of the United States

Constitution. Negro judicial victories which led eventually to Brown were victories based primarily on the equal protection clause. And, since the fourteenth amendment inhibits states, but not the District of Columbia, the Court looked to the due process clause of the fifth amendment for a basis of its rationale to end public school segregation in the nation's capital.

Since, as was observed in Chapters II and III, students fared so poorly in state courts, the question might well be asked: What was the open sesame which admitted expulsion cases to the jurisdiction of the federal courts? Central to the answer is the fact that the Civil Rights Act (28 U.S.C. 1343) provides that:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

However, Van Alstyne points out that Section 1343 requires that the "civil action" testing a due process claim in the federal courts--at least where a matter of intangible value is concerned--be "authorized by law."[1] In other words, the cause of action must be otherwise described by federal statute. Authorization for such an action would seem to lie in 42 U.S.C. 1983, which provides:

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[1]"Procedural Due Process and State University Students." Reprinted in Student Rights & Responsibilities (University of Cincinnati: The Associated Student Governments, 1968), note 24, p. 262.

> Every person who, under color of any statute . . . of any state . . . subjects . . . any . . . other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suits in equity, or other proper proceeding for redress.

These two federal statutes, then, might be understood to admit to the federal district courts actions growing out of official state denials of constitutional rights. However, prior to 1961 the federal courts interpreted Section 1983 as authorizing a cause of action only where the unconstitutional practice was directed against a readily isolated minority group on a systematic basis. Thus, in June, 1960, the Seventh Circuit could observe:

> It might be argued that this case arises under the Civil Rights Acts, 42 U.S.C.A. S 1981 et seq. However, our Court has held contra in the case of Stift v. Lynch, 7 Cir., 267 F.2d 237. There we held that the Civil Rights Acts do not create a cause of action for false imprisonment unless such imprisonment is in pursuance of a systematic policy of discrimination against a class or gourp of perons.[1]

Citing this language in November, 1960, the United States District Court for the Northern District of Illinois apparently felt no discomfort in observing that, "The Civil Rights Act must be interpreted in light of delicate state-federal relationships," and at the same time expressed a fear of flooding the federal courts with civil rights suits.[2]

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[1] Truitt v. Illinois, 278 F.2d 819 (7th Circ. 1960)

[2] Swanson v. McGuire, 188 F.Supp. 112 (N.D. Ill. 1960).

In 1961 the Supreme Court delivered a weighty opinion undertaking to construe the applicability of Section 1983. Mr. Justice Douglas wrote the opinion in Monroe v. Pape,[1] which held, inter alia, that the victim of an unreasonable search had cause for action against the Chicago police under Section 1983. Thus the Seventh Circuit's restrictive interpretation in Truitt v. Illinois was superseded by the rationale that individuals can find cause for action under 42 U.S.C. 1343 and 1983 against officers of a state acting under color of state law in such a manner as to deprive the individuals of their rights. Monroe v. Pape was decided February 20, 1961. The Fifth Circuit was to deliver its Dixon decision eight months later.

Dixon had its inception on February 25, 1960, when a group of twenty-nine students at Alabama State College, a state-supported institution for Negroes, entered a publicly owned lunch grill in the basement of the county courthouse in Montgomery, and asked to be served. Service was refused, and the lunchroom was closed. After the Negroes had refused to leave, police officers were summoned. The Negroes were ordered outside the lunchroom, where they remained in the corridor of the courthouse for approximately one hour.

On the same day, Alabama Governor John Patterson, who served as ex-officio chairman of the state board of education, conferred with Dr. H. Councill Trenholm, president of the college, requesting

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[1]365 U.S. 167 (1961).

that the incident be investigated. Governor Patterson advised the college president that if he (Patterson) were in the president's position, he would consider expulsion or other appropriate disciplinary action.

The following day several hundred Negro students from the college staged a mass attendance at a trial in the Montgomery County courthouse involving the perjury prosecution of a fellow student. After the trial, these students filed two by two from the courthouse and marched through the city approximately two miles back to the college campus.

On the third day, February 27, 1960, several hundred Negro students from Alabama State College staged mass demonstrations in Montgomery and in Tuskegee, Alabama. Also on February 27, President Trenholm told the student body that the demonstrations and meetings were disrupting the orderly conduct of the college's business and affecting the work of the other students, as well as the work of the participating students. Dr. Trenholm personally warned three students who were later to become plaintiffs in the federal court action which was to ensue--these three being Bernard Lee, Joseph Paterson and Elroy Embrey--to cease the disruptive demonstrations immediately, and advised members of the student body to "behave themselves and return to their classes."[1] However, on this same day, one of the students, Bernard Lee, filed

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[1]Words here and chronology generally are from 186 F. Supp. 945, 948 (N.D. Ala. 1960).

a petition with Governor Patterson, protesting statements attributed to the Governor by the press.

The innocuous petition addressed the Governor formally and politely, stating the cause of the students in a simple language, more moral than legal in appeal. Pointing out that the students had violated no law, it described the courthouse snack bar as "a symbol of injustice to a part of the citizens of Montgomery," and a "contradiction of the Christian and democratic ideals of our nation." The language, at the same time, however, clearly indicated that a struggle of principle, not just an isolated demonstration, had been launched at the courthouse snack bar. How strange it must have seemed to the Governor of Alabama in 1960 to read a petition from Negro students which could say, "We have no desire for a prolonged and bitter struggle. But we shall not yield our rights and student-destiny without an extreme effort to retain them."[1]

Before a week had passed, approximately six hundred Alabama State College students held a meeting on the steps of the state capitol, where they sang hymns and heard a speech by Bernard Lee. Lee called on his fellow students to strike and boycott the college if any students were expelled because of the demonstrations.

On the day following the state capitol demonstration, the state board of education met and received reports on the demonstrations from Governor Patterson. These reports included the results

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[1] Ibid., at 948n3.

of investigations conducted respectively by the college president, the state director of public safety, and the office of the state attorney-general. These reports identified the six students who were to become plaintiffs in Dixon and several others as the "ring leaders" in the demonstrations. President Trenholm reported to the board that the demonstrations were having a disruptive influence on the work of other students and on orderly operation of the college. He declared that, in his opinion, he could not control future demonstrations. Twenty-nine Negro students were identified as the core of the organization responsible for the demonstrations. After hearing these reports and recommendations, the board voted unanimously on the Governor's recommendation to expel nine students and place twenty others on probation.

Accordingly, President Trenholm, himself caught in the middle by the racial demonstrations, notified the nine students of their expulsion during the first week of March, 1960. No formal charges were placed against the students and no hearing was granted any of them prior to the expulsion.

On or about March 3, approximately two thousand Negro students staged a meeting at a church near the campus. At this meeting, attended by a number of those who were to become plaintiffs in Dixon, the state school board and the college administration were denounced.

Of interest in the proceedings which were to follow is the text of the letter received by each of the nine expelled students,

notifying him of his expulsion. As printed in the margin of the district court's opinion, President Trenholm's letter of March 4, 1960, read as follows:

> Dear Sir:
>
> This communication is the official notification of your expulsion from Alabama State College as of the end of the 1960 Winter quarter.
>
> As reported through the various news media, The State Board of Education considered this problem of Alabama State College at its meeting on this past Wednesday afternoon. You were one of the students involved in this expulsion-directive by the State Board of Education. I was directed to proceed accordingly.
>
> On Friday of last week, I had made the recommendation that any subsequently-confirmed action would not be effective until the close of this 1960 Winter Quarter.
>
> The State Board of Education, which is made responsible for the supervision of the six higher institutions in Montgomery, Normal, Florence, Jacksonville, Livingston, and Troy (each of the other three institutions at Tuscaloosa, Auburn and Montevallo having separate boards) includes the following in its regulations (as carried on page 32 of the 1958-59 Registration-Announcement of Alabama State College).
>
> "Pupils may be expelled from any of the Colleges:
>
> "a. For willful disobedience of the rules and regulations established for the conduct of the schools.
>
> "b. For the willful and continued neglect of studies and continued failure to maintain the standards of efficiency required by the rules and regulations.
>
> "c. For Conduct Prejudicial to the School and for Conduct Unbecoming a Student and Future Teacher in Schools of Alabama, for Insubordination and Insurrection, or for Inciting Other Pupils to Like Conduct.
>
> "d. For any conduct involving moral turpitude."

Since so few student expulsion cases had been heard in the federal courts prior to 1960, it is interesting to note that U. S.

District Judge Frank M. Johnson found no difficulty in accepting jurisdiction of the case. "The law is now too well settled," he said, "and the authorities are now too numerous for this Court to spend any considerable time on the various defenses herein raised by these defendants challenging the jurisdiction of this Court to hear and decide this type of controversy." Citing Title 28 U.S.C. S 1331 and S 1343(3), the court summarily dismissed defendants' claim that the action was prohibited by the eleventh amendment.

From this point on, however, the trial court proceeding for an injunction against the college ran against the student plaintiffs, who were six of the nine expelled students. Raising the specter of the contract relationship, the court observed that, "The right to attend and matriculate in a public college or university is conditioned upon an individual student's compliance with the rules and regulations of the institution." Then, after quoting a long passage from the state board's rules published in the college catalogue, the court proposed that:

> The courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time and for any reason without divulging the reason other than its being for the general benefit of the institution. This is true as long as the dismissal is not arbitrary and falls within the classes specified for preserving ideals of scholarship or moral atmosphere.[1]

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[1]186 F. Supp. 945, 951 (1960)

U. S. District Judge Frank M. Johnson, an Alabama Republican who went to college with George Wallace and who had written the order outlawing city bus segregation in Montgomery,[1] presided at the hearing. Judge Johnson stated in his opinion that nothing "stated or concluded herein [is] to be construed as an approval or condonation of publicly owned and maintained lunchrooms where there is practiced discrimination solely on the basis of race in violation of the settled law . . . ." At the same time, he observed, conclusions of the court were "not to be construed as either an approval or disapproval of the so-called sit-in demonstrations; the legality of such actions is not here involved."

But one might conclude from even a casual reading of Judge Johnson's opinion that he had little difficulty in relegating students to a role of inferior citizenship. His words would seem to imply that attendance at a state-supported college was a privilege which could be earned by abandonment of conventional constitutional rights. Such would seem to be implied by this passage:

> . . . this Court reaches the firm conclusion that these several plaintiffs in organizing their group and then presenting themselves at the public eating establishment and others in this area, and had as their aim the intention of focusing public attention upon themselves and upon that discrimination. The obtaining of service was only incidental to those objectives. This Court is of the further opinion that the series of demonstrations, speeches, news releases, petitions, and resolutions that followed the initial demonstration . . . was for the same purpose . . . . these plaintiffs, considered to be illegal discrimination as to the members of their race by certain public officials in this area, acted without regard to their status as students at the Alabama State College

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[1]"The Jinxed Seat: Who's Next?" Newsweek, Dec. 1, 1969. p. 24.

> and acted without considering the damage they were doing to the orderly operation of the Alabama State College during this period.

It might be inferred that Judge Johnson was assuming an in loco parentis status for the petitioning students. In finding that their conduct was "unbecoming a student or future teacher in the schools, Judge Johnson further observed that:

> . . . the expulsion of these plaintiffs was in good faith . . . and was not an arbitrary action. It necessarily follows that such action did not operate to deprive any of these plaintiffs of their constitutional rights guaranteed them by the Constitution of the United States.

## Reversal by the Fifth Circuit

Judge Richard Taylor Rives, speaking for a 2-1 majority of the Fifth Circuit, stated the question and the decision of the appellate court tersely in the first paragraph of his August 4, 1961, opinion:

> The question presented by the pleadings and evidence, and decisive of this appeal, is whether due process requires notice and some opportunity for hearing before students at a tax supported college are expelled for misconduct. We answer that question in the affirmative.[1]

What concerned the Fifth Circuit in its review of Dixon was not the substantive values involved, but specifically the procedures. Judge Rives followed his opening synopsis with a telling blow at the procedures ignored in the expulsion of the Alabama State College students:

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[1]294 F.2d 150, 151 (1961).

> The misconduct for which the students were expelled has never been definitely specified. Defendant Trenholm, the President of the College, testified that he did not know why the plaintiffs and three additional students were expelled and twenty other students were placed on probation. The notice of expulsion which Dr. Trenholm mailed to each of the plaintiffs assigned no specific ground for expulsion, but referred in general terms to "this problem of Alabama State College."

Judge Rives cited the findings of the district court as establishing that "the only demonstration which the evidence showed that all of the expelled students took part in was that in the lunch grill located in the basement of the Montgomery County Courthouse."

It was not established that the other demonstrations were attended by all of the plaintiffs. And yet, only one member of the board of education had said this was the sole basis for his vote to expel the students. The question did not involve sufficiency of notice or adequacy of hearing, the opinion holds. Rather, the question was "whether the students had a right to any notice or hearing whatever before being expelled."

Judge Rives described the court as in frontal disagreement with the district court's holding that no notice or opportunity for any kind of hearing was required before the students were expelled.

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.[1]

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[1] Ibid., at 155.

Reviewing the Alabama Board of Education's exculpatory provision which applies to college expulsions, the Fifth Circuit took issue again:

> We do not read this provision to clearly indicate an intent on the part of the student to waive notice and a hearing before expulsion. If, however, we should so assume, it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to due process.

Only private associations may obtain a waiver of notice and hearing before depriving a member of a valuable right. "And even here, the right to notice and hearing is so fundamental to the conduct of our society that the waiver must be clear and explicit."

The court then constructed a property rationale for the nature of student status:

> 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.
>
> There was no effort to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course of studies in mid-term. It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution.[1]

Then came Judge Rives' clincher on the vestment of the status of college students: "Surely no one can question that the right to remain at the college in which the plaintiffs were students in

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[1] Ibid. at 157.

good standing is an interest of extremely great value."

Turning then to the nature of the governmental power to expel students from public colleges, the Fifth Circuit observed, "that power is not unlimited and cannot be arbitrarily exercised." Judge Rives then takes off on perhaps his most creative adventure by observing:

> Admittedly, there must be some reasonable and consitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of the issue. In the disciplining of college students there are no considerations of immediate danger or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing to do so, if not corrected by the courts, can well break the spirits of the students and of others familiar with the injustice, and do inestimable harm to their education.[1]

Turning to the error of the trial court, the Fifth Circuit found that it lay largely on the fact that the district court "simply misinterpreted the precedents." Specifically, Judge Johnson had held that, "the courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general

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[1] Ibid. at 157.

benefit of the institution." Judge Rives points out that this statement is based on language found in 14 C.J.S. Colleges and Universities, S 26, p. 1360, which, in turn, is paraphrased from Judge Sears' opinion in the case of Anthony v. Syracuse, supra. Then follows Judge Rives' strongest language in pursuit of his effort to distinguish between public and private colleges.

Anthony v. Syracuse, he says, "concerns a private university and follows the well-settled rule that the relations between a student and a private university are a matter of contract. The Anthony case held that the plaintiffs had specifically waived their rights to notice and hearing." In college expulsion cases involving the sufficiency of hearings given students, he concedes, the courts have commonly upheld sufficiency of the hearings. He then reached back into the nineteenth century to dredge up Hill v. McCauley, supra. and Gleason v. University of Minnesota,[1] a 1908 state case, to advance two state court decisions holding that some form of hearing is required. Judge Rives points out that it was not a case denying any hearing whatsoever, but one "passing upon the adequacy of the hearing, which provoked from Professor Warren A. Seavey of Harvard the eloquent comment," and he quoted a long paragraph from Professor Seavey's angry assault on the practice of denying procedural rights to college students.[2]

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[1]104 Minn. 359, 116 N.W. 650 (1908).

[2]"Dismissal of Students: "Due Process," op. cit.

The Fifth Circuit then concluded that, "We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."

The court then undertook to outline its views on the nature of the notice and hearing required by due process considerations before a student at a tax-supported college may be justly expelled:

> The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the Regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses in such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiment of an adversary proceeding may be preserved without encroaching upon the interests of the college.[1]

Turning to the case before the court, Judge Rives spelled out the procedural rights of the students dismissed from Alabama State College:

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[1] 294 F.2d 150, 158-159 (1961)

> In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

### Judge Cameron's Dissent

Judge Ben F. Cameron dissented strongly, describing the district court's opinion "so lucid, literate and moderate that I cannot forego expressing surprise that my brethren of the majority can find fault with it."[1] In large part, his dissent is based on dicta from four tangential precedents, the Second Circuit precedent in a college-expulsion case, two authoritative commentaries and his deference to the expertise of educators.

Whereas the majority opinion had quoted the dicta of the Supreme Court in California Cafeteria and Restaurant Workers Union v. McElroy[2] to make a minor, almost whimsical, point, Judge Cameron turns to the same opinion to quote this language:

> It is the petitioner's claim that due process in this case required that Rachel Brawner be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. We are satisfied,

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[1] Ibid. at 159.

[2] 81 S.Ct. 1743 (1961).

> however, that under the circumstances of this case such a procedure is not constitutionally required.
>
> The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests. * * * The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * *

Then turning to 1951 dicta of the Supreme Court in Joint Anti-Fascist Refugee Committee v. McGrath[1] Judge Cameron quoted this paragraph:

> As these and other cases make clear, consideration what procedure due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by the governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. * * * [Emphasis added by Judge Cameron]

Just as the majority opinion quoted 14 C.J.S., Colleges and Universities, Judge Cameron, too, borrowed from that source:

> Broadly speaking, the right of a student to attend a public or private college or university is subject to the condition that he comply with its scholastic and disciplinary requirements, and the proper college authorities may in the exercise of a broad discretion formulate and enforce reasonable rules and regulations in both respects. The courts will not interfere in the absence of an abuse of such discretion.[2]

Judge Cameron's dissent also draws support from American Jurisprudence[3] in its quotation of this language:

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[1] 341 U.S. 123 (1951)

[2] Section 26, p. 1360 cited.

[3] Judge Cameron cites Section 22, p. 16.

> "* * * Where the conduct of a student is such that his continued presence in the school will be disastrous to its proper discipline and to the morals of the other pupils, his expulsion is justifiable. Only where it is clear that such an action with respect to a student has not been an honest exercise of discretion, or has arisen from some motive extraneous to the purposes committed to that discretion, may the courts be called upon for relief.

Turning to college-expulsion precedents, Judge Cameron observes that:

> A sane approach to a problem whose facts are closely related to the one before us was made by the United States Court of Appeals for the Second Circuit in Steier v. New York State Education Commission et al., 1959, 271 F.2d 13. Its attitude is thus epitomized on page 18:
>
> "Education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in their education program no state may discriminate against an individual because of race, color or creed.
>
> "As so well stated by Judge Wyzanski in Cranney v. Trustees of Boston University, D.C., 139 F. Supp. 130, to expand the Civil Rights Statute so as to embrace every constitutional claim such as here made would in fact bring within the initial jurisdiction of thh United States District Courts that vast array of controversies which have heretofore been raised in state tribunals by challenges founded upon the 14th Amendment to the United States Constitution. It would be arrogating to (the) United States District Courts that which is a purely State Court function. Conceivably every State College student, upon dismissal from such college, could rush to a Federal Judge seeking review of the dismissal."[1]

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[1] As Judge Cameron knew, the facts of this case may be "closely related" to Dixon, but in central issue the two cases are radically different. Steier dealt with adequacy of a rather elaborate hearing procedure, whereas Dixon dealt with a total absence of notice and hearing.

One recurring rationale in state court cases which has militated against student seeking to overthrow administrative expulsions, as was previously indicated, has been the factor of judicial deference to the expertise of the educator. Judge Cameron's dissent would seem to be clinging to this deference, when it observes that:

> Everyone who has dealt with schools knows that it is necessary to make many rules governing the conduct of those who attend them, which do not reach the concept of criminality but which are designed to regulate the relationship between school management and the student based upon practical and ethical considerations which the courts know very little about and with which they are not equipped to deal.[1]

Some insight into Judge Cameron's vis-a-vis campus relationships might be read into his observations that plaintiffs "were accused and convicted by competent proof, . . . of public boorishness, of defying the authority of the officials of their school and state, of blatant insubordination, of endeavoring to disrupt the school they had agreed to support with loyalty, as well as break up other schools, and had openly incited to riot," that "We are trying here the actions of state officials, which actions we are bound to invest with every presumption of fairness and correctness," and his concept that "each college should make its own rules and should apply them to the facts of the case before it, and . . . the function of a court would be to test their

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[1] 294 F.2d 150, 160.

validity if challenged in a proper court proceeding."

Further, Judge Cameron asserted:

> Certainly I think that the filing of charges, the disclosure of names of proposed witnesses, and such procedures as the majority discusses are wholly unrealistic and impractical and would result in a major blow to our institutions of learning. Every attempt at discipline would probably lead to a cause celebre, in connection with which federal functionaries would be rushed in to investigate whether a federal law had been violated.[1]

## Other Federal Cases

Although Dixon marks an important milestone in the development of procedural rights for students in expulsion cases, it was not the first federal court case dealing with those rights. Dixon is considered the controlling precedent today, but in 1959 the Second Circuit set a precedent which ran sharply contrary to Dixon in the case of Steier v. New York State Education Commissioner.[2]

### The Steier Case

Steier was apparently the first student-college action brought in federal court under the Civil Rights Act, 28 U.S.C.A. Section 1343(3), the same jurisdictional avenue to be subsequently followed by Dixon. Steier may be sharply differentiated from Dixon in that it questioned the adequacy of procedures employed before a student was dismissed, whereas Dixon was to challenge the absence of notice and hearing. Distinction may be drawn, too, from the sharply differing opinions which the two cases produced.

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[1] 294 F.2d 150, 165.

[2] 271 F.2d 13 (1959).

After entering Brooklyn College, a state-supported institution, in the fall of 1952, Arthur Steier apparently decided that some of the student organizations were unduly dominated by the college administration. In November, 1954, and again in February, 1955, he wrote bitter letters to the college president, in one of which intemperate language was directed at the college's office of student administration. On March 3, 1955, the dean of students, acting as a result of the two letters, suspended Steier for the remainder of the term. In his letter of suspension, the dean quoted a by-law of the governing board which dealt with student discipline.

Steier appealed his suspension to the college president, but without success. He subsequently applied for readmission in the fall of 1955 and was readmitted subject to his written promise to abide by the rules and to generally show a change of attitude. The terms of his probationary status provided that he could not participate as an officer in any student activity organization. Steier was subsequently warned that he was not adequately keeping his agreement. In June, 1956, after the academic year was ended, the dean wrote Steier that he still showed some deficiencies, but that he had made certain gains. The dean advised him that during the 1956 fall term he would not be permitted to hold office or membership in any student organization.

In September Steier caused to be published in the first issue of the college newspaper the story of his latest probation--claiming

that it was caused by discriminatory and vindictive policies of the college administration. On the day following publication of this letter, Steier was suspended for the second time, as of three days later, because of his "continued disregard of the rules and regulations."

Steier and his parents promptly appealed the second suspension to the college president--again without success. In December, Steier applied for reinstatement, and was asked to appear before the faculty committee on orientation and guidance. He did appear, and the committee unanimously recommended his dismissal for these four reasons: (1) Although one provision of his suspension was that he was not to appear on campus, he had been seen on campus placing leaflets in mailboxes and had attended a meeting which he refused to leave until escorted out by a policeman; (2) He had used abusive language in letters addressed to college officials; (3) In spite of college restrictions on his non-academic activities, he had been in attendance at the Students for Campus Democracy booth of the Club Fair on September 19, 1956; and (4) "There is no indication that Mr. Steier understands that his behavior is inappropriate."[1] On December 20, Steier was notified that the faculty council had approved the recommendation of the faculty committee and that he was dismissed.

Steier then appealed--in accordance with state law and rules of the board of education--to the board of education. After a

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[1] 271 F.2d 13, at 15-16.

hearing, his appeal was denied and he then appealed to the New York State Commissioner of Education. After another hearing, this appeal was denied. Steier then brought action in the United States District Court for the Eastern District of New York, claiming jurisdiction under Title 28 U.S.C.A., Section 1343(3). In the words of Judge Gibson for the Second Circuit, he alleged:

> that plaintiff was maliciously suspended by the Dean of Students of Brooklyn College, that on appeal the President of the College arbitrarily sustained the suspension and that later the Faculty Council of the College, acting upon the recommendation of the Faculty Committee on Orientation and Guidance, unlawfully dismissed plaintiff permanently; that thereafter on appeal for reinstatement to the Board of Higher Education, that Board illegally denied plaintiff's request for a fair hearing and that the State Commissioner of Education refused to reverse the action of the Board and the College, rendering unconstitutional decisions in so doing.[1]

The District Court dismissed Steier's action, basing its ruling on Steier's failure to exhaust state remedies.[2] The Second Circuit's decision is interesting in that it was apparently the first federal appellate decision ever rendered in a college expulsion case, and for the fact that each of the three judges wrote opinions, including one concurrent and one dissent. Gibson, district judge, writing for the court, based dismissal of the action "squarely on the ground that the complaint and uncontroverted facts clearly demonstrate there was no jurisdiction in the United States District

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[1] Ibid. at 13.

[2] 161 F. Supp. 549.

Court."[1] Circuit Judge Moore, concurring in the result, disagreed with both the district court and Judge Gibson, except in the result. He favored dismissal of the action, "not because the district court lacked jurisdiction, nor because plaintiff had not exhausted state remedies, but because the pleadings and other documents . . . revealed no material issue of fact which required a trial."[2] Chief Judge Clark dissented, because: "I believe the plaintiff has presented claims which can be legally adjudicated only upon a full dress trial in the district court."

Judge Clark scoffs at the "details selected to show misconduct (which of course stand unproven) [and which] really only demonstrate the more that Steier's vice is nonconformity, rather than crime or misdemeanor." In response to the majority's position that the only restriction the federal government imposes on the purely state function of education is to bar discrimination based on race, color or creed, he raises a finger with these words:

> This indeed is a novel doctrine. No court, ever before to my knowledge, has suggested that the Fourteenth Amendment to the United States Constitution is a paltry piece of class legislation limited, it seems, to according protection to the Negroes in the South and Jehovah's Witnesses in other areas. Surely the noble privileges therein embodied are not to be thus denigrated.[3]

In sum, Steier, apparently the first college expulsion case taken to the federal courts on the basis of the Civil Rights Act, Title 28 U.S.C.A. 1343(3), found acceptance of jurisdiction at the

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[1] 271 F.2d 13, 18.

[2] Ibid. at 21.

[3] Ibid. at 23.

trial court level and two of three circuit judges agreeable to jurisdiction in the Second Circuit. The disappointment felt by civil rights advocates over Steier most certainly was lessened by the fact that the case was not one which many plaintiff's lawyers would describe as a "good" case, as was suggested by Judge Moore's finding of "no material issue of fact which required a trial." Steier obviously was not the ideal case to usher student-college expulsion disputes into the realm of federal jurisdiction. Nor, one might suspect, was the Second Circuit the ideal court.

Dixon was to prove the ideal case, the conscience-searching South the ideal environment, the Fifth Circuit the ideal court, and 1960-61 the ideal year in American history.

## The Dixon Judges

### The Trial Court

A casual reading of the trial court's opinion in Dixon could easily lead one to the conclusion that its author, United States District Judge Frank Minis Johnson, like many another federal judges in the South, was drawing his $30,000 a year and writing his prejudices into case law. For the opinion was not devoid of a tone of condescension, as was noted earlier.

But such a conclusion would seem unwarranted. Judge Johnson made his contribution to the final outcome in Dixon, it would seem, by his sweeping acceptance of the case into federal jurisdiction. Less hesitation than aggressiveness can be read into his offhand declaration that, "The law is now too well settled and the

authorities are now too numerous for this Court to spend any considerable time on the various defenses herein raised by these defendants challenging the jurisdiction of this Court to hear and decide this type of controversy."[1] This is a strong statement, expecially in view of Judge Gibson's opinion in Steier twenty months earlier that the district court for the eastern district of New York lacked jurisdiction in a college dismissal action brought under the same statute. Moreover, Johnson was able to rule that, "The various objections raised by these defendants as to the insufficiency of process and that this action is prohibited by the Eleventh Amendment to the Constitution of the United States are frivolous and merit no discussion." "The only real question in this case," he wrote, "is whether these plaintiffs were accorded 'due process' within the meaning of the Constitution of the United States in their expulsion from the Alabama State College by the Alabama State Board of Education."

Johnson is reputedly one of that rare genre of federal district judges in the South who have remained relatively immune to the pressures of their environment. An Eisenhower appointee from "The Free State of Winston,"[2] he has, according to Time, "probably faced more tough segregation cases than any other Southern judge."[3] Former Alabama Governor George Wallace, a Johnson classmate at the

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[1]186 F. Supp. 945, 950 (1960)

[2]Winston County in the northern hill country of Alabama, described by Time (Feb. 21, 1964, p. 76) as "a staunchly Republican island in a Democratic sea."

[3]"Trail Blazers on the Bench," Dec. 5, 1960, p. 14.

University of Alabama Law School, has called Johnson rash, headstrong, vindictive, unstable and erratic, and once demanded his impeachment.[1] In a 1965 Summary of civil rights demonstrations in Alabama, Johnson was thus described as "the man central to them all," and "one of the most important men in America."[2]

Disowning such labels as "liberal" or "conservative," Johnson claims to be what is popularly called a "constructionist," explaining, "I don't make the law. I don't create the facts. I interpret the law."[3] Nonetheless, he played a role in the finding of "liberal" law in such noted cases as Reynolds v. Sims[4] and Gomillion v. Lightfoot.[5] It was Judge Johnson, too, who in 1967 "mustered the three-judge court that ordered desegregation of all of Alabama's 118 school districts."[6]

The Appellate Court

Of the three Fifth Circuit judges who constituted the court which overruled Judge Johnson in the Dixon case, two--Ben F. Cameron and Minor Wisdom--were Eisenhower appointees. One--Presiding Judge Richard Taylor Rives--was a Truman appointee.

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[1] Ibid.

[2] "Interpreter in the Front Line," Time, May 12, 1967, p. 72.

[3] Ibid.

[4] Sims v. Frink, 208 F. Supp. 431 (M.D. Ala. 1962).

[5] Gomillion v. Lightfoot, 167 F. Supp. 405. However, his ruling in this case was understandably in support of the contested Alabama statute.

[6] The New York Times, April 14, 1964, p. 27.

The dissent in Dixon was written by Judge Cameron, a "vigorous segregationist," 70 years old at the time and destined to die in his home state of Mississippi three years later. The New York Times described him as "the most dedicated segregationist on the Federal bench" after he attempted to block the admission to the University of Mississippi of George Meredith, first Negro student ever to win court-ordered admission to that school.[1]

Concurring on the majority opinion were Richard Taylor Rives, presiding judge for the Fifth Circuit and a Truman Democrat, and John Minor Wisdom, New Orleans attorney appointed to the Fifth Circuit by President Eisenhower. Rives (pronounced Reeves) has been described as "a conservative, tradition-minded Democrat," who has "invariably decided for liberialism, but not always without a twinge of regret."[2] Time credits him with establishing "the far-reaching principle that Negroes cannot be convicted of crime in counties that bar them from jury service. Of Judge Wisdom, The New York Times could report that he carried "the burden of the Republican fight" in Louisiana for Eisenhower in 1956.[3] Eisenhower carried Louisiana. Time described Wisdom as one of President Eisenhower's "first-rate Southern Republican judges."[4]

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[1] Ibid.

[2] "Trail Blazers on the Bench, op. cit.

[3] March 15, 1957, p. 15:1.

[4] "Interpreter in the Front Line," May 12, 1967, p. 73.

The Fifth Circuit itself has been described as both "trail blazing"[1] and "the most significant Federal bench for the South."[2] It handles appeals from all the federal district courts in six of the eleven states of the old Confederacy--Alabama, Florida, Georgia, Louisiana, Mississippi and Texas.

## Commentary on Dixon

Beginning almost immediately after the Fifth Circuit handed down its opinion in Dixon and continuing through 1968, the nation's law journals--perhaps largely because of their normal campus orientation--have proclaimed the significance of the decision. Professor Seavey, who had decried the lack of procedural protections for students,[3] and who had been quoted by the Fifth Circuit in Dixon, soon became widely quoted by other writers and reviewers. From the very beginning, the great preponderance of commentary on Dixon has ranged from favorable to outright laudatory. An illustration of the degree of the favor with which the Fifth Circuit's decision was received may be gained by a brief synopsis of some of the early reviews.

### Harvard Law Review

Under its heading, "Recent Cases," in 1962, the Harvard Law Review published an unsigned three-page summary and analysis of Judge Rives' opinion. "The court's result seems eminently

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[1] Ibid.

[2] The New York Times, April 14, 1964, p. 27.

[3] "Dismissal of Students: 'Due Process'," op. cit.

desirable," the writer observes, and, "under the balancing test adopted by the Supreme Court, inescapable." Again, "the court's decision to remand for a hearing may be justified by the Board's failure to specify the misconduct for which plaintiffs were expelled, which made it impossible to say with assurance that no adjudicative facts remained at issue."[1]

Alabama Law Review

Nearer to the scene of action which spawned the Dixon case, the Alabama Law Review in its fall, 1961, issue noted that Corpus Juris maintained that a college could not dismiss a student without giving him notice and a fair hearing; however, Corpus Juris Secundum dropped this statement and premised court interference on arbitrary action or abuse of discretion by college officials. Ben Leader Erdreich, who signed the comment, observed that these and other authorities "add to the confusion by failing to distinguish clearly between cases involving public schools and those involving private schools." "It would seem," observes Erdreich, "that fairness and justice can best be assured if the student is given notice and hearing."[2] The author believed that:

> little difficulty will arise from this decision. If the courts extend themselves further into what must be an area within which school officials act with a great degree of discretion, real problems will develop. However, the instant case should not create difficulty. It has set out objective procedure by which the school must act.[3]

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[1] 75 Harvard Law Review 1429 (1962)

[2] 14 Ala. L. Rev. 126 (Fall, 1961).

[3] Ibid. at 131.

Temple Law Quarterly

Stanley S. Cohen, writing for the Temple Law Quarterly, observed that under the Fifth Circuit's procedural formula in Dixon, "it is not too farfetched to suggest that cross-examination may be allowed if the facts sufficiently warrant it." He doubted that the decision will "open the floodgate to spurious claims, and concluded his comment by observing that, "The court by including this case within the limits of the due process clause has reaffirmed the protection of individual liberties and provided an adequate safeguard which is 'appropriate to the case and just to the parties to be affected.'"[1]

North Dakota Law Review

Writing for the North Dakota Law Review, Dennis L. Thomte remarks that, "The majority opinion . . . seems to adhere to the minority rule and cites only two cases. Proposing that, "The dissenting judge presents somewhat more authority for his opinion, all of which appears to deny this is due process, he nonetheless concludes by stating, "It is the writer's opinion that the [North Dakota] courts should follow the decision reached in the instant case in an effort to preserve fair play and justice."[2]

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[1] 35 Temple L. Q. 437, 440-441, (Summer, 1962).

[2] 58 North Dakota Law Review, 348 (April, 1962).

# CHAPTER V

## DISMISSAL AND SUSPENSION:

## A MANDATE FOR DUE PROCESS

Exactly what does Dixon mean to the college student who is faced with disciplinary action? Many pages of commentary have been published in efforts to answer this question. As with any newly developing area of case law, Dixon invites speculation. It invites, too, subsequent elaboration by trial courts and appellate courts confronted with challenges to college expulsion proceedings. Narrow distinctions must be drawn. Until they are drawn by courts of competent jurisdiction, they remain fair subjects for legal speculation. One purpose of this chapter is to examine representative speculation which has followed the 1961 decision by the Fifth Circuit. Attention must be paid, too, to some of the leading judicial decisions which have helped amplify the meaning of the Fifth Circuit's important precedent. Beyond this Richard E. O'Leary, Assistant Legal Counsel at the University of Illinois, has noted that, "There seems to be sufficient conflict between the language of Steier and Dixon on this question [of federal court jurisdiction] to warrant review by the United States Supreme Court."[1] And, speaking of the broad subject of

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[1]"The College Student and Due Process in Disciplinary Proceedings," op. cit., p. 448 n82.

constitutional rights of college students, Van Alstyne confessed in February, 1969, "I have not thought it appropriate to compose a book length treatment of the subject as yet, because the field is in such a state of flux that it seems better to watch the judicial trends for at least an additional year or so . . . ."[1] Added to this is the fact that the American Civil Liberties Union in 1969 reported that "some federal district courts have merely paid lip service" to Dixon.[2] From the emerging picture of judicial uncertainty, one might conclude that commentaries by legal writers and a study of subsequent cases would be of especially great value.

During the period that state courts were using the contract and in loco parentis concepts to justify a hands-off policy, it has been observed that a judicial attitude prevailed that higher education was a privilege, not a right. Some writers have been willing to recognize the existence of extensive federal questions involved in education, especially since Brown v. Board of Education,[3] but it was Dixon which first recognized a federal question involved in a college expulsion case. It was Dixon which first resoundingly abandoned the concept of higher education as a privilege--at least in tax-supported institutions. The case still represents the authoritative precedent on due process in student disciplinary

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[1]Letter from William Van Alstyne, dated Feb. 27, 1969.

[2]Excerpt from a draft of an ACLU pamphlet, Academic Freedom and Civil Liberties of Students in Colleges and Universities, while that work was in preparation, Appendix B, p. 2.

[3]See, e. g., O'Leary, op. cit., p. 441, n33.

proceedings, although new facets have since been added. In order to reach the conclusions which Judge Rives formulated in Dixon, it was thus necessary to hold that state-supported higher education was no longer a question of mere privilege, but a question of right for a student who had matriculated and been accepted by an institution. It follows that a student could be separated from the institution for disciplinary reasons only if he were afforded the fundamentals of due process, as provided by the fourteenth amendment.

The fourteenth amendment says that no state shall deprive any person of life, liberty or property without due process of law. Expulsion from college scarcely constitutes a deprivation of life. Nor is it a denial of liberty, since the student may not be incarcerated. The Dixon case held, in effect, that the right to a higher education--or at least the right not to arbitrarily be denied the status of student in good standing--was a property right. Since the student has a property vestment in his status as a student, he accordingly cannot be denied this status in the absence of "due process." It remains for the courts to spell out exactly what procedural considerations come within the meaning of due process in any particular situation.

In the Dixon case the court said that the student should have notice and that the nature of the hearing could vary, depending upon the circumstances of the case. Not every discipline case requires a full-dress hearing. But the court stated that in every case the rudiments of an adversary hearing may be preserved without

disturbing the interests of the college. The court then proceeded to outline procedural safeguards which would meet the requirements of due process in the case at hand. Judge Rives wrote:

> In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.[1]

The foregoing standards were addressed to "the instant case." Elsewhere in the opinion, however, Judge Rives would appear to be addressing himself to a general posterity when he declared that:

> . . . we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case.[2]

The case before the court, he declared, "as opposed to a failure to meet the scholastic standards of the college," requires a collection of facts concerning the alleged misconduct. Such facts are easily colored by subjectivity of witnesses. He continues:

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[1] 294 F.2d 150, 159. (1961).

[2] Ibid. at 158.

> In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that full-dress judicial hearing, with the right to cross-examine witnesses is required.[1]

Dixon, then, held that notice and hearing were required in college disciplinary expulsion proceedings, but left open the question of how much process was due. This question was to be partially answered in subsequent decisions by college administrative authorities and by the U. S. District Courts. An examination of representative cases is required for insight into subsequent developments.

## Subsequent Expulsion Cases

Dixon authoritatively opened the federal courts to review of college expulsion proceedings. The purpose of this section is to briefly review a selection of some of the more widely publicized decisions in subsequent judicial actions.

### The Knight Case

Less than five months after the Fifth Circuit delivered its opinion in the Dixon case, the Nashville Division of the U. S. District Court for the Middle District of Tennessee decided the case of Knight v. State Board of Education,[2] a case similar to Dixon in that it was colored by a backdrop of apparent political

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[1] Ibid. at 159.

[2] 200 F. Supp. 174 (1961).

reprisal against students involved in the then-current civil rights protest movement. Knight has been widely reviewed in the legal journals, its greatest significance perhaps resting in the court's deference to Dixon.

The Knight case involved thirteen students at Tennessee A & I State University who were suspended following an ex parte hearing by the discipline committee of the university. At the time of their suspension, all thirteen students were being held in a Mississippi jail as an outgrowth of their efforts to undermine segregation in a Mississippi bus terminal.

District Judge William E. Miller performed a feat of semantical wizardry in reaching his finding that the students were due "injunctive relief to enforce their rights to procedural due process with respect to any disciplinary action on the part of Tennessee A & I State University . . . ."[1] Enroute to this finding, Judge Miller was able to describe Dixon as "an elaborate and carefully reasoned opinion . . . ." and observe that, ". . . the principles so clearly enunciated therein are not necessarily determinative of this case, [but] they are entitled to considerable weight insofar as the question of procedural due process is concerned."

The Due Case

Providing perhaps the second test for the strength of Dixon in the U. S. District Courts was Due v. Florida A & M University,[2]

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[1] Ibid., at 182.

[2] 233 F. Supp. 396 (1963).

decided two years after Dixon by the Tallahassee Division of the U. S. District Court for the Northern District of Florida. This is the court presided over by President Nixon's third nominee to the United States Supreme Court, G. Harrold Carswell.[1]

The facts in Due are similar to those in Knight. Plaintiffs had been found guilty of contempt of court and fined $1,000 each for leading student demonstrations in violation of a restraining order. Due can be nominally distinguished from Knight on the basis that the Florida students received at least rudimentary notice and hearing, whereas the Tennessee students had received none. Unlike Judge Miller in the Knight case, Judge Carswell did not summon the legerdemain required to find for the students. According to a later note on the case by the ACLU, he paid "lip service" to Dixon.[2] He noted that, "this court concludes that Dixon is, indeed, the most current, explicit and applicable statement of the law governing the disposition of this case."

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[1]Undoubtedly, Judge Carswell's ruling in this case constituted one of the reasons for the tenacious opposition by the N.A.A.C.P. to Senate confirmation of his appointment to the Supreme Court, an opposition which was to prove successful. This case was the second federal court test of the authority of Dixon. Judge Carswell faced the dilemma of finding for the plaintiff students and thus stretching the meaning of Dixon to include inadequate hearing, or else finding against the students and tending to minimize the authority of Dixon. One might well speculate that, had he opted the former course of action, he might have ingratiated himself sufficiently with the N.A.A.C.P. to have neutralized their attitude toward him, and might then have become an Associate Justice of the United States Supreme Court.

[2]Excerpt from a draft of the ACLU pamphlet, "Academic Freedom and Civil Liberties of Students in Colleges and Universities," a work in preparation (n. d.) Appendix B, p. 2.

But he then selected from Judge Rives' language in Dixon a line to support his conditioned response to Negro demonstrators and wrote:

> A fair reading of the Dixon case shows that it is not necessary to due process requirements that a full scale judicial trial be conducted by a university discipline committee with qualified attorneys present or formally waived as in a felonious charge under the criminal law. There need be no stenographic or mechanical recording of the proceedings.[1]

It might be contended that judicial precedent firmly dictated only one finding in the Due case--that the district court had legal jurisdiction. Judge Carswell so determined. Beyond that he was on his own. He ruled against the students. As to the dispensable status of a hearing transcript volunteered by Judge Carswell, one writer has remarked, "one wonders how the case can be reviewed in a judicial proceeding if no transcript of the administrative proceeding is made."[2]

The Esteban Case

The ACLU has cited as "the most encouraging post-Dixon case (if not the most authoritative)" the 1967 case of Esteban v. Central Missouri State College.[3] The opinion in Esteban, written by Judge Elmo B. Hunter for the U. S. District Court, Western District of Missouri, constitutes what the ACLU may consider the first significant expansion of the Dixon doctrine. If Esteban did, indeed,

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[1]233 F. Supp. 396, 403 (1963).

[2]John P. Holloway, "The School in Court," (Ch. 3) Grace W. Holmes (ed,). Student Protest and the Law (Ann Arbor, Michigan: The Institute of Continuing Legal Education, 1969), p. 93.

[3]Excerpt from a draft of the ACLU pamphlet, op. cit., p. 3.

"extend" the Dixon doctrine, this was because Esteban held that plaintiff students should be permitted to have counsel with them at a disciplinary hearing and that plaintiffs themselves might question at the hearing any witness who gave evidence against them. The Fifth Circuit had specifically eschewed both these undertakings by plaintiffs under the circumstances pertaining to Dixon.

In Esteban, Judge Hunter set forth what he viewed as the essential elements of due process: (1) written charges, (2) ten days' notice of hearing, (3) hearing before the college president, (4) student's right to advance inspection of the college's affidavits or exhibits, (5) student's right to counsel, (6) student's right to call witnesses, or introduce affidavits and exhibits, (7) right to confront and cross-examine witnesses, (8) determination solely on evidence in the record, (9) written findings and disposition, (10) either party may make a record of the disciplinary hearing at its own expense.

Jones v. Tennessee

The nearest a college expulsion case has come to being resolved by the United States Supreme Court was in the case of Jones v. State Board of Education of Tennessee.[1] The Supreme Court granted certiorari "primarily to consider issues raised by claim of one of the students that he had been suspended because of distribution of leaflets."[2] But the Court heard arguments, then ruled on February 24,

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[1]279 F. Supp. 190, 407 F.2d 834, 90 S.Ct. 779 (1970).

[2]90 S.Ct. 779.

1970, that the fact that indefinite suspension of the plaintiff had been based in part on the fact that he allegedly lied at a college hearing on charges against him, a fact which had not emerged on the record of the case.

Finding that the lying aspect "sufficiently clouds the record to render the case an inappropriate vehicle for this Court's first decision on the extent of First Amendment restrictions on the power of state universities to expel . . . students for the expression of views . . .," the Court dismissed the case. Justice Black dissented in part, saying he would affirm the judgment below, which was against the students. Justices Douglas and Brennan dissented, saying, "Our failure to reverse is a serious setback for First Amendment rights in a trouble field (sic)."[1]

Briefly stated, the facts of the case are as follows. Plaintiffs were students at Tennessee A and I State University, a predominantly Negro school. They were indefinitely suspended and given notice of nearly three months of their suspension. After they obtained counsel and requested a hearing, they were given two days' notice of the specific charges facing them, an assemblage of charges which ranged from distributing subversive literature to the allegation that one of them had been discovered in bed with a woman. Apparently a basic cause of the action was the allegation that the students had been disrespectful toward college officials. Apparently the case can thus be distinguished from Dixon in that

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[1] 90 S.Ct. 779, 781 (1970).

it pitted the administration against the students, rather than the state against the students, as was the case in Dixon.

The suit was brought as a class action, and the court ruled that it did not technically qualify as a class action. More important, the trial court, sustained by the Sixth Circuit, held that two days' notice of specific charges was adequate to meet due process requirements. This was after the United States District Court in the first Esteban case stipulated ten days' notice in such cases. Concerning the administrative hearings in the Jones case, three noteworthy procedural facts stand out: (1) the students were represented by counsel; (2) students' counsel was permitted to cross-examine hostile witnesses; and (3) a verbatim transcript of the proceedings was made (apparently at the expense of the school). Thus, in the Jones decision, District Judge William E. Miller followed or exceeded the precedent of the first Esteban decision, with the qualified exception of the provision for ten days' notice. One might view this as remarkable, since Esteban dealt with denial of notice and hearing, while Jones dealt merely with the adequacy of notice and hearing. However, the penalties assessed in both cases amounted to expulsion. In effect, the trial court's dismissal of the action was sustained when the Supreme Court dismissed certiorari.

Soglin v. Kauffman

For several years, one of the burning issues surrounding the subject of college discipline, especially in expulsion cases, has

been the vagueness of college regulations and the vagueness of charges used as bases for college expulsions. Students have been expelled for "misbehavior," "behavior unbecoming a student . . . ," and for similarly vague reasons. As was previously mentioned, the United States District Court for the Western District of Missouri, in its second Esteban opinion, followed the guidelines set by the Missouri District, en banc, when it held that the legal doctrine of vagueness and overbreadth in criminal statutes "does not, in the absence of exceptional circumstances, apply to standards of student conduct."[1] In Soglin v. Kauffman, the Seventh Circuit rejected this rationale pointedly and said that, "in the present case, the disciplinary proceedings must fail to the extent that defendant . . . did not base those proceedings on students' disregard of university standards of conduct expressed in reasonably clear and narrow rules."[2]

More pointedly, the court ruled that "expulsion and prolonged suspension may not be imposed on students simply on the basis of allegations of "misconduct." Further, "The use of 'misconduct' as a standard in imposing the penalties threatened here must . . . fall for vagueness. The inadequacy of the rule is apparent on its face."

Two other statements by the Seventh Circuit in this opinion

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[1]290 F.Supp. 622, 630 (1968).

[2]418 F.2d 163, 167 (7th Cir. 1969).

would seem to be pregnant with portent: (1) "It is . . . immaterial that this controversy involves a disciplinary rule rather than a criminal statute;" and (2) "Criminal laws carry their own definitions and penalties and are not enacted to enable a university to suspend or expel the wrongdoer absent a breach of the university's own rule." The first statement might be suspected as signaling the demise of a distinction which has barred students from enjoyment of complete procedural protections which are manifest in criminal cases. The second statement could be interpreted as an undermining of the standard college sanctions against students prosecuted in the regular judicial system for off-campus behavior.

## The Question of Counsel

Commenting on counsel representing students in disciplinary hearings, Van Alstyne has observed that, "The presence of counsel in an advisory role is an emerging trend. To the best of my knowledge, those universities that have permitted counsel to participate in hearings have not found it unduly awkward, time-consuming or expensive."[1]

As to the practical consequence of student representation by counsel, Van Alstyne observed:

> . . . the university will ordinarily have to put counsel on the other side as well. The informality of proceedings in which the commission both hears and adjudicates and really informally prosecutes by asking the questions and

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[1] William W. Van Alstyne, "The Constitutional Protection of Protest on Campus," (Ch. 8) Grace W. Holmes (ed.), Student Protest and the Law, op. cit., pp. 194-195.

> bringing in the witnesses, probably cannot long endure once retained counsel represents the students.[1]

Van Alstyne also discusses the possibility of "an intermediate position" at those universities having law schools, the appointment of a senior law student as counsel for a student charged with an offense. A reading of the cases would indicate that this would be acceptable to most, if not all, district courts and would be compatible with the Fifth Circuit's opinion in the Dixon case. But, the Dixon case is no longer the most extensive precedent in the matter of counsel. Dixon eschewed legal counsel for students in disciplinary proceedings. Esteban I stipulated counsel and cross-examination, but the cross-examination was not to be done by counsel. In Jones the court took note of the fact that the students had counsel at the administrative hearing and that the counsel cross-examined hostile witnesses.

On the subject of the makeup of the panel or "jury" hearing a college disciplinary action within the meaning of due process, Van Alstyne said:

> In regard to the question of trial by one's peers, it is suggested that the sixth amendment notion of trial by jury in that sense is unlikely to be important. The students have a calm and rational policy claim for some representation of their own peers on the hearing boards, but I do not anticipate a federal court decision to that effect.[2]

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[1] Ibid., p. 195.

[2] Ibid.

## Makeup of the Hearing Board

On the subject of student representation on disciplinary hearing boards, both the American Association of University Professors and the American Civil Liberties Union have taken policy positions. The AAUP has proposed that, "The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members."[1] The ACLU statement is similar, stating that, "a hearing should be held by a faculty-student committee, or if the student prefers, by a faculty committee."[2]

## An Extraordinary Judicial Document

Mention was made in Chapter IV of the extraordinary document issued in 1968 by the United States District Court for the Western District of Missouri, en banc, on the subject of student discipline under the heading of, "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education." Judge Elmo B. Hunter, who wrote two decisions in the Esteban case, was one of the four judges issuing this statement of guidelines. It might be assumed that the court's statement will prove weighty in other judicial districts, since it reflects a respectable amount of research by a court which had been confronted with three student-expulsion cases.

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[1] Joint Statement on Rights and Freedoms of Students, infra.

[2] Academic Freedom and Civil Liberties of Students in Colleges and Universities (New York: American Civil Liberties Union, 1961 (rev'd. ed.), p. 7.

Although the document does not rule out requests for "a decision de novo inconsistent with these standards," it would nonetheless seem to mark a noteworthy departure from the American system of case law.

"The following memorandum," the document asserts, "represents a statement of judicial standards of procedure and substance applicable, in the absence of exceptional circumstances, to actions concerning discipline of students in tax-supported educational institutions of higher learning."[1]

Under the subheading, "Relation of Courts and Education," the judges pointed out that, "The courts should exercise caution when importuned to intervene in the important processes and functions of education. A court should never intervene in the processes of education without understanding the nature of education."[2]

Acknowledging that human errors are likely to be committed by "those invested with powers of management and teaching in the academic community," the court declares that, "Only where the erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational process."

Under the subheading, "Lawful missions of tax supported higher education," the court stated in general terms sixteen goals of

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[1]General Order on Judicial Standards, op. cit., at 134.

[2]Ibid., at 136.

higher learning which would be difficult to fault on any account.[1] It then observes that, "If it is true, as it well may be, that man is in a race between education and catastrophe, it is imperative that educational institutions not be limited in the performance of their lawful missions by unwarranted judicial interference."

On the question of whether attendance at a tax-supported college is a right or a privilege, the court offers the opinion that the issue is unimportant, but, "The federal constitution protects the equality of opportunity of all qualified persons to attend." However, the student assumes "obligations of performance and behavior reasonably imposed . . . generally much higher than those imposed on all citizens by the civil and criminal law."

> So long as there be no invidious discrimination, no deprival of due process, no abridgment of a right protected in the circumstances and no capricious, clearly unreasonable or unlawful action employed, the institution may discipline students to secure the compliance with these higher obligations as a teaching method or to sever the student from the academic community.
>
> No student may, without liability to lawful discipline, intentionally act to impair or prevent the accomplishment of any lawful mission or function of an educational institution.[2]

The Analogy to Criminal Law

Except in the case of irrevocable expulsion, the discipline of students in the academic community is a part of the teaching

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[1] In addition to standard encyclopedic writings, the court draws on the writings of Jefferson and an impressive number of government documents and works by noted authors.

[2] General Order on Judicial Standards, op. cit., at 141.

process, the court declared, then continued:

> In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound. (emphasis added)[1]

A federal court should not intervene in college disciplinary matters, the judges thought, unless there appears one of the following:

> (1) a deprival of due process, that is, fundamental concepts of fair play;
> (2) invidious discrimination, for example, on account of race or religion;
> (3) denial of federal rights, constitutional or statutory, protected in the academic community: or
> (4) clearly unreasonable, arbitrary or capricious action.[2]

Procedural and Jurisdictional Standards

The Missouri judges expressed no doubt about federal jurisdiction in college expulsion cases. ". . . United States District Courts," they declared, "have jurisdiction to entertain and determine actions by students who claim unreasonably discriminatory,

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[1] Ibid., p. 4. The concept of discipline as an integral part of the educational process is supported by Brady and Snoxell, Student Discipline in Higher Education (Washington, D.C.: The American College Personnel Association, 1965), which the court acknowledges as a source.

[2] General Order on Judicial Standards, op. cit., at 143.

arbitrary or capricious actions lacking in due process and depriving a student of admission to or continued attendance at tax supported institutions of higher education."[1]

As to the legal action which may be brought in a federal court by an aggrieved student, the judges state that "The action may be (a) Under Section 1983, [Title 42, U.S.C.] an action at law for damages triable by a jury; (b) Under Section 1983, a suit in equity; or (c) Under Section 1893 (correct) and Section 2201 [Title 28, U.S.C.] a declaratory judgment action, which may be legal or equitable in nature depending on the issues therein."[2] This statement would seem actually to represent no more than the Missouri court's interpretation of jurisdictional aspects of federal civil rights statutes. But the interpretation is harmonious with that of the Fifth Circuit in Dixon. One might well take note of the possibility presented here for a tort action against college administrators guilty of arbitrary action in dismissal proceedings.

On the subject of exhaustion of remedies, the court tersely states that, ". . . the doctrine of exhaustion of state judicial remedies is not applicable. The fact that there is an existing state judicial remedy for the alleged wrong is no ground for stay or dismissal.[3] However, administrative remedies must be exhausted,

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[1] Ibid., p. 5.

[2] Ibid.

[3] For authority, the court cites Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492; Damico v. California, 389 U. S. 416, 88 S.Ct. 526, 19 L.Ed. 2d 647; and McNeese v. Board of Education, 373 U. S. 668, 83 S.Ct. 1433, 10 L.Ed. 2d 622.

for, "Ordinarily until the currently available adequate and effective institutional processes have been exhausted, the disciplinary action is not final and the controversy is not ripe for determination." The judges add that, "In an action at law under Section 1983, the issues are triable by jury and equitable defenses are not available."

College administrations in discipline litigation have often advanced the claim of mootness because, for example, of the lapse of time, progression of school year, dispersion of involved students, etc. The Missouri federal judges followed precedent in their statement by observing that, "In an action at law or equity under Section 1983, Title 42, U.S.C., to review severe student disciplinary action the doctrine of mootness is not applicable when the action is timely filed."

The court offered the opinion that legally acceptable standards "may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution." The burden of proof is placed in the institution which undertakes to limit or forbid the exercise of a right guaranteed by the Constitution or a law of the United States. However, the institution must merely demonstrate that a practice "is recognized as reasonable by some reputable authority or school of thought in the field of higher education." Unanimity of expert opinion is not necessary.

In what is perhaps the most controversial aspect of its advisory, the court proposes that:

> Outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited conduct are provocative and should not be employed in higher education.
>
> For this reason, general affirmative statements of what is expected of a student may in some areas be preferable in higher education. Such affirmative standards may be employed, and discipline of students based thereon.
>
> The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally broad does not, in the absence of exceptional circumstances, apply to standards of student conduct . . .[1]

Three minimal requirements, the judges declare, "apply in cases of severe discipline, growing out of fundamental conceptions of fairness implicit in procedural due process." These three requirements are notice, hearing, and the requirement that such disciplinary actions be supported by "substantial evidence." As to the specifics of due process, the judges declare that:

> There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features in a particular case to guarantee the fundamental concepts of fair play. (emphasis added)

In conclusion, the court pays tribute to "the current unusual efforts of the institutions and the interested organizations which are devising and recommending procedures and policies in student discipline which are based on standards, in many features, far

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[1] Ibid. This standard of vagueness and overbreadth was expressed in the second Esteban opinion by Judge Hunter, Esteban v. Central Missouri State College, 290 F.Supp. 622, 630, but was deliberately spurned by the Seventh Circuit in Soglin v. Kauffman, 418 F.2d 163 (1969), and was obliquely disowned by the Supreme Court in Tinker v. Des Moines School District, 393 U. S. 503, 513.

higher than the requirements of due process." Here the court cites the Joint Statement of Rights and Freedoms of Students and the University of Missouri's Provisional Rules of Procedure in Student Disciplinary Matters.

The Document and Esteban II

One might well argue that the Missouri federal judges, in the advisory discussed above, took a backward step in the matter of procedural rights for college students in dismissal actions. Most of what they said had been said before in college-dismissal cases. Their major innovation, then, was their statement waiving for college students the legal principles against "overly broad or unconstitutionally broad" standards of student conduct. One might well contend that this position marks a retrogression toward the in loco parentis doctrine--an acknowledgment, the college students are, after all, legal infants.

Irving Achtenberg, ACLU legal counsel in Kansas City who pleaded the Esteban case, believes that the document, which he describes as an "advisory opinion," adopts "both the good and the bad parts of the Esteban opinion."[1] Achtenberg is doubtful of the legal significance of the judicial document, but is aware that it has been cited at least twice by federal courts, once in the second Esteban case[2] and once disapprovingly by the Seventh Circuit.[3] Since its

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[1]Telephone conversation with Irving Achtenberg, Feb. 22, 1970. Achtenberg uses the term, "advisory opinion," because the court then had before it two college-expulsion cases.

[2]290 F.Supp. 622 (W.D. Mo. 1968).

[3]Soglin v. Kauffman, 418 F.2d 163, 168 (1969).

earliest use was in the second Esteban case, attention might well be turned here to that application.

The suspension case of Esteban v. Central Missouri State College was discussed elsewhere in this chapter. Although Judge Elmo B. Hunter's opinion in that case was hailed as an important precedent in expanding procedural rights of dismissed college students, the victory was a hollow one for the students involved. Esteban was originally suspended for two semesters following his alleged participation in campus disorders. Judge Hunter found that his suspension had been attended by inadequate procedural safeguards--a lack of adequate notice and hearing. Following this decision, the college gave Esteban notice and hearing generally in conformity with standards prescribed by the District Court, at the conclusion of which it, in effect, dismissed him, according to his plea before the court in the second Esteban case. He returned to Judge Hunter's court, claiming that:

(1) The college regulation with regard to mass gatherings violates the first amendment guarantee of freedom of speech and assembly.

(2) The college regulation with regard to participating in mass demonstrations violates the first and fifth amendments in that its language is vague, uncertain and overbroad, providing plaintiffs with no reasonable standard for observance and no notice of illegal conduct.

(3) The enforcement of the mentioned regulation as to offcampus conduct is beyond the powers of the college and is a denial of due process.

(4) The charge as originally made did not contain the words "contributing to" which quoted language is not a part of the regulation and hence is unenforceable.

> (5) The hearing before Dr. Lovinger [the college president] lacked procedural due process as required by the fourteenth amendment in that there was no evidence to support a charge of participating in an unruly or unlawful mass demonstration.[1]

Judge Hunter was one of the four district judges who issued the judicial directive discussed above. At the time the directive was formulated, the second Esteban case, referred to by Achtenberg as "Esteban II," was before his court. It can hardly be viewed as surprising, then, that his opinion in the second Esteban case closely parallels the Western District's broad policy statement on the subject of student discipline. Jurisdictional challenges were decided in favor of the plaintiff, but the central question was determined in favor of the college.

The question of exhaustion of state judicial remedies was ruled not applicable; administrative remedies need not be exhausted before a controversy is "ripe for determination"; the doctrine of mootness was held not applicable; deference to educational expertise was expressed; the earlier Esteban litigation did not bar the students by the doctrine of res judicata; the question was limited to whether the students had been denied by the state any rights, privileges or immunities secured by the Constitution and laws of the United States.

However, the court ruled that the disciplinary process of a college is not equivalent to the criminal-law process of federal or state criminal law; it is relevant to the mission of a college

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[1] 290 F.Supp. 622, 625 (1968).

to prohibit participation in unruly gatherings; the legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally broad does not apply to standards of student conduct; a student who engages in forbidden conduct is in no position to invoke equity relief; college attendance is voluntary and the student assumes obligations to observe reasonable regulations.

Of particular interest in the second Esteban decision are two points expounded by the court--dealing respectively with (1) the nature or extent of "criminal law" procedures to which students are entitled; and (2) the nonapplicability of the legal ban against overly broad or unconstitutionally broad prohibitory statutes.

Since the 1967 decision of the United States Supreme Court in the case of In re Gault,[1] many civil rights enthusiasts had hoped that the principle of that decision--that juveniles were entitled to the procedural protection granted in criminal law in actions which might deprive them of their liberty--would broaden the rights afforded students in expulsion cases. Paralleling the rationale of the Western District's advisory, Judge Hunter laid to rest this hope. His comment:

> . . . the disciplinary process is not equivalent to the criminal law process of federal or state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound. Such cited cases as In re Gault, 387 U. S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527

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[1]387 U. S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967).

(1967), Kent v. United States, 383 U. S. 541, 86 S.Ct. 1045, 16 L.Ed. 2d 84 (1966), and Cox v. State of Louisiana, 379 U. S. 536, 85 S.Ct. 453, 13 L.Ed. 2d 471 (1965) are not applicable.[1]

On the subject of specificity of regulations, the court stated an opinion consistent with the judicial document which perhaps most dismayed the ACLU counsel. Judge Hunter declared:

> The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally broad does not, in the absence of exceptional circumstances, apply to standards of student conduct. (emphasis in original)
>
> Judicial notice is taken that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education. See, Brady and Snoxell, Student Personnel Work in Higher Education, p. 378 (Haughton Mifflin, Boston, 1961). For this reason, general affirmative statements of what is expected of a student may be preferable in higher education. Such affirmative statements should, of course, be reasonably construed and applied in individual cases.[2]

## The AAUP and ACLU Statements

It must be remembered that all the preceding discussion has dealt with judicial views of the minimal procedural protections to which a college student is entitled under the fourteenth amendment due process clause before he may be suspended or expelled from a tax-supported college. The four federal judges for the Western District of Missouri pointed out in the judicial document discussed

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[1] 290 F.Supp. 622 (1968) at 628.

[2] Ibid., at 630.

elsewhere in this chapter that efforts are being made by non-judicial interest groups toward "devising and recommending procedures and policies in student discipline which are based on standards, in many features, far higher than the requirements of due process." The judges specifically cited the Joint Statement on Rights and Freedoms of Students. Attention is now directed to procedural rights recommendations proposed in the Joint Statement and in a comparable publication by the ACLU.

The Joint Statement

In June, 1967, a joint committee, composed of representatives of the American Association of University Professors, U. S. National Student Association, Association of American Colleges, National Association of Student Personnel Administrators, and National Association of Women Deans and Counselors met in Washington, D. C., and drafted the Joint Statement on the Rights and Freedoms of Students. This meeting was held six years after the Fifth Circuit's decision in the Dixon case, and one might well argue that it is unimportant whether the five associations responsible for originating the document acted out of a response to pressure from the courts or out of a sense of recognition of the demands of "justice."

At any rate, this group originated what has become the much-publicized Joint Statement on Rights and Freedoms of Students.[1] The statement won prompt endorsement by the five groups whose members had created it, and by six other college-related organizations

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[1]54 A.A.U.P. Bulletin No. 2, Summer 1968, 258.

as well. Newcomers to the ranks of endorsers included the American Association for Higher Education, Jesuit Education Association, American College Personnel Association; Executive Committee, College and University Department, National Catholic Education Association; and the Commission on Student Personnel, American Association of Junior Colleges.[1]

Under the heading, "Procedural Standards in Disciplinary Proceedings," the Joint Statement asserts that the institution has "an obligation to clarify those standards of behavior it considers essential to its educational mission and its community life." Students should be as free as possible from regulations that have no direct relevance to education. Offenses should be defined as clearly as possible. Regulations should be formulated with student participation and published by the institution.

As to the hearing procedures, the statement proposes that the student who questions the fairness of disciplinary action against him should have the privilege of a hearing before a regularly constituted hearing committee. This committee should include faculty members or students or both faculty members and students. The committee should exclude persons otherwise interested in the action. The student should receive from the committee written notice of the reasons for the disciplinary action "with sufficient particularity and in sufficient time" to afford opportunity to prepare for the hearing. He should have a right to an advisor of his choice in his

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[1]Ibid.

defense. The burden of proof should rest on the accusers.

The student should be given opportunity to testify and to present evidence and witnesses. He should have an opportunity to hear and cross-examine adverse witnesses. The committee should not consider statements against the student unless he has been advised of their content and has had opportunity to rebut unfavorable inferences. The committee's decision should be based on evidence introduced at the hearing. Improperly acquired evidence should not be considered, a provision which raises the question of unwarranted search of the student's quarters. In the absence of a transcript, both a digest and a verbatim record of the hearing should be made. The committee decision should be final, subject to the student's right to appeal to the college president or ultimately the governing board.[1]

The ACLU Statement

Probably no organization in the United States has displayed a greater interest in protecting the rights of students than the American Civil Liberties Union. Therefore, an examination of the ACLU position on student procedural rights might well be expected to be informative. In a working paper for a forthcoming edition of its publication, Academic Freedom and Civil Liberties of Students in Colleges and Universities, the ACLU outlined its views on the subject. The ACLU statement is parellel in most respects to the Joint Statement, differing primarily in that it achieves

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[1] Ibid.

greater specificity in places. For example, under the subtitle, "A. Enacting and Promulgating Regulations," the ACLU statement eschews generalizations to declare that, "Regulations should be clear and unambiguous. Phrases such as "conduct unbecoming a student," or "actions against the best interests of the college," should be avoided because they allow too much latitude for interpretation." The ACLU declaration adds that the range of penalties for the violation of regulations should be clearly stated. Minor infractions may be dealt with summarily, but the student should retain the recourse to appeal. In the case of infractions punishable by suspension, expulsion or notation on a student's permanent record, the student is entitled to notice and hearing. At a disciplinary hearing, the student should have the right to remain silent, and the college should assist him in requiring the presence of witnesses and production of documents at the hearing, at least to the extent that this is possible.

In other respects, the ACLU statement is closely parallel with the Joint Statement.[1]

## Summary

It must be noted that all the cases of student discipline discussed in this chapter involved either expulsions or suspensions, with the courts on occasion yielding to the inclination to use the

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[1]Academic Freedom and Civil Liberties of Students in Colleges and Universities (working draft) (New York: American Civil Liberties Union, 1969), pp. 9-10.

two terms interchangeably. Expulsion would seem to be the ultimate sanction available to the college administrator against a student. Suspension would seem to be the second ultimate sanction only by a matter of degree.

At the present stage of development of case law in the area, judicial review in the federal courts would seem to be limited to cases of expulsion or suspension. The Fifth Circuit's opinion in the Dixon case embraced the matter of student expulsion. However, the district court opinion in the Knight case closely followed the Dixon precedent, although Knight involved suspensions rather than expulsions. Referring to the Knight case, O'Leary has observed that, "Although reference was made to the fact that suspension here was tantamount to dismissal, the claim of denial of due process was directed against a university suspension, raising the question of whether all college and university actions, however minimal, may now be said to be open to review in the courts."[1]

On the other hand, the Harvard Law Review seemingly took the opposite view in 1968, when it noted that:

> The seriousness of the plaintiff's injury seems often to have influenced the court's decision to provide relief. At present, for the student to prevail, his injury must be severe and usually must be to an interest which the courts are accustomed to protect. The farther advanced the student in his program at a given institution and the more his reliance on successful completion is justified, the greater the likelihood of the court's intervening on his behalf.
> . . . . . .

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[1]Richard E. O'Leary, "The College Student and Due Process in Disciplinary Proceedings," op. cit., pp. 450-51.

> . . . the student dismissed from professional school tends to have greater judicial protection than do others, including nonprofessional graduate students.
> . . . . . .
>
> The legitimate expectation of receiving such a degree may be regarded as a property interest, which the judiciary, of course, is accustomed to protect and an injury to which is traditionally necessary for the granting of specific performance, the remedy many students seek.[1]

## Conclusions

From what has been observed in this chapter, one might feel justified in drawing a number of conclusions which would seem to be at least tentatively acceptable:

1. Federal court review is now available without prior resort to state courts for students who have been disciplined by expulsion or suspension by college officials in the absence of procedural safeguards adequate to satisfy fourteenth amendment due process requirements.

2. The extent of procedures required at the administrative level to satisfy due process considerations is a flexible matter. Pending an opinion from the United States Supreme Court, Dixon is the authoritative precedent, with its provision for notice and a rudimentary hearing of an adversary nature. The student's right to counsel, cross-examination of adverse witnesses and a record of the administrative hearing at his own expense would seem to have been tentatively established by the first Esteban decision,

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[1] "Developments in the Law--Academic Freedom," 81 Harvard Law Review 1134, taken here from reprint in Student Rights & Responsibilities, op. cit., pp. 65-66.

but would seem to be inadequately stable.

3. Although it is the sort of proposition which hardly lends itself to proving, one might feel secure in surmising that acceptance of disciplinary cases into the federal courts has led, and will continue to lead, to a greater procedural awareness on the part of college administrators.

4. Dixon is being followed by the district courts, perhaps more than the literature would lead one to believe. This would seem to be especially true when it is remembered that Dixon dealt with an absence of notice and hearing, not with inadequate notice and hearing. Knight and the first Esteban case would seem to support this proposal. Due and the second Esteban case would seem to support a contention that courts will hesitate to interfere where any rudiments of a hearing can be demonstrated.

# CHAPTER VI

## OTHER PROCEDURAL CONSIDERATIONS:

## SEARCH AND SEIZURE, SELF-INCRIMINATION

What are a student's rights to privacy in his quarters when he lives in a college-controlled residence hall? And, for that matter, what are his rights to remain silent in a disciplinary proceeding against him without attracting prejudice against his cause? These questions cannot be answered categorically in terms of judicial precedent. Nonetheless, both questions form bases for heated discussion in student gatherings on many college campuses.

Although commentary on these particular aspects of student rights has been less common than commentary on due process in dismissal proceedings, what commentary has appeared in legal journals would seem to indicate a conviction that the death of the in loco parentis doctrine will lead to a greater acknowledgment of fourth amendment and perhaps fifth amendment protections due students in state-supported colleges. The first of the two questions--dealing with the student's right to privacy in his dormitory room--would seem to be the more compelling, since on most campuses it would have direct application to a vastly larger number of students than the question of procedural protections for students which may grow

out of the fifth amendment. These two constitutional questions will be treated separately.

## The Student's Right to Privacy in Quarters

The college student's assertion of the right of privacy challenges most directly the college administrator's view that the college stands *in loco parentis* to its students and that the administrator is vested with broad discretionary powers to adopt and enforce any regulations thought reasonably necessary to exercise effective supervision and discipline over the students. At least one writer has proposed that this view of the university's role *vis-a-vis* its students has its antecedent in the apprentice system and "reflects the Renaissance notion that the university is responsible for educating the whole man."[1]

Consequently, many college catalogues contain statements essentially the same as the following one in the Troy State College bulletin: "The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary the room may be searched and the occupant required to open his personal luggage and any other personal material which is sealed."[2]

### The Moore Case: Protection Denied

Has the dormitory resident, then, no protection of his quarters under the fourth amendment's injunction against unwarranted searches and seizures? Obviously, conflicting interests of the student and

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[1]Richard A. Lippe, "The Student in Court" (Ch. 4) *Student Protest and the Law* (Ann Arbor, Michigan: The Institute of Continuing Legal Education, 1969), pp. 116-17.

[2]284 F.Supp. 725, 728 (M.D. Ala. 1968), quoting the 1967-68 college bulletin.

the institution must be reconciled when a student's right of privacy in a dormitory room is involved. In spite of a preponderence of opinion by legal writers that dormitory students either should have or will have protection of their privacy under the fourth amendment, the most-quoted precedent on the subject is Moore v. Student Affairs Committee of Troy State University,[1] in which Judge Johnson of the United States District Court, Middle District of Alabama, eschewed the applicability of the fourth amendment to the college-dormitory situation.

In this case, police of Troy, Alabama, accompanied by the dean of men at the college, acting on information from informants, searched six dormitory rooms in two separate residence halls. Moore's room was searched in his presence, but without his permission. It was later stipulated:

> That no search warrant was obtained in this case, that no consent to search was given by the defendant, that the search was not incidental to a legal arrest, that no other offense was committed by the defendant in the arresting officers' presence, that Troy State College had in force and effect at the time of the search and subsequent arrest of the defendant [the catalogue statement on room searches quoted above].[2]

The search yielded from Moore's room a matchbox containing marijuana. Moore objected that the evidence was seized as a result of a search in violation of the fourth amendment. He also challenged the constitutionality of the catalogue regulation under which the search was conducted.

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[1]284 F.Supp. 725 (M.D. Ala. 1968).

[2]Ibid., at 728.

Following a hearing before the student affairs committee, Moore was indefinitely suspended from the college. He appealed to the United States District Court on the ground that he had been denied due process in the administrative hearing. Judge Johnson determined that Moore had been denied his right to procedural due process and retained jurisdiction of the case pending remand to the college's student affairs committee "for the purpose of conducting a hearing comporting with procedural due process of law." Following a second hearing before the student affairs committee, Moore was again indefinitely suspended. He entered the district court again, requesting readmission to the college and a declaratory judgment that none of the evidence seized in the search of his room "may be admitted in any criminal proceedings. . ." He also alleged that the admission in the administrative hearing of evidence seized in the search of his dormitory room violated his fourth amendment rights prohibiting illegal search and seizure. Judge Johnson's dicta is enlightening. As to the relationship between the institution and the dormitory resident, he declared:

> College students who reside in dormitories have a special relationship with the college involved. Insofar as the Fourth Amendment affects that relationship, it does not depend on either a general theory of the right of privacy or on traditional property concepts. The college does not stand, strictly speaking, in loco parentis to its students, nor is their relationship purely contractual in the traditional sense. The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student. A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a "waiver" of that right as a condition precedent to admission. The college, on the

> other hand, has an "affirmative obligation" to promulgate and enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student "waives" his right to Fourth Amendment protection or whether he has "contracted" it away; rather its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty.[1]

If the regulation or action of college authorities is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," Judge Johnson wrote, "then it will be presumed facially reasonable <u>despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students.</u>" [Emphasis added]

Judge Johnson then reached back four decades to a Supreme Court of Missouri decision to quote the following statement about a dormitory resident: "When appellant took up residence there, he impliedly agreed to conform to all reasonable rules and regulations for its government which were then in force or which might thereafter be adopted by the proper authorities."[2]

Returning his attention to Moore and the particular problem with which he confronted the court, the judge wrote:

> The regulation was reasonably applied in this case. The constitutional boundary line between the right of the school authorities to search and the right of a dormitory student to privacy must be based on a reasonable

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[1] <u>Ibid</u>., at 729.

[2] <u>Ibid</u>., at 730, quoting <u>Englehart v. Serena</u>, 318 Mo. 263, 300 S.W. 268, 271 (1927).

> belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline. Upon this submission, it is clear that such a belief existed in this case.[1]

Judge Johnson then turned to the Fifth Circuit's opinion in Dxion to provide the rationale to sustain his opinion that dormitory residents are entitled to only qualified protection by the fourth amendment:

> This standard of "reasonable cause to believe" to justify a search by college administrators--even where the sole purpose is to seek evidence of suspected violations of law--is lower than the constitutionally protected criminal law standard of "probable cause." This is true because of the special necessities of the student-college relationship and because college disciplinary proceedings are not criminal proceedings in the constitutional sense. It is clearly settled that due process in college disciplinary proceedings does not require full-blown adversary hearings subject to the rules of evidence and all constitutional criminal guarantees. "Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out." Dixon v. Alabama State Board of Education, supra.[2]

Judge Johnson then seemingly undertook to distinguish this case in the following language:

> Assuming that the Fourth Amendment applied to college discipline proceedings, the search in this case would not be in violation of it. It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security. A student who lives in a dormitory on campus which he "rents" from

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[1] Ibid., at 730.

[2] Ibid.

> the school waives objection to any reasonable searches conducted pursuant to reasonable and necessary regulations such as this one.[1]

Moore's action was, of course, dismissed. The stability of this case as a lasting legal precedent was opened to doubt, however by a subsequent New York action which reached the United States Supreme Court in the case of Overton v. New York.

The Overton Case: A Tightening of Criteria

In the Overton case, detectives had obtained search warrants directing search of two high school students and their lockers at the Mount Vernon, New York, high school. They presented the warrant to the vice-principal, who summoned the two students to his office. The detectives searched the boys and found nothing of pertinence to their investigation. One of the boys, asked if he had marijuana in his locker, responded, "I guess so," or, "Maybe."

A detective, the vice-principal and a school custodian then accompanied the boy to his locker with a master key and the detective found marijuana cigarettes in the boy's jacket. It subsequently developed that the search warrant was ineffective insofar as the boy's locker was concerned. The boy's counsel then proceeded to attempt to suppress the evidence at the ensuing youthful-offender proceeding. The trial judge denied the motion, holding that the board of education and the school administration "retained dominion over the use of the lockers and the court finds that the

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[1] Ibid., at 730-31.

the search was legal."[1] The court of appeals upheld the trial judge and ruled the evidence admissible.[2] The United States Supreme Court, in a two paragraph per curiam opinion, vacated the decision and remanded the case, with Justice Black entering a lone dissent.[3] The conviction was then reaffirmed, however, by the New York courts, and was to "be before the Supreme Court again next term [1969-70].[4] In its per curiam, the supreme court remanded "for further consideration in the light of Bumper v. State of North Carolina," an opinion issued by the high court in April, 1968.[5] In Bumper, the supreme court stated that, "When a law enforcement authority claims authority to search a home under a warrant, he announces that the occupant has no right to resist the search."[6]

The supreme court's reference to Bumper in its Overton per curiam would thus indicate that it considers a valid warrant prerequisite to the search of a high school student's locker. The inevitable legal analogy to be argued is that since a high school

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[1] 20 N.Y.2d 360.

[2] 283 N.Y.S. 2d 22 (1967).

[3] 393 U.S. 85 (1968).

[4] "End of an Era: The Last Warren Court Term," Civil Liberties, August, 1969, p. 3.

[5] 391 U.S. 543 (1968).

[6] Ibid., at 550.

administrator cannot authorize search of a student's locker merely because it is school property, then a college administration cannot authorize an official search of a student's dormitory room. The argument that the high school principal occupies the in loco parentis role, whereas the college official does not may lend strength to this argument to bring the college dormitory occupant fully under the protection of the fourth amendment.

People v. Cohen: Warrantless Evidence Excluded

Lippe cites the case of People v. Cohen[1] as more pertinent to the fourth amendment rights of college dormitory residents. In this case, a criminal proceeding, the court ruled inadmissible evidence obtained by a warrantless search of a student's dormitory room at a private college. Here the police had been accompanied by school officials who were concerned about drug use and had requested a police survey. In excluding evidence seized without a warrant, Judge Burstein declared:

> It has been argued that a student impliedly consents to entry into his room by University officials at any time . . . . Even if the doctrine of implied consent were imported in this case, the consent is given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it . . . .
>
> University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure. To suggest that a student who lives off campus in a boarding house is protected but that one who occupies a dormitory room waives his constitutional liberties is at war with reason, logic and law.[2]

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[1] 52 Misc. 2d 366, 292 N.Y.S. 2d 706 (1st Dist. Ct. Nassau Cty., 1968).

[2] 292 N.Y.S. 2d 706, 713 (1968).

Lippe reads into the two cases of Moore and Cohen the suggestion, "that college officials may conduct reasonable searches of dormitory rooms without obtaining a search warrant as part of their disciplinary authority but that such power may not be delegated to police officers whose activities are governed by the strict standards of the fourth amendment . . . ."[1]

Legal Commentary

Lippe's personal belief is "that university regulation of personal conduct in nonacademic areas is so peripherally related to the academic interests of the university that any substantial encroachment on the personal freedom of the student may be held unconstitutional as the law of student legal rights evolves."[2]

More particularly, on the subject of privacy in quarters, he has written his opinion that:

> Officials of schools deemed to be "public" should be bound by fourth amendment standards and required to obtain a search warrant prior to searching a dormitory room. From the student's point of view it makes little difference if his privacy is invaded by a police officer or a college official. Furthermore, it can hardly be argued that college discipline should take priority over effective law enforcement.[3]

Van Alstyne stated in a 1963 article that, "It is forseeable that random and unannounced searching of student rooms may be forbidden."[4] Five years later, in another law journal article, he

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[1]"The Student in Court," op. cit., p. 119.

[2]Ibid., p. 118.

[3]Ibid., p. 119.

[4]"The Judical Trend Toward Student Academic Freedom," 20 Florida Law Review 290, 297 (1963).

observed that:

> Unlike the situation respecting the private landlord who may contractually reserve the right to enter and inspect the premises at any time for reasons satisfactory only to himself, . . . it is exceedingly likely that the fourth amendment's interdiction of "unreasonable searches and seizures" restricts colleges receiving substantial public support from imposing such sweeping conditions upon a student's privacy as those which may be reserved by contract to a private landlord. Random fishing expeditions without warrant and without excusable emergency, resulting in the seizure of things subsequently introduced in a disciplinary hearing to provide a basis for expelling a student, are probably forbidden.[1]

While generally preoccupied with the general legal relationship between students and colleges, Goldman has nonetheless observed that, "when a university provides dormitory facilities, the contracts it has with its students with respect to the use of such facilities should be judged under the law of landlord and tenant."[2] Again, he observes, "there is no reason why the university should be permitted to utilize its fiduciary role as an educator in order to give itself greater control over its tenants than a landlord would normally possess.[3]

Monypenny has written that, "The role of the university in the direct control of the non-classroom life of the student should be as restricted as possible; in particular he should have rights of privacy and self-regulation of his own leisure time."[4]

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[1]"The Student as University Resident," 45 Denver Law Journal 582, 588 (Summer, 1968).

[2]"The University and the Liberty of Its Students--A Fiduciary Theory," 54 Kentucky Law Journal 643, 681 (1966).

[3]Ibid.

[4]"University Purpose, Discipline and Due Process," 1967 North Dakota Law Review 739, 750 (1967).

Edward C. Kalaidjian, a New York attorney with an interest in student rights, has written that, "the student has the right to be free of unreasonable search and seizure. A tax-supported public college may not compel a waiver of that right as a condition of admission."[1] Expanding on this, he has further observed that:

> The rule seems to be that a university authority requires less information to render a search reasonable than would be required to get a warrant. As a practical matter, however, the business of search has to be done most judiciously. I don't believe university people ought to be popping in and out of rooms indiscriminately. They must have some very substantial grounds for believing that something very serious is going on in the room to justify it as a matter of policy and law.[2]

Van Alstyne concurred in this opinion and added a word about the direction in which the law is moving when he stated that:

> This development of the law is less than a year old. Until a year ago, comfortable counsel might have said, "Why, it's outrageous! There is no such thing as a student right to privacy; we have this form that every student signs, consenting to search of his apartment." I assure you that such consent is absolutely worthless in this area.[3]

Paul D. Carrington, Professor of Law at the University of Michigan, proposed in 1969 that, "This is a time for reappraisal and perhaps a time for shedding burdensome tasks and functions with which the educational process has been freighted by an unthinking public." In particular, he says, "One function that

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[1] "Problems of Dual Jurisdiction of Campus and Community," Student Protest and the Law, op. cit., p. 143.

[2] "Panel Discussion--II," Ibid., p. 204.

[3] Ibid., p. 205.

I would expect most institutions to deem dispensable is the function of the moral disciplinarian."[1] Pragmatically, he adds that, "Educational institutions are sometimes called to exercise greater power over individuals than they are equipped to exercise."[2]

As early as 1964, Michael T. Johnson, who was later to join the University of Oklahoma law faculty, was able to observe that, "The cases in this area indicate that for a university to search a student's room without his permission and seize evidence to be used against him would be illegal."[3] Johnson was careful to distinguish between criminal due process and disciplinary proceedings, which are civil actions, and concludes that, "It is probable that the student has a right . . . to the privilege against unreasonable search and seizure and its corollary, the exclusionary rule . . . ."[4] "There is nothing in the language of the fourth amendment," he adds, "which would limit its application to instances wherein the evidence illegally obtained is to be used in criminal proceedings."[5]

Beaney expressed an attitude which would seem to be commonly held by many college educators when he wrote that, "While residing in university dormitory facilities, a student may be required to

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[1]"The Lawyer's Role in the Design of a University," Ibid., p. 13.

[2]Ibid., p. 15.

[3]"The Constitutional Rights of College Students," 42 Texas Law Review 344 (1964), reprinted in Student Rights and Responsibilities, op. cit., p. 207 at 215.

[4]Ibid., p. 223.

[5]Ibid., p. 217.

submit to periodic fire and health inspections of his quarters, and to have them entered to prevent harm to persons or property, or when necessary to maintain order, but students should be able to enjoy security from casual and prying entries."[1] C. Peter Magrath, Dean of the College of Arts and Sciences and Professor of Political Science at the University of Nebraska, in 1968 declared that, "colleges and universities which respect the privacy and individual dignity of their students will find it easier to demand the same for their administrators and professors."[2]

## AAUP and ACLU Statements

Both the AAUP and the ACLU have adopted statments relating to fourth amendment rights of campus dormitory residents. The Joint Statement, discussed in Chapter V, contains the following provisions:

> B. Investigation of Student Conduct
>
> 1. Except under extreme emergency circumstances, premises occupied by student 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.[3]

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[1]"Students, Higher Education, and the Law," 45 Denver Law Journal 511, 522 (1968).

[2]"Comment," 45 Denver Law Journal 614, 615 (Summer, 1968).

[3]Joint Statement of Rights and Freedoms of Students, op. cit., p. 368.

The ACLU would prefer that the student have the same privacy in his dormitory room as he would have in off-campus facilities, as reflected by the following 1969 statement:

> 1. Student Residences.
>
> a) Although on-campus living is often regarded as an important part of the total educational experience, it should not be compulsory.
>
> b) Dormitory rules with respect to visiting hours, curfew and the use of liquor may be adopted by resident students in their common interest. Any such rules should be drafted so as to leave the maximum freedom of choice to each individual student.
>
> . . . . . .
>
> 4. Search and Seizure
>
> A student's locker should not be opened, nor his room searched, without his consent except in conformity with the spirit of the Fourth Amendment which requires that a warrant first be obtained on a showing of probable cause, supported by oath or affirmation, and particularly describing the things to be seized. An exception may be made in cases involving a grave danger to health or safety.[1]

## Summary

Probably the case most often cited in support of the opinions and attitudes presented here is the United States Supreme Court's decision in the 1967 case of Camara v. Municipal Court, [2] in which

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[1] Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., pp. 8-9.

[2] 387 U.S. 523 (1967). Pertinent cases also cited by Lippe include United States v. Donato, 269 F.Supp. 921 (E.D. Pa. 1967), aff'd, 379 F.2d 288 (3d Cir. 1967) U.S. officials have right to search employee's locker in U.S. Mint; and U.S. v. Grisby, 335 F.2d 652 (4th Cir. 1964) military authorities may search living quarters of marine; Overton v. New York, 20 N.Y. 2d 360, 283 N.Y.S. 2d 22 (1967) judgment vacated and remanded, 393 U.S. 85 (1968, reargument scheduled, 23 N.Y. 2d 869 (1969).

the court struck down the legitimacy of a provision for warrantless administrative searches in public housing units.

The rationale behind requiring a search warrant for the entry of students' dormitory rooms might appear too obvious for mention. Nonetheless, the following succinct statement by Lippe is perhaps worth consideration:

> The warrant requirement is designed to insure that an independent judicial officer not involved in the situation will make the determination as to whether there is probable cause to infringe on an individual's privacy. A college official desiring to conduct an administrative search of a student's dormitory room is likely to be just as "involved" as a police officer and, therefore, should be subject to the warrant requirement.[1]

As to the application of the Camara rule to college dormitories, Lippe has observed that, "its rationale in these cases certainly extends to a public college's search of dormitory rooms. The different needs of college authorities and the police can certainly be reflected in the standards evolved to govern the issuance of such warrants."[2]

In sum, it would seem safe to conclude that in this unsettled area of law involving the tax-supported college campus that (1) the student's waiver of the right to privacy in his dormitory room is unenforceable and will fade into disuse; (2) existing case law does not support a student claim to the same privacy in his dormitory room as he enjoys in a private residence, but that the law in recent

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[1] "The Student in Court," op. cit., pp. 119-120.

[2] Ibid.

years has moved steadily in that direction and will no doubt continue to accord the student greater protection; and (3) since the fourth and fourteenth amendments restrain official actions only, evolving case law applicable to dormitory-room privacy has thus far been applied only to dormitories operated by tax-supported colleges.

## Self-Incrimination

In a disciplinary proceeding at the administrative level, does the college student stand under the aegis of the fifth amendment's provision against compulsory self-incrimination? Fewer judicial precedents and less commentary have been directed to this matter than to the subject of the student's right to privacy in his dormitory room. Nonetheless, this issue would seem to rise on the periphery of the evolving law pertaining to college students.

This question was not overlooked by the Joint Statement, for it includes the proposal that, "No form of harassment should be used by institutional representatives to coerce admissions of guilt or information about conduct of other suspected persons."[1] The "other persons" provision here would seem to cloak the student in a very adequate armor of protection, indeed. But the Joint Statement is a recommendation, rather than a judicial caveat.

Similarly, the ACLU has made a broad policy statement on the subject, observing that, "The student should be advised of his

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[1] Joint Statement, op. cit., p. 368.

privilege to remain silent and should not be penalized for exercising this privilege."[1] One may note in passing that the ACLU refers to silence of an accused student as a privilege, rather than a right.

Van Alstyne stated in 1969 that, "Thus far no university proceeding has been regarded as sufficiently criminal in character that a student could justly claim the privilege against self-incrimination."[2] In amplification, he added that:

> There is, however, the cross-over problem-- . . . the very practical problem of the student who is involved or alleged to be involved in a demonstration and also arrested on a downtown charge. I quite agree that the university need not suspend its proceeding on the basis that the information thus required of the student might be used to his inconvenience in the downtown prosecution. I agree also that if it is a state university putting the student on trial, and he is obliged to discuss the transaction or risk losing the case on campus, nothing he discloses may be admitted in evidence downtown or even used to furnish a further lead for investigation of that charge.[3]

On the same point, John P. Holloway, resident legal counsel for the University of Colorado, has stated:

> Where students have sought an injunction postponing expulsion hearings until after criminal trials are had, it is clear that the courts do not consider such hearings a threat to the fifth amendment right against self-incrimination, since the fifth amendment might be invoked in the later criminal actions.[4]

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[1] Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., p. 10.

[2] "The Constitutional Protection of Protest on Campus," Student Protest and the Law, op. cit., p. 196.

[3] Ibid.

[4] "The School in Court," Ibid., pp. 93-94.

On the general right of students to fifth amendment protection, Lippe has written:

> Although not entirely clear, it is my understanding that a student at a public college may be disciplined or expelled for refusing to testify at a disciplinary hearing. This is consistent with a number of cases which hold that a public school pupil employed may be dismissed for refusing to answer questions relating to the conduct of his job.[1]

Lippe acknowledges, however, that some uncertainty has been created by the Supreme Court's decision in the case of Spevack v. Klein.[2] Here it was held that a lawyer may not be disbarred for for refusing to provide information concerning his professional behavior.

In Furutani v. Ewigleben,[3] a federal district court in California denied students' application to enjoin a college's disciplinary proceeding, pointing out that if the students were obliged to testify in the college proceeding to avoid expulsion, their testimony could be excluded in the subsequent criminal trail. This posture was based on the decision of the United States Supreme Court in Garrity v. New Jersey.[4] The Garrity case involved several New Jersey police officers who testified in an investigation

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[1] "The Student in Court," Ibid., p. 126.

[2] 385 U.S. 511 (1967).

[3] 297 F.Supp. 1163 (N.D. Cal. 1969).

[4] 385 U.S. 493 (1967).

of irregularities to which no immunity statute was applicable. Under a New Jersey statute, the officers would have been subject to a removal from office if they had invoked the fifth amendment when questioned in the investigation. The police officers involved were subsequently tried for conspiracy to obstruct the administration of the traffic laws. At their trial, the testimony which they had given in the attorney general's investigation was used in evidence against them and they were convicted. The United States Supreme Court reversed on the grounds that the officers' testimony in the attorney general's investigation was inadmissible in the criminal proceedings.[1]

The court described the predicament of the officers as placing them "between the rock and the whirlpool," and concluded:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.[2]

Judicial Precedents

Most of the case law dealing with student exemption from self-incrimination must be accepted as law drawn from analogy. This study has led to the discovery of only two cases in which the court addressed itself directly to the question.

In the 1942 case of Sherman v. Hyman,[3] the Supreme Court of

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[1]Edward C. Kalaidjian, "Problems of Dual Jurisdiction of Campus and and Community," op. cit., p. 138.

[2]Ibid., p. 138.

[3]171 S.W. 2d 822, 826 (1942).

Tennessee stated that, "Students should not be compelled to give evidence against themselves or which may be regarded as detrimental to the best interests of the school." While saying this, the court nonetheless ruled that the accused students had no right to cross-examine witnesses against them. Judge Johnson of the federal district court in Alabama, however, decided in 1968 that a student accused of having marijuana in his room was "denied his right to procedural due process of law" and entitled to a new hearing, since he had been denied the right to confront and cross-examine witnesses and because of the presumption of guilt which was raised by his refusal to testify on grounds of self-incrimination.[1]

## Summary

Grave doubt must surround any assertion of fifth amendment protection against self-incrimination by an accused student in a college disciplinary proceeding. The fifth amendment injunction, "nor shall [any person] be compelled in any criminal case to be a witness against himself," provides a shield only for witnesses in criminal cases. College disciplinary proceedings, although quasi-criminal in nature, are still considered, as Professor Johnson and others have pointed out, to be civil actions. Van Alstyne suggests, however, as indicated above, that it is not beyond the realm of

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[1] Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (1968). See also, Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., Appendix A, p. 2.

imagination that a college disciplinary proceeding may yet be considered grave enough in its proposed sanction that the accused student will be declared entitled to protection under the fifth amendment. One may imagine, for example, that such a situation might involve a senior medical student denied his degree at the normal time for graduation because of some rule infraction.

Apparently, the law is settled on the issue that statements made in a college disciplinary action cannot be used in a subsequent criminal proceeding to incriminate the student accused in the earlier action.

Additionally, the ACLU quotes the following dicta from Re Gault as being laden with promise of future decisions favorable to college students seeking protection from forcible self-incrimination:

> The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects any disclosure which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be used. [Emphasis is the Court's.][1]

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[1] 387 U.S. 1 (1967), at 47.

# CHAPTER VII

## THE FIRST AMENDMENT

## AND EXPANDING SUBSTANTIVE RIGHTS

The legal death of the in loco parentis doctrine vis-a-vis college students has ushered in an almost unbelievable termination of the once stifling administrative paternalism regarding campus matters of first amendment consideration. In a rapid succession of judicial decisions, the federal courts have been especially active in the curtailment of administrative surveillance over campus speech, press, and political activity. This expansion of student rights has also embraced the public-school campus, in spite of the continuing acceptance there of the in loco parentis rationale,[1] extending, at least in some respects, "from kindergarten through high school"--as Justice Black complained in dissent.[2]

"It is in the area of student expression and association that the university's disciplinary power poses its greatest potential threat to society, to the university itself, and possibly to the

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[1]On December 3, 1969, the Seventh Circuit ruled that, "Although schools need to stand in place of a parent in regard to certain matters during the school hours, the power must be shared with the parents, especially over intimately personal matters such as dress and grooming . . . ." [Breen v. Kahl, 419 F.2d 1034, 1037 (1969)].

[2]Tinker v. Des Moines Independent Community School District, 89 S.Ct. 733, 741 (1969).

individual student." So wrote Professor Goldman. Goldman's comment came in his 1968 article published in the Kentucky Law Journal.[1]

In general agreement with this sentiment expressed by Goldman that American universities may pose a threat, rather than a culture medium, to the twentieth century democratic zeitgeist, the Yale Law Journal preceded him by five years in declaring that:

> In some cases, the court ought properly to grant review because of the characteristics of the effect on the student, regardless of the alleged educational characteristics of the university's act. Such need for judicial inquiry is established when it is claimed that the school has infringed such basic interests as freedom of speech--both to speak and to hear--freedom of the press, freedom of assembly, right to political activity, freedom of religion, or the right to privacy. Our society depends on its courts to make the ultimate decision as to the propriety of such infringements--a responsibility which is not to be delegated to university officials, even where they claim superiority founded upon educational expertise.[2]

And, in the case of the university, the author could add:

> . . . society's interest in free and open debate, including the rights of assembly, association and publication and the right of all to hear and speak even unpopular ideas is particularly strong. The university is needed as a source of new ideas which a democracy constantly requires. Thus relevant legal doctrines, such as the doctrine of university "reasonable rules," should be construed as to further society's interest in freedom of expression, by preventing university incursions upon student freedoms.[3]

The preceding statements were published in 1963. By the latter part of 1968, the ACLU was to observe that:

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[1]"The University and the Liberty of Its Students--A Fiduciary Theory," op. cit., p. 643.

[2]"Private Government on Campus--Judical Review of University Expulsions," op. cit., p. 1395.

[3]Ibid., pp. 1397-98.

> Like the right to due process in discipline, the right of freedom of expression has been expounded by the courts in cases involving public colleges. Recent decisions have provided judicial support for a free student press, students' rights to engage in lawful demonstrations, and their right to hear outside speakers of their choosing.[1]

The first amendment guarantees of freedom of religion, speech, press, and assembly and the prohibition against an establishment of religion have assumed much greater significance in most areas of American existence in the past four decades. When the United States Supreme Court in 1937 abandoned its role as a censor of social and economic legislation it assumed a new and often-neglected function of protecting dissenting individuals and minority groups in their espousal of unpopular causes, shielding them against repressive official action from any quarter. With a good deal of consistency, the federal courts ever since have served this function, reaching the zenith in this new role during the Warren years.[2] Many of the more important causes coming under the federal courts' aegis in recent years have involved demonstrations of various forms and other types of social protest aimed incidentally at expanding first-amendment freedoms of the American people.

Actions by both the state and national governments are limited by first-amendment guarantees. However, the courts have stated on

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[1] Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., Appendix B, p. 5.

[2] See H. Abraham, Freedom and the Court (1967), for a survey of post-1937 leading decisions by the United States Supreme Court.

many occasions that first-amendment rights are not unlimited. Government officials may set reasonable conditions for the time, place, and manner of exercising these rights. A college or university is similarly justified in setting reasonable regulations to protect its educational objectives and to maintain order on campus. Much litigation has arisen from differences of interpreting the concept of reasonable to make it apply to difficult situations.

Respective first-amendment rights, although distinctively identified in the United States Constitution, are commonly blended together in legal literature and in court opinions--often under the general category of "free expression." The arbitrary decision was made, for the treatment which follows, to divide and limit the subject to what would seem to be the most litigious areas, insofar as the college campus is concerned: freedom of speech, freedom to hear, and freedom of the press.

### The AAUP and ACLU Positions as Criteria

Since the AAUP and ACLU are probably the two most prominent national organizations consistently expressing an interest in the rights of college students, it would seem appropriate to advance the stated policy positions of these two groups on the first amendment rights of college students. Therefore, in the discussion which follows, AAUP and ACLU positions have been advanced as criteria against which legal opinions and judicial decisions may be judged.

## Freedom of Speech

Since students, at least in theory, enjoy all the constitutional rights accorded other citizens, some legal writers today find it difficult to understand how a college can conscionably undertake to restrict on-campus and off-campus student activities involving the lawful exercise of what would appear to be first-amendment rights. Professor Beaney has noted that, "The unpopularity or irrationality of student expression provides no justification for suppression or penalty."[1] He adds:

> It would be extremely unfortunate if institutions of higher learning, having successfully fought so many battles with legislatures and trustees in the name of academic freedom for the faculty, should fail to recognize that freedom for students to express ideas without fear of penalty is also essential to a free academic community. Obviously, students may not always exhibit a full sense of responsibility in their zeal to express ideas, but that is hardly a sufficient reason to stifle their expression.[2]

In 1968 Beaney was looking to the future when he declared that:

> The expansion of first amendment rights by the courts in the past 30 years, and the attention which the courts are willing to give to claims of minorities and dissident individuals, should warn colleges and universities to avoid policies and practices that overtly or indirectly curtail students' exericse of first amendment rights of free speech, press, and assembly.[3]

### The AAUP and ACLU Positions

On the subject of free expression, the Joint Statement contains the expected declarations on freedom of inquiry and discussion

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[1] William N. Beaney, "Students, Higher Education, and the Law," op. cit., p. 523.

[2] Ibid.

[3] Ibid., p. 524.

in the classroom. Of greater interest to this study, however, is the subject of out-of-class expression, since this is the primary arena of free-speech litigation involving college students. On this subject, the statement declares that students should be free to examine and discuss all questions of interest to them, and to express opinions publicly and privately. "They should always be free to support causes which do not disrupt the regular and essential operation of the institution." However, it should be made clear that they speak only for themselves.[1]

In a section headed, "Off-Campus Freedom of Students," the Joint Statement acknowledges that college students are both citizens and members of the academic community. "As citizens, student should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy." As members of the academic community, they are subject to the obligations growing out of that membership.[2]

The ACLU Statement

The ACLU central statement on freedom of speech is perhaps broader than that of the Joint Statement--or possibly one should say it is more militant. Under the heading, "Students' Personal Freedom Off-Campus," it observes that, "American college students possess the same right to freedom of speech, assembly, and association as do other residents of the United States. They are also,

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[1] Joint Statement, as reprinted in Student Protest and the Law, op. cit., p. 218.

[2] Ibid., p. 220.

of course, subject to the same obligations and responsbilities as persons who are not members of the academic communities."

Student participation in such off-campus activities as peace marches, civil rights demonstrations, draft protests, picketing, boycotting, political rallies, non-campus publications, and acts of civil disobedience are not the legitimate concern of the college. However, students do have a moral obligation not to misrepresent the views of others in their academic community.[1]

Legal Commentary

Lawyers and political scientists writing on the subject of first-amendment freedoms for college students are inclined to stand agape at the fact that an institution of higher learning would even consider infringement on such a basic right, guaranteed to all by the first and fourteenth amendments.[2] But all are aware of the complexity of the situation today, when no universally accepted definition of speech is available. It is, after all, quite likely that many university officials are currently engaged in deep soul-searching in quest of an answer to the question, "Just what are the proper limits on constitutionally protected speech."

Judge Frank M. Johnson of the United States District Court, Middle District, Northern Division, Alabama, addressed himself briefly to the subject in the 1969 case of Scott v. Alabama State

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[1] Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit. p. 8

[2] See comment by Beaney, supra.

Board of Education.[1] There he said, "There seems to be a tendency in this country--and it is especially prevalent among students--toward the view that if one only believes strongly enough that his cause is right, then one may use in advancing that cause any means that seem effective at the moment, whether they are lawful or unlawful . . . ." Judge Johnson pointed out that those who assume this position must not expect protection from the law, but must expect to be punished when they violate laws and college regulations which are part of a system designed to protect the rights and interests of all.[2]

The United States Supreme Court assumed a similar position in 1968, when it expressed the view that, "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaged in the conduct intends to express an idea."[3]

As Judges are said to do, Bakken selected a precedent to serve his purpose when he concluded that, "The boards of their delegated representatives are justified in making rules that will keep the school functioning properly and the right of free speech cannot be used as a justification for violating the rules."[4] He observes

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[1]Civil Action No. 2865-N, as reprinted in Student Protest and the Law, op. cit., p. 315.

[2]Ibid., at 322.

[3]United States v. O'Brien, 391 U.S. 367, 376 (1968).

[4]Clarence J. Bakken, The Legal Basis for College Student Personnel Work (Washington, D. C.: The American College Personnel Association, 2d e., 1968), p. 39. In effect, Bakken's description of the judicial

that the courts have set limits to the enforcement of such rules--the clear and present danger doctrine. Under this doctrine, he says, "there must be some reasonable probability that the presence of unauthorized persons on school grounds would reasonably lead to ascertainable interference with normal conduct of the school before the restriction will be sustained in court.

In the mid-1960's the so-called "free-speech" movement at the University of California raised the question of the legality of common obscenities used in a public place. At a law conference, Professor Van Alstyne was confronted with the question, ". . . to what extent is demonstration which employs obscene language, amplified by bullhorn, constitutionally protected?"

Van Alstyne's answer was that "Very little" constitutional protection would be enjoyed under the circumstance. He felt that the United States Supreme court had properly scaled down the offense of obscenity by applying considerations of time, place and manner. However, "The deliberate use, before a captive audience, of obscene language that offends their sensibilities may appropriately be made the subject of discipline without violating first-amendment standards."

Van Alstyne emphasized the time-and-place aspects of the question.

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rationale issuing from the courts today is correct. However, it is especially noticeable in the leading school free-speech decision, Tinker v. Des Moines Independent Community School District (80 S.Ct. 733), the Court achieves the effect of the "clear and present danger" doctrine, but attaches the label of "reasonableness" to its rationale, which inspired a heated dissent from Justice Black.

In the first place, he said, he saw nothing constitutionally objectionable if a university should ordain that "there must be no picketing of any kind within 100 yards of the administration building." But, he added:

> The justification must be that under the particular circumstances the style of communication rises above the level of mere inconvenience or petty annoyance, and is at least in substantial conflict with the accomplishment of other legitimate uses to be made of the property. Thus, clearly congestive picketing, clearly disruptive or raucous demonstrations, clamorously interfering with classes, blocking access, are clearly subject to prohibition by a university as they are by responsible state law.[1]

On another occasion, Van Alstyne spelled out a similar viewpoint. He said, "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." He identified two areas of student activity to which the foregoing comment is especially applicable: "(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." First-amendment protection, he wrote, extends to those who are otherwise properly on a college campus which is sufficiently "public" to be subject to the first or fourteenth amendment. First-amendment protection applies, he said, to protect students in their expression of grievances which originate in the college community itself, or not especially related

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[1]This dialogue is taken from "Panel Discussion--II," Student Protest and the Law, op. cit., pp. 202-203.

to the college. Rules which would undertake to restrain students in this area of liberty, he adds, must generally satisfy two standards: (1) they must be clear and specific so as not to chill the exercise of orderly political expression; and (2) they must go no farther than forbidding conduct that is manifestly unreasonable in terms of time, place, or manner, or forbidding incitements under such circumstances as to create a clear and present danger of precipitating a serious violation of the law.[1]

Thus, says Van Alstyne, "a rule that broadly forbids 'any student . . . [to engage on campus] in any public demonstrations without prior approval of the administration,' is void on its face. It is a prior restraint devoid of proper standards . . . ." He indicates that the burden of proof would be on the school to prove that banned demonstrations would disrupt the normal functions of the school.[2]

Lucas points out a serious inconsistency between the theory of student rights of free speech and campus application of those rights. He observed that the overriding first-amendment value of open discussion of public issues probably provides the same protection for a student criticizing a college official as it does for a non-student. He suggests that the student may be in a better position than other citizens to expose academic inadequacies.

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[1] "The Judicial Trend Toward Student Academic Freedom," op. cit., pp. 298-299.

[2] Ibid., p. 299, quoting Hammond v. South Carolina State College, 272 F.Supp. 947 (D.S.C. 1967).

Nonetheless, he points out, the few existing decisions concerning student criticism of college officials "have accorded the student an incredibly narrow range within which he can criticize." He cites Steier v. New York Education Commissioner, which upheld a student's expulsion for writing caustic, critical letters to the college president. Similarly, he cites Jones v. Board of Education, in which the District Court upheld the expulsion of a student whose chief error was to call the college president "Super Tom" and other college officials "Uncle Toms." Finally, he points out, one of the students readmitted in De Veaux v. Tuskegee Institute[1] was later expelled because he called one of the board of trustees a "honkie." "The student," he observes, "would certainly have no remedy at the present stage of Alabama justice, if the trustee had called him 'nigger.' It is fair to conclude from these decisions that expansion of the student's right to criticize and petition his administration must await further clarification in the courts."[2]

Lucas adds that, "There can be no question that a university campus is an appropriate setting for student expression in the form of peaceful picketing," but he acknowledges that the development of the law regarding student picketing has hardly begun. "Narrowly drawn restrictions are valid," he suggests, "providing they protect legitimate and substantial state interests."[3]

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[1]Civil No. 758-E (M.D. Ala. 1968).

[2]Roy Lucas, "Comment," op. cit., pp. 627-628.

[3]Ibid., pp. 628-629.

Cases on Free Speech

The leading precedent in support of free speech on the campus is actually an opinion by the United States Supreme Court in 1969 protecting symbolic speech in the elementary and secondary schools, Tinker v. Des Moines Independent Community School District.[1] Briefly, the facts of the case are as follows. When principals of several Des Moines public schools became aware of a plan by several students to wear black armbands to publicize their objections to the hostilities in Vietnam and their support for a truce, they adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused to remove it he would be suspended until he returned without the armband. Parents of the children sought an injunction restraining enforcement of the new policy. After an evidential hearing, the District Court dismissed the complaint, upholding the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline.[2] The court referred to but declined to follow the Fifth Circuit's ruling in Burnside v. Byars,[3] infra, where it was held that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially" interferes with the appropriate discipline in the school.

On appeal, the Eighth Circuit, en banc, was evenly divided,

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[1] 89 S.Ct. 733 (1969).

[2] 258 F.Supp. 971 (1966).

[3] 363 F.2d 744, 749 (1966).

thus upholding the District Court. The Supreme Court granted certiorari. Justice Fortas, for the Court, declared that, "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech.'"[1]

Although Tinker, as was noted, dealt with public school pupils below the college level, the Court cited with apparent approval a number of college cases which have expanded campus liberties, including Dixon, Knight, and Dickey v. Alabama State Board of Education,[2] which will be discussed later in this chapter.

Remindful of the language of Dixon, Justice Fortas observed for the majority that, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] The majority opinion reminded educators, "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."[4] Also, ". . . undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[5] And, in what might

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[1]89 S.Ct. 733, 736 (1969).

[2]273 F.Supp. 613 (D.C.M.D. Ala. 1967).

[3]89 S.Ct. 733, 736.

[4]Ibid., at 737.

[5]Ibid.

be interpreted as a slap at the philosophy of education embraced by the Des Moines school officials, Justice Fortas wrote, "In our system, state-operated schools may not be enclaves of totalitarianism."[1]

"School discipline aside," the Court said, "the First Amendment rights of children are co-extensive with those of adults."[2]

Reversing the trial court, the majority thus reinforced the authority of Burnside v. Byars from the Fifth Circuit and apparently exluded first-amendment considerations from the prospect of in loco parentis curtailment in the public schools and colleges.

Justice White concurred, and Justices Black and Harlan wrote separate dissenting opinions. Black's dissent was lengthy and heated. He accused the majority of resurrecting the ghost of substantive due process and applying the criterion of "reasonableness."

## Other Speech Cases

The Steier case was discussed at some length in Chapter V with emphasis there placed on procedural aspects. Substantively, the case was exactly what Lucas presented it to be in the preceding quotation. In brief, the Second Circuit let stand the disciplinary expulsion of Arthur Steier from Brooklyn College, his expulsion being based primarily on the fact that he had written letters to the college president in which he was sharply critical

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[1] Ibid., at 739.

[2] Ibid., at 741.

of another college official and subsequently wrote a disquieting letter which was published in the student newspaper.

The majority in Steier based the court's decision on an argument couched almost entirely in procedural considerations. However, Judge Clark's dissent was expressed both in procedural considerations and the facts of the case. Without mentioning the first amendment directly, he wrote:

> Steier's several letters, on which the college's action is purportedly based, show perhaps an obstinate and overstated sense of indignation against student discrimination, but nothing indecent, delinquent, or criminal and nothing (I submit) calling for discipline and expulstion, rather than patient response.[1]

In Goldberg v. Regents of University of California,[2] which one writer describes as "of equal importance with the Dixon case,"[3] an appellate court in California ruled that students do not have an unlimited right to demonstrate on university property. This was the case which climaxed the "free speech movement" on the Berkeley campus. Goldberg found the California courts yielding to the expertise of the educator in these terms: ". . . in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself."[4]

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[1] 271 F.2d 13, 22 (1959).

[2] 57 Cal.Rptr. 463 (Ct. App. 1967).

[3] John P. Holloway, "The School in Court," Student Protest and the Law. op. cit., p. 83, 91.

[4] 57 Cal.Rptr. 463 (Ct.App. 1967) at 472.

However, absolute bans on demonstrations without prior approval are not constitutionally permissible, except possibly in the presence of a clear and present danger. In Hammond v. South Carolina State College,[1] three students had been suspended under an administrative regulation requiring prior approval of all campus demonstrations. The federal district court found this regulations void on its face and constituting "prior restraint on the right to freedom of speech and the right to assemble." The right of students to demonstrate for redress of grievances was equated with the right of citizens to demonstrate at the site of their government.

The apparent conflict between the Goldberg and Hammond cases can probably be explained in terms of the respective regulations of conduct. In Hammond, the conduct was more purely protected speech and the rule was broadly prohibitory. In Goldberg, the conduct was highly offensive to many, and the regulation was seemingly reasonable.

A rash of free-speech cases in the federal and state courts in the late 1960's underscored the fact that the "speech" provision of the first amendment embraces more forms of expression than mere oral communication. For example, the right of students to wear long hair was firmly declared for the first time on December 3, 1969, and the ACLU conjectured that "the case may produce the

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[1] Breen v. Kahl; 272 F. Supp. 947 (D.S.C. 1967).

the first Supreme Court ruling on the issue."[1]

The Wisconsin Superintendent of Public Instruction asked the state attorney general to appeal the decision of the Seventh Circuit that "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution."

The Seventh Circuit cited the "penumbra" of the first amendment's free-speech guarantee and the ninth amendment's guarantee of unenumerated personal freedoms as the bases for its decision. The opinion held that the Williams Bay, Wisconsin, school board did not prove a valid interest in insisting on short hair. It did not undertake to prove that long-haired students created disturbances. "To uphold arbitrary school rules . . . for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution, the court said. It added that high school students, like adults, are protected by the Constitution from "arbitrary and unjustified government rules."

The high school advanced its claim to an in loco parentis relationship with students, but the court ruled it inapplicable because it is impossible to comply with a hair-length regulation during school hours only. The Seventh Circuit observed that, "Although schools need to stand in the place of a parent in regard

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[1]"Circuit Affirms Long Hair Win," Civil Liberties, February, 1970, p. 1.

to certain matters during the school hours, the power must be shared with the parents, especially over intimately personal matters such as dress and grooming . . . In the absence of any showing of disruption, the doctrine of in loco parentis has no applicability."[1]

While the Seventh circuit was protecting hirsute high school students, the United States Supreme Court was erecting a wall of protection against efforts by Iowa school officials to ban the non-disruptive wearing of protest armbands on campus and in classrooms as a form of expression protected by the first amendment.[2] Other noteworthy free-speech precedents of the late 1960's included these: Burnside v. Byars,[3] declaring that nondisruptive wearing of protest buttoms on campus and in classrooms in protected by the first amendment; Power v. Miles,[4] upholding university demonstration guidelines and ruling that a private university does not perform such a public function as to render its regulation of student demonstrations subject to the fourteenth amendment; State v. Zwicker,[5] in which the supreme court of Wisconsin upheld disorderly conduct convictions of students for their activities during a demonstration, thus rejecting students' contention that the statute was overly broad; Schuyler v. University of New York at Albany,[6] in

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[1] 419 F.2d 1034, 1038 (7th Cir. 1969).

[2] Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503 (1969), supra.

[3] 363 F.2d 744 (5th Cir. 1966).

[4] 407 F.2d 73 (2d Cir. 1968).

[5] 164 N.W.2d 512 (Wisc. 1969).

[6] 297 N.Y.S. 368 (App. Div. 1969).

which a New York appellate court held that university officials have an inherent right to discipline students who took part in a boisterous demonstration to harass a chemical company employment interviewer when the demonstrations had violated university regulations and interfered with classes; Barker v. Hardway,[1] in which a federal district court upheld suspension for students for abrasive demonstration at a football game, although the college president had suspended them without a hearing, reserving for them the right of appeal to the faculty committee on student affairs; Evers v. Birdsong,[2] in which a federal district court permanently enjoined a group of non-student demonstration leaders, following a series of disruptive and destructive demonstrations on campus; Jones v. Board of Education, supra.,[3] in which a federal district court upheld an expulsion for calling school officials "Uncle Toms" and passing out SNCC literature; and Zanders v. Louisiana State Board of Education,[4] in which a federal district court upheld the expulsion of eighteen students who blockaded a campus building for forty-eight hours.

## The Right to Hear

"It is highly doubtful," notes the ACLU, "whether any flat ban against outside speakers or any category of outside speakers,

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[1] 283 F.Supp. 228 (S.D. W. Va. 1968).

[2] 287 F.Supp. 900 (S.D. Miss. 1968).

[3] 279 F.Supp. 190 (M.D. Tenn. 1968).

[4] 281 F.Supp. 747 (W.D. La. 1968).

or any particular speaker, will survive a series of recent court rulings."[1]

The problems associated with college speaker bans and various degrees of prior restraint on speakers are as apparent as they are numerous. A visiting speaker can express himself with greater candor without concern about community reprisal than can a permanent member of the college community. The speaker need remain in the environs of his delivery only so long as it takes a limousine to drive him to the airport. But the member of the academic community who drives him to the airport must return to the scene of delivery and be confronted with any hostile reaction which the speech may have engendered in the larger community or on the campus itself. Thus the visiting speaker often leaves in his wake what the college administrator might reasonably consider to be a public relations shambles. One might logically assume that this would present the greatest problem to a community with a long history of value inbreeding. Accordingly, Lucas has observed that, ". . . it is in the South and Midwest where speaker bans are most likely to flourish."[2]

AAUP and ACLU Positions

The Joint Statement addresses itself to campus speakers in this language:

> 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

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[1] Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., Appendix A, p. 4.

[2] Roy Lucas, "Comment, 45 Denver Law Journal 622, 638.

> invited to appear on campus should be designed only to insure that there is an 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 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 view expressed, either by the sponsoring group or the institution.[1]

The ACLU shows a similar awareness of the pressures of public opinion in the larger community in its statement on "Student Sponsored Forums," which declares:

> Students should have the right to assemble, to select speakers and guests, and to discuss issues of their choice. It should be made clear to the public that an invitation to a speaker does not necessarily imply approval of his views by either the student group or the college administration. Students should enjoy the same right as other citizens to hear different points of view and draw their own conclusions.
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> When a student group wishes to hear a controversial or socially unpopular speaker, the college may not require that a spokesman for the opposing viewpoint be scheduled either simultaneously or on a subsequent occasion.[2]

Justification for the practice of inviting guest speakers to the campus would seem to lie in the fact that individuals with expertise in a multitude of national issues cannot be kept in ready supply on each college campus. Lucas has noted that, "In the spring of 1968, there were no substitutes for William Sloan Coffin, Dr. Benjamin Spock and Dick Gregory as social critics, and these men

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[1] "Joint Statement on Rights and Freedoms of Students," taken here from reprint of statement in Student Protest and the Law, op. cit., p. 218.

[2] Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., pp. 5-6.

spoke on hundreds of campuses, although they were excluded from several."

Commentary

Legal commentary on students' right to hear, as might be expected, remains less plentiful than commentary on the more celebrated first-amendment freedoms. Nonetheless, enough commentary by qualified writers has appeared to indicate that a weighty preponderance of the legal publicists are convinced that the right of students to hear speakers of their choice on campus without official interference is well established. It would perhaps not be too much to say that a genuine feeling of satisfaction over this development in the law runs through their writings.

Van Alstyne has given considerable attention to the subject. In a 1968 article, he wrote that, "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 a college." He points out that the college may regulate the appearance of invited guest speakers only as much as the government may regulate public facilities which are otherwise suitable as meeting places. It may establish neutral priorities. "But it may neither proceed by rules that are vague or reserve unchecked discretion to censor, nor may it screen speakers according to their political affiliation, their subject matter, or their point of view."[1]

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[1] "Judicial Trends Toward Student Academic Freedom," op. cit., at 301 (1968).

In another article in 1968, Van Alstyne took a closer view of some of the implications of such a policy when he wrote that campus speaker bans have been enjoined where they were so vague as to reserve complete censorship to the administration[1] and where the university weighed the political views of a speaker to determine his acceptability,[2] where the university classified speakers as acceptable or unacceptable on the basis of their unrelated conduct before congressional committees,[3] or their having been subjected to an unadjudicated criminal charge--even one of murder or homosexual soliciting.[4] He summarized his concept of the judicial acceptability of speaker regulation in these words:

> Where no physical disorder is imminent, where there is no substantial basis for supposing that the speaker will himself violate the law or incite others to a violation in the course of his remarks, where the facilities are otherwise available and other guest speakers are generally allowed on campus, the student residents interested in hearing a given speaker on campus may not be denied.[5]

Other protected forms of expression, Van Alstyne noted, include peaceful political expression, orderly and nondisruptive assemblies

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[1] Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968).

[2] Danskin v. San Diego Unified School District, 28 Ca.2d 536, 171 P.2d 885 (1946). Buckley v. Meng, 35 Misc.2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

[3] Dickson v. Sitterson, supra, n2.

[4] Student Liberal Federation v. Louisiana State University, Civil No. 68-300 (E.D.La. 1968); Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969).

[5] "The Student as University Resident, 45 Denver Law Journal 582, 587 (Summer, 1968).

on campus by students meeting to express a grievance against the college, and critical comment on the college in the campus newspaper. In its efforts to affect such forms of expression, he adds, university government is subject to a substantial degree of constraint similar to that which limits the civil government from which the university derives its powers. As a campus constituent of that government, the student cannot be made to forfeit his freedom of speech and cannot be made to barter it away as a condition of being admitted or of remaining.[1]

As early as 1963, the Yale Law Journal expressed an interest in the subject of the student's right to hear. Five years before Van Alstyne made the observations cited above, the Journal observed, drawing on the experience it has gained in protecting free expression, a court might strike down as unreasonable any regulation which has the effect of depriving some or all of that freedom. Regulations which prohibit all campus meetings on political subjects or ban speakers of an unpopular viewpoint would be unreasonable, the Journal said.[2]

Commenting on student political organizations in 1968, Lucas proposed that the college views the active student group as posing a threat to its unquestioned campus authority and infallibility.[3]

The preceding comments and the following cases would seem to

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[1]"Judicial Trends Toward Academic Freedom," op. cit., at 301.

[2]"Private Government on Campus--Judicial Review of University Expulsions," 72 Yale Law Journal 1362, 1366 (1963).

[3]Roy Lucas, "Comment," op. cit., p. 632.

substantiate the assertion that students have a first-amendment right to hear speakers of their choice--a right which grows out of the first amendment's free-speech guarantee, and that no administration of any tax-supported college may legally infringe this right.

Freedom-to-Hear Cases

Recent case illustrations of the viewpoints expressed above 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 because of vagueness by a federal district court in 1968.[1] Similarly a rule permitting use of a college auditorium by outside organizations "insofar as these aims are determined to be compatible with the aims of Hunter College as a public institution of higher learning," was ruled void for vagueness.[2]

The Human Rights Forum, a student organization at Auburn University, was granted a charter by the student government on the condition that it not invite outside speakers. At both Auburn University and the University of Alabama, the student government determines which student organizations will receive charters. Approval is not a matter of course, but may be delayed or denied when unpopular student groups seek recognition. Lucas describes these practices as "patently invalid under prior restraint decisions."[3]

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[1] Dickson v. Sitterson, 280 F.Supp. 486 (M.D.N.C. 1968).

[2] Buckley v. Meng, 30 Misc.2d 476, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

[3] 412 F.2d 1171 (5th Cir. 1969).

Speaker bans at both the University of Alabama and Auburn University were struck down by federal courts in 1969. In Brooks v. Auburn University,[1] the Fifth Circuit held that the university president's refusal to allow a speaker invited by a student organization under normal procedures constituted a restraint in violation of the first amendment. The speaker, the Reverend William Sloan Coffin, had been scheduled at an agreed honorarium and travel expenses. The court observed that, "Attributing the highest good faith to [the president] in his action, it is nevertheless clear . . . that the right of the faculty and students to hear a speaker, selected as was the speaker here, cannot be left to the discretion of the university president on a pick and choose basis . . . ." This decision upheld the ruling of the United States District, Middle District of Alabama, Eastern Division, which cited both the first and fourteenth amendments in its opinion.

The opinion of the district court noted that, "The Supreme Court has recognized that hearers and readers have rights under the first amendment." The court went on to say that, "There can no longer be much doubt that constitutional freedoms must be respected in the relationships between students and faculty and their university." Auburn University may provide disinterested scheduling of campus speakers, but, "the regulations may not be used to deny either the speakers or the listeners equal protection of the laws by discriminating among speakers according to the orthodoxy or popularity of their political or social views." The court expressed

[1] 296 F.Supp. 188 (M.D. Ala. 1969).

interest in the meaning of the word, "convicted," in the Auburn speaker regulation and concluded that, "That part of the regulation which would bar speakers whose views Auburn could not sanction also sweeps overbroadly, although it is difficult for this court to see why a university administration should be thought to have the authority to approve the ideas of a campus speaker as a condition for the speaker's appearance at the invitation of the students and faculty.[1]

> . . .The vice of these regulations, however, is really far more basic than their just being vague and overbroad. These regulations of Dr. Philpott are not regulations of conduct at all. . . . . The State of Alabama cannot, through its President of Auburn University, regulate the content of the ideas students may hear. . . . such action . . . is unconstitutional censorship . . . . . While it can be said that President Philpott has the ultimate power to determine whether a speaker is invited to the campus, the First Amendment right to hear of the students and faculty of Auburn University means that this determination may not be made for the wrong reasons or for no reason at all. . . . . The evidence in this case does not reflect any reason for the disruption of the academic functions and mission of Auburn University by reason of the appearance and lecture. . . .[2]

Just as vagueness and overbreadth were instrumental in voiding the speaker regulation at Auburn University, the same criteria were noted by the United States District Court, Eastern District of Tennessee, Northern Division, in yet another 1969 decision overruling a campus speaker ban. In Smith v. University of Tennessee,[3]

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[1] Ibid.

[2] 296 F.Supp. 188, 195-196 (M.D. Ala. 1969), as reported in The Education Court Digest, June, 1969, p. 5.

[3] 300 F.Supp. 777 (E.D. Tenn. 1969).

action was brought by students and faculty to enjoin the University of Tennessee from enforcing rules prohibiting students from inviting as speakers for university-sponsored programs persons who do not meet established standards. The standards required that the speaker be competent and that his topic be relevant to the approved constitutional purpose of the inviting organization; that there be no reason to believe that the speaker would speak in a libelous, scurrilous, or defamatory manner or in violation of laws which prohibit incitement to riot and conspiracy to overthrow the government by force, and that the invitation and timing be in the best interests of the university.

In finding for plaintiffs in the action, the court ruled that, " . . . The First Amendment protection of free speech extends to listeners." It declared further that:

> It has long been recognized that in carrying out their primary mission of education, state owned and operated schools may not disregard the constitutional rights of students. . . . . authorities establish that the defendant's regulations on student-invited speakers may not constitutionally be vague or broad beyond certain limits.

When a statute or regulation," the court continued, "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the due process clause of the Fourteenth Amendment because of vagueness."[1]

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[1] Ibid., at 781.

## Freedom of the Press

Twenty years ago, few student editors, in all probability, gave much thought to the exalted free-press provision in the first amendment of the United States Constitution. Student publications constitute a special kind of press. The college administrator could convincingly advance the claim that, since the college assumed financial and domiciliary responsibility for student publications, this was not the kind of publishing venture embraced by first-amendment considerations. One may only speculate as to how much the college administrator's viewpoint has changed in two decades. Certainly there is at least some evidence that the actual status of college newspapers has changed very little, vis-a-vis first-amendment considerations.

But the law has changed. Free-press considerations are inextricably intertwined with the preceding paragraphs dealing with freedom of expression and the right to hear. But some distinctive commentary and some distinctive cases have been addressed to campus press rights as distinguished from other civil liberties.

### The Joint Statement

The section on student publications occupies a prominent place in the Joint Statement, commanding at least three times as much space as the section on student participation in institutional government and more than twice as much space as is devoted to the section on freedom of inquiry and expression. The following is an abridgment of the student publications section:

> Student publications and the student press are a valuable aid in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on campus. They are a means of bringing student concerns to the attention of the faculty . . . .
>
> Whenever possible the student newspaper should be an independent corporation financially and legally separate from the university.
>
> Institutional authorities, in consultation with students and faculty, have a responsibility to provide written clarification of the role of the student publications, . . .

The preceding paragraphs deal generally with the role of the student press. The next three paragraphs become more specific.

> 1. The student press should be free of censorship and advance approval of copy, and its editors and managers should be free to develop their own editorial policies and news coverage.
>
> 2. Editors and managers of student publications should be protected from arbitrary suspension and removal because of student, faculty, administrative, or public disapproval of editorial policy or content. Only for proper and stated causes should editors and managers be subject to removal and then by orderly and prescribed procedures. The agency responsible for the appointment of editors and managers should be the agency responsible for their removal.
>
> 3. All university published and financed student publications should explicitly state on the editorial page that the opinions there expressed are not necessarily those of the college, university, or student body.[1]

The ACLU Position

While the ACLU statement on student publications overlaps the position reflected by the Joint Statement, it is nonetheless significantly different in that it might seem to place greater emphasis

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[1] Joint Statement, op. cit., p. 219.

on student autonomy in press management:

E. Communications Media

All student publications--college newspapers, literary and humor magazines, academic periodicals and yearbooks--should enjoy freedom of the press, and not be restricted by either the administration or the student government. This should be the practice, even though most college publications, except for the relatively few university dailies which are autonomous financially, are dependent on the administration's favor for the use of campus facilities, and are subsidized either directly or indirectly by a tax on student funds.

1. College Newspapers

Campus papers subsidized by student fees should impartially cover news of special student interest, be free to express their own editorial opinion, and should serve as a forum for opposing views on controversial issues as do public newspapers. They may also be expected to deal in news columns and editorials with the political and social issues that are relevant to the concerns of the students as citizens of the larger community. Neither the faculty, administration, boards of trustees nor legislatures should be immune from criticism.

In no case should the independent decision of the editors be overruled by pressures from alumni, boards of trustees, state legislatures, the college administration, or the student government.

Student initiation of competing publications should be encouraged. [Emphasis added]

Wherever possible the student newspaper should be financially and physically separate from the college, existing as a legally independent corporation. The college would then be absolved from legal liability for the publication and bear no direct responsibility to the community for the views expressed. In those cases where college papers do not enjoy financial independence, neither the faculty adviser nor the publications board if the paper has either or both, nor any representative of the college should exercise veto power, in the absence of a specific finding of potential libel as determined by an impartial legal authority.

> Where there is a college publications board, it should be composed of at least a majority of students selected by the student government or council, or by some other democratic method. Should the board, or in the case the paper has no board, an ad hoc committee selected by the faculty and student government, decide that the editor has been guilty of deliberate malice or deliberate distortion in one or a number of instances, the validity of this charge must be determined through due process.[1]

It is interesting to note that the ACLU recommends the encouragement of competing publications, especially since such "unofficial" publications today pose a sore bone of contention between sensitive administrators of colleges and public schools on one hand and students backed by parental support on the other.

Commentary on a Free Student Press

Bakken, who views the universe from the narrow window of a student personnel administrator's office, as late as 1968 remained apparently unaware of the student-rights revolution being introduced to the American campus by the federal courts. For, in that year, he could note with equanimity that, "There is very little law regarding student publications. [A] California law . . . provides for such activity. The operation of student publications is basically dependent upon the governing boards and exists at their will."[2]

While Bakken, like many student personnel administrators, apparently viewed student publications as a jewel to be added to

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[1]Academic Freedom and Civil Liberties of Students in Colleges and Universities, op. cit., pp. 6-7.

[2]Bakken, Student Personnel Work, op. cit., p. 49.

the student dean's crown, he nonetheless apparently viewed them primarily as threats to the academic and civic peace tranquillity. For he was able to make this sweeping statement: "Student publications come under the same general authority as do other personnel services listed in this chapter. There is little to add to this statement. Those who are guiding the publications should prevent, if possible, anything that injures a person or a business and may be classed as slander or libel."[1] One familiar with the campus scene might feel jusitified in observing that this statement typifies the empire-building ambitions which occasionally seize some members of the campus bureaucracy. Bakken's casual classification of campus publications as "personnel services" may have roused the ire of a few student editors, but probably caused the collapse of few schools and departments of journalism, which were primarily at least the nominal overseers of publications on the majority of campuses.

In commenting on the Joint Statement before a national conference on law and student protest at Ann Arbor in 1969, Van Alstyne stated that, "The sections of the Statement congruent with recent federal decisions include the statement of policy with regard to the prerogative of the students to support political causes on campus by an orderly means; their prerogative to be critical through the student press, albeit a university-financed press."[2] At the

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[1] Ibid.

[2] "The Constitutional Protection of Protest on Campus," Student Protest and the Law, op. cit., p. 183.

same conference, Tom J. Farar of the Columbia University School of Law suggested limitations on the student press in these words, "The notion of fair allocation of time to present opposing views on important controversial issues should be imposed on college newspapers and perhaps ought to be contemplated more broadly, although it does raise serious constitutional questions."[1]

Van Alsytne expressed the viewpoint that relative freedom of the student newspaper is conditioned by circumstances of ownership and organization, as he explained in this language:

> If the newspaper is wholly financed by the university and is part of its journalistic laboratory, this would seem to give it a greater proprietary control. The school is not attempting merely to use a so-called claim of governmental force to regulate the press, but it is deciding rather, how it elects to spend its money in developing this auxiliary enterprise as part of its program in journalism. It is a very different situation if the student newspaper is an independent corporation which supports itself by advertising, even though much of the advertising comes from the university under a contract reserving them the right to use certain space every day to publish notices of general interest to the campus. The degree of possible control by the university scales way down in that circumstance, especially if other kinds of magazines and newspapers are also permitted on campus, which I suspect might be constitutionally compelled.[2]

Lucas has said that when a student editor violates a college censorship rule which constitutes prior restraint, as in Dickey, infra, "expulsion is unquestionably beyond the college's power; and . . . the college cannot remove the student as editor under these circumstances."[3]

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[1]"Panel Discussion--I," Student Protest and the Law, op. cit., p. 160.

[2]Ibid., p. 161.

[3]Lucas, op. cit., p. 637.

Referring to an incident in which two high school students were expelled for publishing remarks critical of their teachers, Charles Alan Wright declared:

> It seems to me that speech cannot be punishable on campus simply because it is vigorous and uncomplimentary. I fully share the view . . . that the life of a university depends on "the pursuit of truth and knowledge through reason and civility," and that lack of civility leads only to a harmful polarization of opinion, but it is perfectly clear that the first amendment did not enact Mrs. Emily Post's book of etiquette.[1]

Aside from the student newspaper, free-press considerations raise the question of handbills on campus. Handbills have frequently constituted a phase of student demonstrations on campus. Lucas is willing to accord handbills first-amendment protection. In 1968 he wrote:

> Student distribution of handbills on campus frequently accompanies demonstrations. The Supreme Court has consistently held that a city cannot ban distribution of noncommercial handbills on public streets. . . . . A college campus is arguably even more appropriate for picketing and distribution of handbills than a busy public street, since the institution is supposedly dedicated to the concept of free inquiry. Accordingly cases such as Talley v. California [362 U.S. 60, (1960).] will probably apply with even greater force to protect a student leafleteer corps from charges of littering or annoying.[2]

Cases on Campus Press Freedom

As was related in Chapter V, Arthur Steier was dismissed from Brooklyn College after he wrote a letter critical of college policies

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[1]"The Constitution on the Campus," 22 Vanderbilt LR 1027, 1055 (October, 1969).

[2]Lucas, op. cit., p. 630.

and caused the letter to be published in the student newspaper. But it must be remembered that Steier was decided by the Second Circuit before Dixon had been decided by the Fifth Circuit. Or, in the words of Charles Alan Wright, "In retrospect, the surprising thing is not that Steier lost his case, but that he lost it to a divided court."[1]

Actually, so few court decisions have dealt with the tenuous question of freedom of the student newspaper or freedom of the press on campus that it would be presumptuous to say that either a trend or a firm precedent has been established. But an examination of the few decisions in the area will at least demonstrate that the Second Circuit's decision in Steier has fallen in disrepute.

One Supreme Court decision has touched on the subject. This is Pickering v. Board of Education,[2] which reversed the Illinois Supreme Court by overturning the action of an Illinois school board in dismissing a teacher for writing and causing to be published a letter criticizing actions of the school board.

In Pickering, Justice Marshall, speaking for the Court, declared that, "It cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly with those it possesses in connection with the regulation of the speech of the citizenry in general."[3]

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[1] "The Constitution on the Campus," op. cit., at 1030.

[2] 88 S.Ct. 1731 (1968).

[3] Ibid., at 1734.

The analogy between the position of the teacher and that of the student, as embraced by these words, is apparent. The same might be said for his observation elsewhere that, "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[1] In Pickering, the Supreme Court re-examined the evidence on which the Illinois school board had based its decision to dismiss the teacher. On re-examination, the Court concluded that the board had made erroneous findings.

Although Pickering is tangentially a press-freedom case and presents analogies with the campus situation, it does not deal with publication on the campus. For such a case, one must step down from the Supreme Court to the United States District Court for the Middle District of Alabama. Gary Clinton Dickey was editorial page editor for the student newspaper at Troy State University in Alabama. In that role, he was subject to a rule that no editorials be printed which were critical of the governor or the state legislature. The rule did not prohibit editorials or articles of a laudatory nature.

In the spring of 1967, Dickey prepared an editorial praising the president of the University of Alabama for taking a public

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[1] Ibid., at 1736.

stand in defense of academic freedom for university professors in the face of criticism of this stand by some members of the state legislature. First the faculty adviser to the student newspaper and then the university president refused to permit publication of the editorial because it violated the president's rule against criticizing the lawmakers. The faculty adviser directed that the proposed editorial be replaced with some material on "Raising Dogs in North Carolina." Dickey, instead, left the column blank, except for the word, "Censored," printed diagonally across the column. For this "insubordination," he was suspended for one year. The federal court, in a strong opinion by Judge Johnson, ordered his reinstatement. The action was later dismissed as moot when Dickey transferred to Auburn University while the appeal was pending. The Fifth Circuit, ordering the dismissal, declared that this took away from the decision below "any precedential effect." Nonetheless, Judge Johnson's opinion in the Dickey case is twice cited in the Tinker case, supra.[1] In Dickey, Judge Johnson declared:

> A state connot 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

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[1] 393 U.S. 503, 514n2. (1969).

> punish Gary Clinton Dickey for his exercise of this constitutionally guaranteed right by cloaking his expulsion in the robe of "insubordination."[1]

In sum, the district court held Dickey's suspension invalid because it was made pursuant to an unreasonable rule which bore no relation to maintaining order and discipline on campus. The court held that the college could not establish a student newspaper and then subject it to arbitrary censorship, although Judge Johnson did suggest that Dickey could have been removed as editor.

Of Judge Johnson's decision in Dickey, Lucas has written this estimate:

> It is apparent from Dickey that the challenged regulation inhibited free inquiry in discussion of governmental activities, that it constituted an officially imposed form of orthodoxy by limiting inquiry to praise, and that there was no evidence that censorship of this character was required to maintain law and order on the campus. These observations, however, provide only a partial answer, for Dickey could have distributed leaflets, made speeches, written letters to the editor, demonstrated, and engaged in unlimited forms of expression. The college only asked that his editorial privileges be limited to the broad sphere beyond criticism of the state governor or legislature. Yet this request carves the heart out of the first amendment and severely limits defense of academic freedom. As Justice Jackson so eloquently stated in Barnette: "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is to differ as to things that touch the heart of the existing order."[2]

Three recent high school press-freedom cases are worthy of mention. These would seem to be addressed squarely to the subject

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[1] 273 F.Supp. 613, 618 (M.D. Ala. 1967).

[2] Lucas, op. cit., p. 636.

of freedom of the press on campus. They are Sullivan v. Houston Independent School District,[1] Vought v. Van Buren Public Schools,[2] and Baughman v. Freienmuth.[3] In Sullivan, a federal district court ruled that two students engaged in first-amendment activity in its purest form and that they had been expelled by school officials for exercise of their rights because the authorities disliked the contents of the paper they published and distributed off school premises. The court found regulation of that conduct a questionable proposition and ruled that, at any rate, the school may not exercise more control of off-campus conduct than it may exercise over on-campus conduct. It held that discipline must be based on a standard of substantial interference with normal operations of the school.[4] In Vought, a federal district court in Michigan ruled that an expelled student's first-amendment rights had been violated and he had been denied due process when dismissed for possessing a copy of an "obscene" tabloid newspaper; the court ruled the school's position "preposterous on its face."[5] In Baughman, the parents of five students seek to enjoin enforcement of a school regulation which requires that all literature distributed on school grounds have prior approval of the school's

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[1]307 F.Supp. 1328.

[2]306 F.Supp. 1388 (E.D. Mich. 1969).

[3]Civil Action 21484 (D. Md. 1969).

[4]307 F.Supp. 1328 (S.D. Texas, Houston Div. 1969).

[5]306 F.Supp. 1388 (E.D. Mich. 1969).

principal.[1] At this writing these three cases apparently had not been reported.

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[1]College Law Bulletin, January, 1970, p. 37.

# CHAPTER VIII

## CONCLUSIONS

The Fifth Circuit's broad mandate for constitution protection, expressed in Dixon, opened a Pandora's Box of procedural and substantive rights for college students. After nine years in the judicial market-place Dixon has proved that it was more than a decision bearing the label, "good for this case only." The Fifth Circuit's caveat of campus rights has been accepted as authoritative precedent by United States District Courts, Circuit Courts, and by state courts. It has received acquiescence from the United States Supreme Court.

The several decades of sporadic state-court litigation in the student-rights area have been characterized by some legal writers as a nadir of legal logic and justice vis-a-vis student-college relationships. Legal scholarship is not required to enable one to see the transparent weaknesses of the contract and in loco parentis theories of student-college relations which for many years enabled American college campuses to deny students reasonable procedural protections. To the civil libertarian, the fact that state courts went along with this scheme of arbitrary social control places in question the entire system of popular selection of state judges and degrades the state judicial systems to a level of arbitrary

social control. Beyond doubt, the college student has been arbitrarily discriminated against in the matter of individual liberties.

The history of college administration in the United States is marked with frequent examples, well documented in court records, of arbitrary treatment of college students so flagrant as to be correctly identified as intolerance. It is probably less than satisfactory to dismiss the record by drawing the too-obvious conclusion that intolerance is an occupational hazard faced by the college administrator. For the college administrator must exist in a milieu of state legislatures, boards of control, alumni, taxpayers and parents, as well as students. One might well ask, too, if the student culture is affected by a unique dynamics which has justified, fully or partially, the tight rein held on college students by campus administrators. Empirical evidence to support such a hypothesis is either lacking, or else has not received wide publicity.

Presumably, a primary theoretical function of the board of control for a tax-supported college is to serve as a "buffer" between the college and the general public, to absorb and deflect public pressures by exponents of conformity. Detailed study of the effectiveness of college boards in this role would seem to be warranted by the facts reported in this study. Study, too, of the ideal interest representation on a college board of control would seem to be indicated. A strong argument can be advanced for providing board representation for students and faculty, two clientele groups commonly unrepresented on college boards.

Veblen, a caustic critic of American higher education, pointed out that university boards are made up largely of businessmen, men of wealth and clergymen, and that their primary function is the control of expenditure budgets. He observed that, "their pecuniary surveillance comes in the main to an interference with the academic work, the merits of which these men of affairs on the governing board are in no special degree qualified to judge."[1] He declares further that, "their sole effectual function [is] to interfere with the academic management in matters that are not of the nature of business and that lie outside their competence."[2]

Arthur Schlesinger, Jr., has written the following insightful evaluation of the role of the board of trustees of Columbia University:

> At Columbia, the all-powerful board of trustees, composed of men from banks, corporations and government, act as representatives of [the] ruling class. To be sure, certain reforms are possible within the university, but these are mostly either to give the illusion of democracy, as in student and faculty senates and judicial boards, or to grant more privileges to students, such as longer dormitory visiting hours or later curfew. University administrators can well afford to make such concessions, because of their lack of social significance.[3]

The Conveyance Theme

One of the more pertinent conclusions to be drawn from this study surrounds the fact that Dixon was born in a Negro-rights

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[1]The Higher Learning in America, op. cit., p. 47.

[2]Ibid., p. 48.

[3]"Joe College Is Dean," Saturday Evening Post, September 21, 1968, p. 72.

context, but served as the vehicle to convey a broad spectrum of individual rights not merely to Negroes, but to all college students. It has been pointed out that the facts indicate that Dixon was suspended from Alabama State College because he was a Negro out of place, not because he was a student out of place. But the caveat of individual rights issued by the Fifth Circuit through Judge Rives was addressed to students rather than to Negroes or Negro students.

It has been pointed out that Dixon v. Alabama State College marked a 180-degree about-face in the law embracing a significant American minority group. But, although the case was pressed by the N.A.A.C.P., it turned out that the beneficiary minority group was not the American Negro, but the American college student.

In a sense, prior to 1961 and the Fifth Circuit's decision in this case, college matriculation amounted to an extreme form of expatriation in an area of the student's life. That is to say, when one assumed the role of student at a tax-supported institution of higher learning, he surrendered some of his rights of citizenship and many of his rights as a person, in the language of the fourteenth amendment. Of course the sanctions to which he exposed himself did not include imprisonment. But after matriculation he nonetheless stood exposed to the application of such sanctions as are available to college authorities. The point to be made is that the college-bound high school graduate was expected to surrender rights in this area of his life without

parallel in the experience of his vocation-bound high school classmate. In a day when little material significance was attached to the attainment of higher learning, slight significance was accorded by the courts to the matter of whether one was a student in good standing or a former student expelled by arbitrary action of the college administrator. Expulsion was almost assumed to be in the best interest of the college and the general student body.

Dixon climaxed an attempted use of the college discipline power for imposing politically inspired punishment--punishment of a group of Negro students who had "stepped out of place." Dixon, then, poses an example of a federal court using the judicial power for the protection of a minority--Negroes who were students. And yet, because of the circumstances of the case, the Fifth Circuit was compelled to address itself, not to the rights of Negroes, but to the rights of students. It had no option in that matter. Thus the clamor for the rights of one group--the Negroes--led to the conveyance of broad and sweeping rights to another group--college students--and within a decade has contributed to the expansion of individual liberties of students at all levels of the public-school system. It is highly unlikely that any other court decision has ever been accompanied by so apparent a transfer or conveyance of civil liberties from one group to another.

By 1969 apparently more student-college cases leaning on the authority of Dixon had been brought to protect the rights of white students than to protect Negroes. One of the more important of

these actions[1] was brought in the name of a student of Latin-American extraction. But this case, like many another, was free of racial implications. Indeed, by 1969 the emphasis of student-college court actions had shifted from procedural questions like that which had provided the grist for Dixon. Substantive rights had become the new issue--freedom of the campus press, freedom of assembly, freedom to speak and to hear. These are individual rights less susceptible to racially discriminatory restrictions than was evident in such cases as Dixon, where procedural overtones were paramount.

While Dixon gave birth to a student-rights revolution in the setting of the college campus, by 1969 many of the challenges to public-school authority were springing from the high schools, rather than the colleges. The in loco parentis doctrine, invalidated in its applicability to college students at tax-supported institutions, has retained much of its validity as applied to public-school pupils. But even so, the doctrine has been closely circumscribed, until today public-school pupils cannot be denied essential first-amendment rights either on-campus or off-campus in the absence of a showing by school authorities that such restriction is necessary in pursuit of the educational aims of the public schools. Thus public-school pupils from kindergarten through high school have apparently won freedom from official

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[1] Esteban v. Central Missouri State College, 272 F.Supp. 649 (W.D. Mo. 1967).

regulation of what they say--either literally or symbolically--, what they read or publish, and how they dress and groom themselves. Thus the federal courts have largely ruled out the official peevishness and prudery which has long served to stereotype public-school teachers and administrators in the United States. Although Dixon has served as a guiding light to the courts in this liberalization movement, court cases conveying these new freedoms for pupils have been generally free of racial characteristics.

The Authority of Dixon

Since 1961 Dixon has stood as an unchallenged authority in its area of public policy. Shepardizing Dixon in March, 1970, one could find neither a state case nor a federal case which had sought to rebuff the Fifth Circuit in this important decision or to impeach its revolutionary doctrine. On the other hand, several cases had tended to expand the procedural rights enunciated by Judge Rives, and Dixon had served to support a remarkable succession of substantive rights for college students and public-school pupils. No doubt inspired by the Fifth Circuit's findings in Dixon, the courts have displayed challenging creativity while moving in several directions to curb arbitrary administrative actions in tax-supported schools.

Not to be overlooked as an important factor in future litigation is the fact that on October 24, 1969, the Seventh Circuit demolished an important underpinning of college and public-school disciplinary codes when it subjected such standards to the test of

vagueness and overbreadth.[1] Since some college personnel authorities have defended vagueness as essential in campus codes, and since vagueness is a common characteristic of such ordinances, one might assume that college administrators of disciplinary codes are required to seek an entirely new philosophy of discipline.

The Dixon rationale suffers the defect of never having been considered on all four points by the United States Supreme Court. This is not to say, however, that the court has had no opportunity to reverse the Fifth Circuit. In three respects, the Court might be said to have acquiesced to the rationale conveyed in Dixon: (1) It denied certiorari to the state of Alabama when its granting would have placed the issue directly before the Court for review; (2) The Supreme Court did not use the convenient forum of its Tinker opinion in 1969 to undercut the rationale of Dixon; (3) The Court did use Tinker to extend a compatible rationale downward into the elementary and secondary schools.

Of course, the fact that Dixon has not been directly challenged by any court does not mean that it has been followed without exception. It was demonstrated in Chapter V that Judge Carswell, President Nixon's ill-fated second appointee to the Fortas seat on the Court, distinguished the facts in Due v. Florida A and M University so as to side-step the Fifth Circuit while paying "lip service" to Dixon. One can only guess at the importance of this action in

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[1]Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

political struggle which ended in Carswell's being barred from a seat on the Supreme Court.

Voluntary Compliance With Dixon

What is the record of voluntary compliance with the Dixon rationale by college authorities? Unfortunately, little empirical evidence is available to reflect on this important question. It is certainly an area which warrants further study. The literature indicates that many of the larger universities are complying. A survey of the most recent student-rights cases, however, suggests that a large number of smaller colleges have not been touched by the new doctrine. The one publicized study has indicated that compliance is minimal. A related study of the attitude of college board members indicates that a significant number of these officials hold personal values which are antipathetic to the principles announced in Dixon.

On the other hand, the Joint Statement, which has been discussed in the foregoing pages, seems to hold the greatest promise as an extra-legal description of the constitutional rights of college students. No evidence is available to indicate how many colleges have altered their student codes in response to the Joint Statement.

In response to the new legal alignment, as well as to campus disorders which have sometimes involved violence, some colleges and universities have promulgated new codes embracing behavior in

the academic community.[1]

In all probability, the greatest effect of the judicial decrees of the constitutional rights of college students has been one which defies measurement to any degree--the administrator's fear of being sued and the out-of-court responsiveness by college administrators to student-retained counsel. The martinet college administrator who once answered only to his controlling board is becoming increasingly aware that he may now be required to answer to a disinterested federal judge as well.

The New Status of In Loco Parentis

In consequence of Dixon and subsequent student-rights cases, it is reasonable to draw three conclusions concerning the new status of the in loco parentis doctrine: (1) Many college administrators still consider it the governing rule regarding student-college relationships. This is reflected as a consistent theme running through legal literature on the subject and is confirmed by the increasing frequency with which student-rights cases are being reported by the federal courts; (2) The legal legitimacy of the doctrine is dead, at least insofar as tax-supported colleges are concerned. The in loco parentis doctrine has been superseded by the new constitutional rights doctrine at least insofar as

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[1] See, e.g., the 1969 "Rules of the Board of Higher Education of the City of New York," and "Columbia University Interim Rules Relating to Rallies, Picketing and Other Mass Demonstrations," appendixes C and D, Student Protest and the Law, op. cit.

student discipline is concerned; (3) Although the in loco parentis rationale survives as a viable description of the relationship between educators and pupils in elementary and secondary schools, it was demonstrated in this study that first-amendment cases, especially in the areas of symbolic speech, press, and grooming have significantly undermined its legitimacy here.

Student Rights and Juvenile Rights

One must be careful not to confuse the rapid growth in procedural rights for juveniles with the expanding right of college students. Gault and other recent decisions expanding juvenile procedural rights addressed themselves to criminal proceedings. College discipline cases, even in their most severe form, remain in the realm of civil law, despite the fact that Van Alstyne, as was shown, believes should be entitled to the full protections afforded criminal-charge defendants.

The Law Versus Public Opinion

Evidences of a broad-based public opinion in support of the Dixon rationale are conspicuously lacking. No legislative action embracing the public-policy direction of Dixon had been learned of at the time of this writing. Some insight into public attitudes on the subject may be gained from the experience of United States District Judge James E. Doyle of Wisconsin's Western District. After delivering a number of student-rights decisions in harmony with the Dixon precedent, and after being sustained in two important decisions within a period of three months, Judge Doyle might

well have expected public plaudits. What he received, however, was quite different. Disturbed by Judge Doyle's rulings, the lower house of the Wisconsin legislature passed a resolution calling for a constitutional amendment to make federal judgeships elective, rather than appointive. Assembly Speaker Harold Froehlich, in arguing for the measure, may have expressed the feelings of millions of his fellow citizens when he declaimed, "Judge Doyle is using the United States Constitution to protect people who are trying to tear down our society."[1] This statement probably reflects a characteristic of middle-class conservatism much more broadly held than civil libertarians would like to admit.

Student Rights and the Private College

Since the injunction of the fourteenth amendment addresses itself to state governments, and thus inhibits only state and local governments and their agencies, the rationale of Dixon and related cases applies only to tax-supported colleges and schools. The courts have been careful to spell out this distinction. Therefore, colleges which operate without the support of public funds remain immune to the constitutional-rights doctrine.

However, "private" colleges, including those related to churches and other non-public institutions, commonly operate under a charter issued by the state. They certainly serve a public function--education. Increasingly, they are being funded by tax moneys. Consequently, the commonest opinion expressed by legal writers

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[1]"The Law," Time Magazine, March 23, 1970. p. 64.

dealing with the subject is that developing case law will move inevitably to bring the so-called "private" colleges and universities within the purview of the fourteenth amendment and the rationale of Dixon and other constitutional-rights cases. At the time of this writing, no breach has been noted on this front.

Of course, several arguments might be advanced to establish the view that it is relatively unimportant that non-public colleges be included in this new doctrine. It has been pointed out that private colleges have shown less of a trend toward authoritarianism than tax-supported colleges have. Additionally, students who attend private colleges are motivated in their choice of schools less by economic and geographic considerations than those who attend public colleges, placing the non-public schools in a more highly competitive situation than is occupied by state schools.

New Frontiers in Student Rights

Two new frontiers in the student-rights movement--areas in which students' already substantial gains may be expected to expand even further are related to fourth and fifth amendment guarantees.

Just as residents in public housing are protected against unwarranted search and seizure, students living in college dormitories may be expected to share in this protection as case law in this novel field grows.

The other area of expected expansion of student rights relates to the procedural protection against self-incrimination. This right

is not a complete stranger to the college campus, but it has not thus far been granted as a matter of right under the United States Constitution.

Indicated Areas of Additional Research

This study has undertaken to examine the pivotal court case defining the rights of college students in relation to tax-supported colleges, to describe the 180-degree turn in the law concerning procedural rights for college students and to sketch the course of subsequent case law in that same general area. It has perhaps left untouched more questions than it has undertaken to examine. The general area of student-college relationships is one pregnant with research possibilities in many disciplines. In the areas of law and political science, a few of these research possibilities perhaps deserve to be mentioned: (1) A continuing study of voluntary compliance with the new direction of the law by college administrations which have not been sued would seem to be warranted. Simple surveys such as that by Van Alstyne, cited in this study, would seem to offer great possibilities in measuring the extent of voluntary compliance; (2) A challenging area of research would involve the degree of awareness and acceptance of the Joint Statement by faculties and administrations. The relationship between acceptance of the principles of the Joint Statement and frequency of litigation at respective institutions might well be worth noting; (3) The adoption of the procedure of ombudsmanship for student representation to college faculties and administration

and the effectiveness of this practice would appear to offer fruitful research possibilities. Case studies in this area might be especially valuable to beleaguered college administrations; (4) A comprehensive treatment of the subject of college and university constitutions and handbooks insofar as they deal with student rights should prove rewarding. It would be of much interest and potential practical value for administrators to know precisely how other institutions define and promulgate codes of student rights. Study would seem warranted into the subject of the means being utilized to finance expensive litigation against colleges and universities failing to comply with the new judicial rationale of student rights. One might perceive the germs of student unions in co-operation efforts to bring recalcitrant administrators into court.

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The student is indebted to Irving Achtenberg, Kansas City counsel for the ACLU for an extensive interview in his office in the Spring of 1967 and a telephone interview on February 22, 1970. Since Achtenberg was ACLU counsel in the two Esteban cases, while the student was teaching on the faculty at the defendant Central Missouri State College, these interviews were very helpful in inspiring and carrying forth this study.

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