Denver Law Review

Volume 45 | Issue 4 Article 15

January 1968

Comment

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BY ROY LUCAS*

THERE have been so many recent articles on legal rights of students that little remains to be said, at least in regard to the major issues of procedural due process, free expression, and double jeopardy.[1] This Comment, therefore, will not retrace ground already well covered, but will instead be limited to expansion of several specific legal and sociological issues of current importance to the politically active and socially conscious campus resident: (1) the phenomenon of increasing student unrest, (2) use of the legal process to protect student expression and organization, and (3) the role of educators and the legal profession in encouraging expanded free inquiry on the college campus.

I. STUDENT UNREST: ITS CAUSES AND IMPLICATIONS FOR THE FUTURE OF HIGHER EDUCATION

The student unrest that is sweeping college campuses in the United States arises from a fundamental disenchantment with significant deficiencies in American culture. These deficiencies merit close scrutiny. There is no evidence, for example, that student protests are instigated by hard-core "communist agitators" intent upon depriving congressional committeemen of their seniority. Nor is there evidence that protesters seek anarchy for its own sake. Student revolts are led by students with a variety of political beliefs and have taken place in countries representing all points on the political spectrum. Moreover, these revolts have all too frequently occurred because college bureaucracies were hopelessly delinquent in making promised progressive reforms within their institutions.[2]

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* Assistant Professor of Law, University of Alabama; B.S., University of South Carolina, 1963; J.D., New York University, 1967. The author has recently joined the staff of The Twentieth Century Fund, New York, N.Y.

[1] *See, e.g.*, Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1 (1965) (probably the most comprehensive leading article); Goldman, *The University and the Liberty of its Students — A Fiduciary Theory*, 54 KY. L.J. 643 (1966) (development of fiduciary theory with particular utility for problems at private institutions); Monypenny, *University Purpose, Discipline and Due Process*, 43 N.D.L. REV. 739 (1967); *Symposium — Student Rights and Campus Rules*, 54 CALIF. L. REV. 1-174 (1966). *See also* Dorsen, *Racial Discrimination in "Private" Schools*, 9 WM. & MARY L. REV. 39 (1967). For relatively narrow interpretations of student academic freedom see *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1128-56 (1968).

[2] For example, the Student Council President at Columbia University recently pointed out that the university president was "inaccessible to student leaders" and had ignored for ten months a report "recommending a greater role for faculty members and students in Columbia's disciplinary machinery." N.Y. Times, May 13, 1968, at 47, col. 1 (city ed.).

Accounts of student protests in more or less authoritarian nations are common. In early April 1968, Brazilian students began demonstrations against inadequate educational facilities and poor cafeteria food. Police moved in with tanks and heavy armor and several students were killed.[3] Students in Lisbon, demonstrating against the United States and its involvement in Vietnam, were met with nightsticks and billy clubs reminiscent of Birmingham.[4] In Poland, repression at all levels was the government's response to students and faculty members seeking educational reform. When students at Warsaw University protested against censorship and cultural controls, many were expelled or were drafted into military service.[5] The fathers of some of the students were removed from government positions.[6] The Polish government is considering compulsory military training and required courses in Marxism-Leninism as a remedy for the unrest.[7] Reports of similar events in East Germany, Greece, Czechoslovakia, France, Indonesia, Japan, and Italy can be found in the international press.

In the United States, widespread student unrest stems from increased American support of the military government in South Vietnam. Typical student objections are that the military effort perpetuates a totalitarian regime which is unresponsive to the needs of the Vietnamese people, and that the war effort detracts from needed social reform within our own country. After students became fairly active in opposing the war, it is not surprising that their reform efforts began to concentrate on glaring deficiencies within their own university or college communities. A brief consideration of several student complaints is instructive.

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[3] Washington Post, Apr. 3, 1968, at A3, col. 6.

[4] *Id.*, Apr. 5, 1968, at B7, col. 5. Demonstrations in nearby Spain led to the closing of Madrid University in late March. Students objected to United States military bases in Spain and the war in Vietnam. N.Y. Times, Mar. 29, 1968, at 7, col. 1 (city ed.).

[5] *See* N.Y. Times, Mar. 29, 1968, at 4, col. 4 (city ed.); *id.*, Mar. 31, 1968, at 1, col. 7. In numerous instances within the United States, students have been forced into military service because they participated in demonstrations to protest the war in Vietnam. *See* Wolff v. Selective Serv. Local Bd. 16, 372 F.2d 817 (2d Cir. 1967) (local draft board cannot induct student demonstrators who had allegedly interfered with induction processes while protesting the war in Vietnam). The identical issue is presently before the Supreme Court. Oestereich v. Selective Serv. Local Bd. 11, 390 F.2d 100 (10th Cir.), *cert. granted*, 391 U.S. 912 (1968).

[6] N.Y. Times, Mar. 13, 1968, at 1, col. 2 (city ed.).

[7] *Id.*, Apr. 27, 1968, at 3, col. 5 (city ed.). Compulsory military training in tax supported colleges within the United States was upheld in Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934). Although *Hamilton* has never been overruled, the decision has been seriously questioned. *See* School Dist. of Abington v. Schempp, 374 U.S. 203, 251 (1963) (Brennan, J., concurring). Compulsory ROTC, however, is a continuing source of discontent for students and was one of the causes of student demonstrations at Tuskegee Institute this spring. N.Y. Times, Apr. 8, 1968, at 30, col. 7 (city ed.).

Student demonstrations in the United States have generally been preceded by efforts to effect change through negotiation. Topheavy college bureaucracies react with notorious lack of speed, however, and students are all too frequently ignored in the hope that their complaints will evaporate. But students are continuing to press for change, and it is unlikely that they will diminish their pressure.[8]

A particularly strong student grievance is that contemporary higher education is almost wholly irrelevant to the social, political, and economic issues which the students will face as citizens and voters.[9] A relevant education would presumably give more course emphasis to race relations, urban problems, employment problems, welfare issues, and contemporary foreign policy.

A second student grievance is that colleges impose too many unduly restrictive rules which are not pertinent to a student's education. These include rules requiring ROTC training,[10] restricting campus speakers,[11] regulating student organizations,[12] and impinging upon student privacy in dormitories or off-campus residences.[13] Since

[8] The literature of student involvement is also increasing. In particular, see STUDENT POLITICS (S. Lipset ed. 1967), and *Symposium — Students and Politics*, J. AM. ACAD. ARTS & SCI. (Winter 1968), for comprehensive coverage of student "activism" both in the United States and abroad.

[9] This is a grievance of students who see modern education as little more than a sorting process for entrance into the technological, commercial, dehumanized society which they reject. These students urge educational reform as a step toward overall societal changes. *See, e.g.*, Rossman, *The Movement and Educational Reform*, 36 AM. SCHOLAR 594 (1967). Some student objections are discussed elsewhere in a parallel context. *See* Henry, *Education for Stupidity*, 10 N.Y. REVIEW OF BOOKS No. 9, at 20 (May 9, 1968). Space limitations in this Comment preclude a detailed analysis of this important topic.

[10] *See* note 7 *supra*.

[11] *See* Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968) (North Carolina speaker-ban statute and regulations held unconstitutionally vague; the State did not appeal); Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963); and Pollitt, *Campus Censorship: Statute Barring Speakers from State Educational Institutions*, 42 N.C.L. REV. 179 (1963), discuss the constitutional issues raised by speaker-ban statutes and practices. *Compare* 42 TUL. L. REV. 394 (1968), *with* Comment, *Mississippi's Campus Speaker Ban: Constitutional Considerations and the Academic Freedom of Students*, 38 MISS. L.J. 488 (1967).

[12] For example, 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. These practices are patently invalid under prior restraint decisions. *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); *cf.* Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967). *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

[13] *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968), holding that college administrators could search dormitories without prior authorization from an independent officer or magistrate and with less than the fourth amendment's requirement of probable cause. *See also* Englehart v. Serena, 300 S.W. 268 (Mo. 1927); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967).

students view campus rules from the "consumer perspective," they cannot fail to notice that they are subjected to the condescending dehumanization of being cared for on the assumption that they cannot care for themselves. At the same time, students see they would not be so regulated had they failed to meet college entrance requirements![14]

A third major focus of student discontent is that universities seldom provide outlets for student opinion in making rules, disciplining students, or determining policies which affect students. Administrators are rarely active in educational reform. Consequently, students and some members of the faculty are frequently the only members of the academic community conversant with new trends and experimental activity. Yet, these individuals are least likely to have a voice in charting the institution's future course.

Today's campus resident, who must ultimately spend the major portion of his later life in the 1980's and 1990's, understandably prefers that his institution and teachers frame their policies with a view toward the future, rather than the past or present. But universities have a vested interest in avoiding the wrath of conservative alumni and, where the institution is public, the legislators. Administrators, moreover, are not greatly affected by failure to make needed reforms. Inertia avoids effort, satisfies alumni, and promotes an illusion of security. It can lead to criticism from students and faculty, but these individuals are precisely those with the least authority and are, therefore, the most easily ignored. Consequently, it is only the rare progressive institution that grants students a fair share of decision-making.

II. Use of the Legal Process to Protect Student Expression and Organization

The proliferation of student litigation, demonstrations, seizures, and expulsions points out the need to analyze the framework of free expression within which the student complaints are being aired. To the student, it is important to know the probable limits of protection afforded him by the first amendment so that he may fully exercise

[14] For example, a nonstudent could presumably engage in peaceful picketing along a college campus street without fear of reprisal from police or college authorities. *See, e.g.*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Marsh v. Alabama, 326 U.S. 501 (1946). At least one institution, however, does flatly prohibit "use of the campus area for picketing" by "any person not a member of the University community . . . ." Policy on Picketing and Assembly: University of Alabama (spring 1968).

his rights of expression and assembly.[15] It is equally important to the continued well-being of the university that administrators be fully cognizant of their legal responsibilities to permit free expression so that embarrassing litigation will be avoided.

Although resident-administration conflicts over expression are ancient, the entrance of the judiciary into this area is relatively recent.[16] This Comment will be limited to a brief analysis of the most recent litigation and to a projection of future issues.[17] The context, of course, is that of regulation of student and speaker activity at tax-supported institutions.[18]

A. *Student Petitions and Assemblies*

1. The Student Petition

A common method of presenting student grievances is by petition, letter, or pamphlet, listing particular issues and requesting specific

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[15] The full range of procedural due process protections has yet to be extended to students facing possible expulsion from a college or university. It can be strongly argued, however, that expulsion is a substantial penalty more damaging to the student than a short prison term or a large fine. An expelled student may be denied admission to another institution, thereby depriving him of a college degree with its glowing financial future.

Unless advances are made in extending procedural safeguards to students, it is unlikely that their substantive rights will flourish to the degree otherwise possible and desirable in the academic setting. A college or university should be a training ground for democratic fairness and should be the last American institution to flee from the Bill of Rights.

For further discussion of the issues presently being raised in the area of procedural due process see Van Alstyne, *The Student as University Resident,* 45 DENVER L.J. 582 (1968).

[16] Oddly enough, the most recent Supreme Court case involving a student against his institution was Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934), discussed in note 7 *supra.*

[17] At this point, the author must acknowledge that his viewpoints may be colored by having participated as counsel for student litigants in several pending cases. *E.g.,* Counsel for National Student Association as Amicus Curiae in Tinker v. Des Moines Independent Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd mem. by an equally divided court,* 383 F.2d 988 (8th Cir. 1967) (en banc), *cert. granted,* 390 U.S. 942 (1968); Counsel for National Student Association, Alabama Conf. AAUP, Alabama Civil Liberties Union, and U.S. Student Press Association in Alabama State Bd. of Educ. v. Dickey, 394 F.2d 490 (1968), *postponing final decision on appeal from* 273 F. Supp. 613 (M.D. Ala. 1967); Counsel for National Student Association in De Veaux v. Tuskegee Institute, Civil No. 758-E (M.D. Ala., Apr. 25, 1968); Cocounsel for Petitioner in Johnson v. Board of Trustees, Civil No. EC6828 (N.D. Miss., May 28, 1968).

[18] Arguments can be devised to apply first amendment standards to a private college, but a full discussion of this issue is beyond the scope of this Comment. The most recent and pertinent Supreme Court cases are: Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), *rev'g* 379 F.2d 33 (8th Cir. 1967); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Louisiana Financial Assistance Comm'n v. Poindexter, 389 U.S. 571 (1968), *aff'g per curium* 275 F. Supp. 833 (E.D. La. 1967); Evans v. Newton, 382 U.S. 296 (1966); Brown v. Pennsylvania, 392 F.2d 120 (3rd Cir. 1967), *cert. denied,* 391 U.S. 921 (1968). Several cases in the lower courts offer more specific support: *E.g.,* Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964); De Veaux v. Tuskegee Institute, Civil No. 758-E (M.D. Ala., Apr. 25, 1968); *cf.* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962), *vacated in part,* 212 F. Supp. 855 (E.D. La. 1962). *See generally* Dorsen, *supra* note 1; *cf.* analysis in Note, *Uncle Tom's Multi-Cabin Subdivision — Constitutional Restrictions on Racial Discrimination by Developers,* 53 CORNELL L. REV. 314 (1968).

reforms. The first amendment clearly protects, in some way, "the right . . . to petition . . . for a redress of grievances," and there is little justification for contending that a college may legitimately restrict a student's unfettered exercise of this right. Complications arise, however, when students publicize their petitions, carry them into the classroom, color them with false, mistaken, or intrusive innuendoes, or use them to harass or annoy busy men within the university hierarchy. At some point, the institution will allege, the right to petition must yield to the right to carry on institutional business in an orderly manner, and indeed it must.

Such recent Supreme Court cases as *Pickering v. Board of Education,*[19] *St. Amant v. Thompson,*[20] *Time, Inc. v. Hill,*[21] *Garrison v. Louisiana,*[22] *New York Times Co. v. Sullivan,*[23] indicate that a college official could not recover damages from a citizen for derogatory statements made about the official unless made with "actual malice," that is, with knowledge that the statement "was false or with reckless disregard of whether it was false or not."[24] 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 nonstudent. Certainly, the public interest in exposing a false college image or the clay feet of a college official is identical to that in discussing any other issue. Moreover, a student may be in a

[19] 391 U.S. 563 (1968). *Pickering* differs from the subsequently cited cases in that it concerned the dismissal of a public high school teacher for making critical and partially false statements concerning operations of the local board of education. Any critical distinction between statements made by the employees of a public official and nonemployees, however, was solidly rejected by a near-unanimous Court in *Pickering*. Justice Marshall, writing for a majority of eight, said:

> In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Id. at 574 (footnote omitted).

The importance of *Pickering* to the student resident is that it prevents his dismissal when he is also an employee of the institution, provided he is in a lower echelon position, as students normally are. Moreover, *Pickering* must necessarily apply with greater force to members of the school community who are not employees — for example, students.

Two other cases were remanded for reconsideration in light of principles enunciated in *Pickering*: Watts v. Seward School Bd., 421 P.2d 586 (Alas. 1967), *vacated and remanded,* 391 U.S. 592 (1968); and Puentes v. Board of Educ., 18 N.Y.2d 906, 223 N.E.2d 45, 276 N.Y.S.2d 638, *vacated and remanded,* 88 S. Ct. 2271 (1968). *But see* Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968).

[20] 390 U.S. 727 (1968).

[21] 385 U.S. 374 (1967).

[22] 379 U.S. 64 (1964).

[23] 376 U.S. 254 (1964).

[24] *Id.* at 279-80, *quoted in* St. Amant v. Thompson, 390 U.S. 727, 728 (1968).

better position than other citizens to expose the inadequacies within his academic community.[25]

Nonetheless, the few decisions extant concerning student criticism of college officials have accorded the student an incredibly narrow range within which he can criticize.[26] *Steier v. New York State Education Commissioner,*[27] for example, upheld a student's expulsion for writing a series of caustic, critical letters to the college president.[28] Chief Judge Clark's dissent presents a more appropriate view.[29] In *Jones v. Board of Education,*[30] the district court upheld the expulsion of a student whose chief misconduct was to call the college president "Super Tom" and other officials "Uncle Toms." These terms, while not flattering, are no more than sarcastic and certainly are not defamatory. Finally, one of the students readmitted in *De Veaux v. Tuskegee Institute*[31] was later expelled because he called a member of the board of trustees a "honkie." The student would certainly have no remedy at the present stage of Alabama

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[25] A slightly different standard from that of *New York Times Co. v. Sullivan* may be applicable when a student breaches a confidential relationship in exposing a college official.

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

Pickering v. Board of Educ., 391 U.S. 563, 570n.3 (1968). Relationships such as professor-student assistant, college dean-student assistant, judge-law clerk may be of the kind envisioned by the Court.

[26] *But see* Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), which invalidated a college rule prohibiting student newspaper editors from criticizing the state legislature or governor.

[27] 271 F.2d 13 (2d Cir. 1959), *cert. denied,* 361 U.S. 966 (1960).

[28] It should be noted, of course, that *Steier* was decided five years before *New York Times Co. v. Sullivan.*

[29] 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 expulsion, rather than patient response.

271 F.2d at 22. *See also* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967), holding that indecent student petitions (in particular, one four-letter word repeatedly mentioned in the court's opinion) are not to be judged by technical standards of "obscenity" but rather by whether display of the word tends to thwart pursuit of the institution's educational goals. *Goldberg* involved students who certainly offended the court's sense of propriety and that of a large segment of the populous, but it is doubtful whether a student's interest in not being expelled should turn on whether or not he conforms to cultural taboos. Perhaps *Goldberg* is another ill-starred decision which will meet its proper fate on appeal.

[30] 279 F. Supp. 190 (M.D. Tenn. 1968).

[31] Civil No. 758-E (M.D. Ala., Apr. 25, 1968) (temporary restraining order issued requiring that all students who had been expelled be readmitted pending hearings in accordance with procedural due process).

justice, however, 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.[32]

2. The Student Demonstration

A further form of student expression is the peaceful demonstration or picket line, supplemented by the use of handbills, posters, and, occasionally, extemporaneous student orations on the evils of society in general and universities in particular. There can be no question that a university campus is an appropriate setting for student expression in the form of peaceful picketing.[33] Certainly, a university holds a lesser claim to immunity from demonstrations than does a court house,[34] a private shopping center,[35] a company town,[36] or a state capitol building.[37]

Students cannot, of course, claim an unbridled right to picket any time, any place, and in any manner they choose. While narrow limitations may be permissible in many situations, the development of the

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[32] Some clarification of the student's right to express himself on the campus and in the classroom may result from Tinker v. Des Moines Independent Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd mem. by an equally divided court,* 383 F.2d 988 (8th Cir. 1967) (en banc), *cert. granted,* 390 U.S. 942 (1968). *Tinker* involved high school students who were expelled for violating a regulation against wearing black armbands on school premises to mourn the dead in Vietnam. The district court held simply that any "reasonable" school regulation was valid, even if it curtailed student expression.

On appeal to the Supreme Court, the National Student Association, as Amicus Curiae, has briefed the proposition that lower courts are applying unduly narrow standards and has asked for a reaffirmation of the clear and present danger test to certain controversies between a college student and his institution, relying on the authority of West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633, 639 (1943). With one exception — Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967) — the lower federal courts have evaded *Barnette* and applied standards of "reasonableness" or a "balancing test" such as can be read into Dennis v. United States, 341 U.S. 494 (1951), and Königsberg v. State Bar of Cal., 366 U.S. 36 (1961) (Königsberg II).

[33] *See, e.g., Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045 (1968):

> Unlike jails, public universities are perhaps the archetypical example of a public facility dedicated to inquiry and discussion; hence demonstrations over either matters of general social or political concern or specific campus grievances may not be barred completely from the public university . . . .

Id. at 1131.

[34] *Compare* Cox v. Lousiana, 379 U.S. 536 (1965), *with* Cameron v. Johnson, 390 U.S. 611 (1968).

[35] *See* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[36] *See* Marsh v. Alabama, 326 U.S. 501 (1946).

[37] *See* Edwards v. South Carolina, 372 U.S. 229 (1963). *But see* Adderley v. Florida, 385 U.S. 39 (1966), in which a bare majority upheld criminal trespass convictions of students who held a demonstration outside a jail to protest the confinement of one of their fellows. However, a university can hardly claim the necessity for the physical security of penal institutions. Students, unlike prisoners, may "escape" at will.

law regarding student picketing has hardly begun.[38] The *Cameron,*[39] *Cox,*[40] and *Edwards*[41] decisions indicate that narrowly drawn restrictions on demonstrations are valid, provided they protect legitimate and substantial state interests. Thus, these cases would support the inference that a college may completely prohibit picketing at outrageous times and places, *i.e.,* within normally crowded hallways or dormitories (particularly late at night), within administration buildings, or within classrooms when classes are in session. However, there could be no such blanket prohibition on the use of sidewalks or parade grounds. The sole decision specifically directed to the issue of campus demonstrations, *Hammond v. South Carolina State College,*[42] takes this approach. In *Hammond,* students challenged a college regulation requiring advance administration approval of all campus demonstrations. The district court found the regulation to be an invalid prior restraint on first amendment rights because it did not limit its scope to regulating events creating a clear and present danger of riot or disorder.[43]

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.[44] Although the state may outlaw commercial leaflets[45] and commercial solicitations generally,[46] it may not restrict distribution of leaflets carrying messages of political or social significance.[47] 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*[48] will probably apply with even

[38] For a relatively restrictive view of the student's right to demonstrate see *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045, 1130-32 (1968). *See generally,* on demonstrations, Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 SUP. CT. REV. 1; Note, *Regulation of Demonstrations,* 80 HARV. L. REV. 1773 (1967).

[39] Cameron v. Johnson, 390 U.S. 611 (1968).

[40] Cox v. Louisiana, 379 U.S. 536 (1965).

[41] Edwards v. South Carolina, 372 U.S. 229 (1963).

[42] 272 F. Supp. 947 (D.S.C. 1967).

[43] *Id.* at 950. The court in *Hammond* relied principally on Thomas v. Collins, 323 U.S. 516 (1945), and distinguished Adderley v. Florida, 385 U.S. 39 (1966), as involving much greater state interests in security.

[44] *See, e.g.,* Talley v. California, 362 U.S. 60 (1960); Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939).

[45] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[46] Breard v. City of Alexandria, 341 U.S. 622 (1951).

[47] Talley v. California, 362 U.S. 60 (1960).

[48] *Id.*

greater force to protect a student leafleteer corps from charges of littering[49] or annoying.[50]

Audience hostility is a problem unlikely to arise in the comparatively sophisticated setting of campus demonstrations. However, the racist violence by University of Mississippi students during the enrollment of James Meredith, the "liberal" student violence against Alabamian evangelist George Wallace's appearance at Dartmouth College in 1967, and the frequent reports that contemporary student radicals often deny the right of free expression to those who disagree with them indicate that a brief summary of the Supreme Court's position on audience hostility as a possible limitation on free speech is appropriate.

A number of Supreme Court decisions repeatedly state that the right to speak or to demonstrate cannot be curtailed because of the cool reception or angry reaction accorded the speaker. Most recently, in *Brown v. Louisiana,*[51] Mr. Justice Fortas reaffirmed this proposition:

> Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.[52]

Justice Fortas than cited a number of cases indicating the frequency with which the Court has been called upon to reaffirm the point,[53] which, however, has been ignored with disheartening regularity by the lower courts.[54] 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, yet the same officials are rarely outraged by the attempted "theft" of the liberty of expression.

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[49] Although the *possibility* of littering cannot justify a prohibition on handbills, the first amendment presumably does not forbid an ordinance against littering itself. The recent draft card burning cases stand at least for this point. United States v. O'Brien, 391 U.S. 367 (1968).

[50] The charge that the state has an interest in protecting the recipients of the leaflets from annoyance is frequently made and is as frequently rejected on the ground that the state may not broadly determine what forms of speech may or may not annoy its citizens, at least its adult citizens. *See, e.g.,* Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); *cf.* Lamont v. Postmaster General, 381 U.S. 301 (1965). *But cf.* Ginsberg v. New York, 390 U.S. 629 (1968); Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied,* 335 U.S. 886 (1949).

[51] 383 U.S. 131 (1966).

[52] *Id.* at 133n.1.

[53] *See, e.g.,* Cox v. Louisiana, 379 U.S. 536, 551-52 (1965); Wright v. Georgia, 373 U.S. 284, 293 (1963). The Court recently agreed to review another case raising the question of whether a peaceful demonstrator's breach of peace conviction can be based on threat of violence posed by bystanders. Gregory v. City of Chicago, 391 U.S. 964, *granting cert. to* 39 Ill. 2d 47, 233 N.E.2d 422 (1968).

[54] *See, e.g.,* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Tinker v. Des Moines Independent Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

Another issue raised in numerous recent student demonstration cases is the outer limits of the freedom accorded speech mixed with conduct. Not surprisingly, lower courts have upheld the expulsion of students who overran college buildings, took over the chancellor's offices, and smoked his expensive cigars.[55] *Zanders v. Louisiana State Board of Education,*[56] for example, upheld the expulsion of students who seized campus facilities and stayed overnight in the school auditorium. Similarly, *Buttny v. Smiley*[57] upheld the expulsion of students who effectively prevented recruiting by the Central Intelligence Agency on the University of Colorado campus. While these cases are in accord with recent analogous decisions by the Supreme Court,[58] they leave open the possibility of the university imposing sanctions less severe than expulsion.[59] Moreover, 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 cleansed themselves of their own misconduct.

A final problem associated with student expression and conduct is that of civil disobedience. In its narrowest terms, civil disobedience is the intentional violation of valid law. From a judge's standpoint, under this definition, condoning civil disobedience may seem to be an abdication of judicial responsibility. However, a broader definition of the term would encompass the violation of questionable law in order to test its ultimate constitutional validity. Viewed in this light, judges possess the power to formulate legal doctrines which accommodate occasional technical violations of law when substantial justification is apparent, thereby "legalizing" the disobedience.

Although moral justification of civil disobedience is a value judgment elevating the ends over the means, one should not automatically shrink from this conclusion. It must be admitted that there are conceivable situations — *i.e.,* severing the vocal cords of Adolf Hitler or curtailing the brutalities of Stalin — in which the desirability, necessity, and moral justification of certain acts of civil disobedience would evoke very substantial agreement. Of course, acts of student civil disobedience arise in less dramatic settings. Assume, for example, that a college president is a hopeless incompetent who turns

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[55] For the most part, colleges have not expelled students who occupied their buildings. Moreover, few of the recent expulsions have reached the courts.

[56] 281 F. Supp. 747 (W.D. La. 1968).

[57] 281 F. Supp. 280 (D. Colo. 1968).

[58] *See, e.g.,* Cameron v. Johnson, 390 U.S. 611 (1968); Zwicker v. Boll, 391 U.S. 353 (1968) (per curiam).

[59] A college clearly could not expel a nonstudent who occupied its institutional headquarters, but the college could seek monetary damages and injunctive relief against the intruder. Accordingly, when a college is faced with a takeover, it could employ the weapon of injunction rather than the severe penalty of expulsion.

a deaf ear to student and faculty suggestions for improvement of the institution. From a moral standpoint, one cannot say that a student would be unjustified in creating maximum publicity in order to expose the president in hopes of obtaining more valuable leadership and furthering long-range institutional improvement. Even a degree of disobedience that risks expulsion from the institution should not, at least from the student's moral standpoint, be categorically condemned.

These observations are made simply to note what has been and will continue to be the arguments in favor of student demonstrations and sit-ins that exceed the bounds of the first amendment. There is ample moral and philosophical justification for these acts. At many institutions, students have been able to achieve reforms *only* by disobedience — their one, sure-fire method of securing attention and publicizing the misconduct of college officials. The tragedy of this is not that students violate rules and defy college officials, but that too many colleges have become rigid, bureaucratic corporations engaged in dehumanizing students and manufacturing graduates. One cannot place the total blame, or even most of it, on students; it must be shared by the institutions. There is much truth in the commonsense observation that students who are young adults would not take over a college without reason. In examining these reasons, one can find much of substance and value for the future of higher education.

B. *Student Organizations*

Although as yet unlitigated, problems of student political organizations may become critical as colleges attempt to maintain closer surveillance over the activities of student groups.[60] To the student, the organization is a means of magnifying his educational experiences by joining with others to participate in, and *change,* campus life. However, the college sees an active student group as posing a potential threat to its unquestioned campus authority and infallibility. The group may conduct demonstrations; it may criticize the administration; it may invite controversial speakers; and it may imperil legislative appropriations. As a result, the college may choose to establish a variety of regulations, beginning with the requirement that all student organizations obtain institutional charters to be issued only after a complete investigation of projected membership, activities, and financial status. It may also require that the group be sponsored

[60] Problems of student *social* organizations are not within the ambit of this discussion. There have been decisions, however, to the effect that a college may exclude or closely regulate social fraternities to protect the academic environment from the debilitating effects of undue emphasis on social, as opposed to intellectual, activity. *See, e.g.,* Waugh v. Board of Trustees, 237 U.S. 589 (1915); Sigma Chi Fraternity v. Regents, 258 F. Supp. 515 (D. Colo. 1966); Webb v. State Univ. of New York, 125 F. Supp. 910 (N.D.N.Y. 1954).

or advised by a faculty member, and that the group either not invite outside speakers[61] or clear all speakers with the administration, preferably several weeks in advance.[62] This done, the college will be in an excellent position to observe and, to an extent, regulate any student organization which might cause "trouble."

From the constitutional perspective, the possible restraints on student political organizations present a variety of complex and undecided questions. The "freedom of association" cases do not provide an immediate solution,[63] since they would indicate that a student group may be required to prove a likelihood that chartering, membership registration, and faculty sponsorship create a burden on free association which outweighs the institution's general interest in ensuring that organizations contribute to the academic environment. Cases such as *NAACP v. Alabama ex rel. Patterson,*[64] *Bates v. City of Little Rock,*[65] *Shelton v. Tucker,*[66] and *NAACP v. Alabama ex rel. Flowers*[67] provide an uncertain quantum of guidance. While the first *NAACP* decision refused to permit compulsory disclosure of membership lists, the decision was specifically based upon "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."[68] *Bates* involved a city's effort to couple a license tax on organizations with compulsory disclosure of membership. While the Court found "no relevant correlation" between the city's taxing power and its alleged interest in learning of an organization's membership, a university's general interest in regulating the lives of its students may present a more compelling justification for membership disclosure than found in *NAACP* and *Bates.* If students are to withhold their membership lists as a matter of principle, or to avoid suspected misuse, they will have to establish that disclosure has had a "chilling effect" on the organization's growth, or that the institution has occasionally misused the lists. However, a student group might also prevail if it could persuade a court that the institution has insufficient justification for

[61] *See* note 12 *supra.*

[62] The University of Alabama, for example, requires that the administration be petitioned two weeks in advance of any student group meeting at which an outside speaker is scheduled to appear.

[63] For a general discussion of freedom of association see Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1, 2n.4 (1964).

[64] 357 U.S. 449 (1958).

[65] 361 U.S. 516 (1960).

[66] 364 U.S. 479 (1960).

[67] 377 U.S. 288 (1964). Additional pertinent cases are: Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961).

[68] 357 U.S. at 462.

maintaining membership files in light of the obvious *possibilities* of abuse alone.

C. *Student Publications: The Censored Student Press*

Additional outlets of expression for the student resident include campus newspapers, literary journals, and, to a lesser degree, student yearbooks. A student newspaper is a particularly suitable vehicle for discussion of specialized topics of concern to students.

If student newspapers were organized as private corporations operated by voluntary student contributions, there would be few legal difficulties. Presumably, such decisions as *New York Times Co. v. Sullivan,*[69] *Mills v. Alabama,*[70] and, in some cases, *Redrup v. New York*[71] would define the narrow scope of permissible institutional or state regulation. *New York Times Co. v. Sullivan,* for example, recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[72] While these cases delineate the exceedingly narrow scope remaining for government censorship, the context of a student newspaper is different. It rests within a unique category hitherto untouched by litigation, with one pending exception.[73] Student editors at public institutions are, in a sense, state employees engaged in "state action." Administration supervisors and censors are also state employees acting by virtue of state authority. Furthermore, the editor holds a position of "privilege"[74] whereby he receives the "benefit" of using "state property" — the student press. The student paper may also be viewed as a part of an institution's educational mechanisms. It can serve as a training ground in which journalism students present material of educational value to the student body.

A few of the issues in this area have been temporarily resolved by the recent case of *Dickey v. Alabama State Board of Education.*[75] Dickey was the editorial page editor for the student newspaper at

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[69] 376 U.S. 254 (1964).

[70] 384 U.S. 214 (1966).

[71] 386 U.S. 767 (1967). *Compare* Ginsberg v. New York, 390 U.S. 629 (1968).

[72] 376 U.S. at 270.

[73] Alabama State Bd. of Educ. v. Dickey, 394 F.2d 490 (5th Cir. 1968), *postponing decision on appeal from* 273 F. Supp. 613 (M.D. Ala. 1967). The Fifth Circuit decision postpones final determination of the controversy until Dickey has returned to Troy State University from which he had been expelled for misconduct as student editor. The Court suggested that the case might otherwise be moot, since Dickey is currently a student at Auburn University.

[74] For an excellent discussion of the "right-privilege" problem in constitutional law see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968). *See also* French, *Unconstitutional Conditions: An Analysis,* 50 GEO. L.J. 234 (1961). The most pertinent recent cases include: Pickering v. Board of Educ., 391 U.S. 563 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Sherbert v. Verner, 374 U.S. 398 (1963).

[75] 273 F. Supp. 613 (M.D. Ala. 1967).

Troy State University in Alabama. As such, he was subject to a college rule "that there could be no editorials written in the school paper which were critical of the Governor of the State of Alabama or the Alabama Legislature. The rule did not prohibit editorials or articles of a laudatory nature . . . ."[76] In the spring of 1967, Dickey proposed to write an editorial in his normal slot which implied that various state legislators held an unduly narrow view of the concept of academic feedom.[77] Dickey's faculty advisor invoked the rule and ordered Dickey to print a substitute article on another topic of major student concern, "Raising Dogs in North Carolina."[78] Dickey refused and printed instead a blank column headlined with the original article's title and crossed with the word "CENSORED." After a fair hearing, the college expelled Dickey for refusing to obey the advisor's order to print the material on "Dogs." Dickey then obtained an order from the federal district court reinstating him, although he ultimately decided to enroll in another institution. In sum, the district court held Dickey's expulsion invalid because it was made pursuant to an unreasonable rule which bore no relation to maintaining order and discipline on the campus.[79] The court also held that the college could not establish a student newspaper and then subject it to arbitrary censorship backed with threats of expulsion, although the court did suggest that Dickey could have been removed as editor.

Ample precedent lends support to several aspects of the *Dickey* opinion. The academic freedom cases suggest a prohibition of college practices which inhibit or prevent free inquiry.[80] *Barnette,* the flag salute decision,[81] suggests a broad first amendment principle against the imposition by state officials of political orthodoxy, and several Fifth Circuit student disciplinary cases hold that school officials "cannot infringe on their students' free and unrestricted expression . . . where the exercise of such rights . . . does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[82] 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 evi-

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[76] 273 F. Supp. at 616.

[77] The college conceded that Dickey's proposed article was "well-written and in good taste." 273 F. Supp. at 617. A copy of the article is printed in 273 F. Supp. at 617n.3.

[78] 273 F. Supp. at 616.

[79] 273 F. Supp. at 618.

[80] *See, e.g.,* Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[81] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[82] Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). *See, e.g.,* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966).

dence 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*: "[F]reedom 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 the right to differ as to things that touch the heart of the existing order."[83]

Finally, the fact that Dickey used the school newspaper as his vehicle of expression presents no conclusive argument against his right to express himself. Significantly, it was he, not the faculty advisor, who in reality controlled the editorial page, though subject to the noncriticism rule. Dickey's argument, then, was that of unconstitutional conditions, that the college could not qualify his status as editor with the condition that he either praise the state government or not discuss it at all. His argument is supported by cases holding that the government cannot condition public employment in a way which indirectly curtails first amendment freedoms,[84] and that the use of such public facilities as auditoriums and lecture halls cannot be reserved only for persons with acceptable beliefs.[85] These conclusions speak to both issues raised by Dickey: first, that expulsion is unquestionably beyond the college's power; and second, that the college cannot remove the student as editor under these circumstances.

Further resolution of the *Dickey* case must await action at the appellate level, but even that determination will undoubtedly leave unsolved perplexing problems: (1) Do minority students, who are compelled to pay an activity fee which partially supports the student press, have a claim to substantially equal space for their viewpoints in editorial or letters-to-the-editor columns?[86] (2) Can a student

[83] 319 U.S. at 642.

[84] *See* Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); *cf.* Spevack v. Klein, 385 U.S. 511 (1967).

[85] *See* Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); East Meadow Community Concerts Ass'n v. Board of Educ., 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966), *reaff'd after remand*, 19 N.Y.2d 605, 224 N.E.2d 888, 278 N.Y.S.2d 393 (1967) (per curiam); Egan v. Moore, 20 App. Div. 2d 150, 245 N.Y.S.2d 622 (1963), *aff'd mem.*, 14 N.Y.2d 775, 199 N.E.2d 842, 250 N.Y.S.2d 809 (1964).

[86] *See* the provocative analysis in Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). *See also* Avins v. Rutgers, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

editor impose a regime of censorship over the paper? (3) When can a student editorial board remove an editor? (4) Does the standard of *New York Times Co.* or some lesser standard apply to misreporting by student editors? (5) What principles apply when student newspapers venture into the use of profanity? (6) Can the college in any way limit the field of a paper's inquiry? (7) Can minority students, as in labor cases, claim a partial refund of student fees when the paper advocates principles which the minority deplores?

D. *Speakers and Speaker Bans*

The problems associated with campus speaker bans and subtle prior restraints on speakers are numerous and complex.[87] Constitutional issues might arise if a university should choose to bar all outside speakers, specific individuals, or specific classes of individuals. Requiring that campus sponsors of a proposed speaker furnish the institution advance notice of the speaker's appearance or supply the college with a copy of his proposed remarks, prior remarks, or even a history of his activities over the last 10 years could also raise constitutional questions.[88] However, most institutions need not necessarily feel restricted, since appellate-level court decisions outlawing the various types of speaker regulations are few outside of New York[89] and California.[90] Yet, it is in the South and Midwest where speaker bans are most likely to flourish.[91]

From the viewpoint of the student resident who seeks to expand his horizons, speaker issues are critical. Individuals with expertise in the multitude of national issues cannot be kept in ready supply on

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[87] *See* authorities cited note 11 *supra.*

[88] For Supreme Court guidelines in this area of prior restraint, see authorities cited note 12 *supra.*

[89] *See* East Meadow Community Concerts Ass'n v. Board of Educ., 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966); Egan v. Moore, 20 App. Div. 2d 150, 245 N.Y.S.2d 622 (1963); Ellis v. Allen, 4 App. Div. 2d 343, 165 N.Y.S.2d 624 (1957); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962); *cf.* Wolin v. Port of New York Authority, 268 F. Supp. 855 (S.D.N.Y. 1967), *modified and aff'd,* 392 F.2d 83 (2d Cir. 1968); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967).

[90] The California cases emerged from a controversy of several years duration between the ACLU and various southern California boards of education. *See* ACLU v. Board of Educ., 59 Cal. 2d 224, 379 P.2d 16, 28 Cal. Rptr. 712 (1963) (en banc); ACLU v. Board of Educ., 59 Cal. 2d 203, 379 P.2d 4, 28 Cal. Rptr. 700, *cert. denied,* 375 U.S. 823 (1963); ACLU v Board of Educ., 55 Cal. 2d 167, 359 P.2d 45, 10 Cal. Rptr. 647 (1961); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); *cf.* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (en banc).

[91] There has been almost no speaker ban litigation in the Fifth Circuit. *But cf.* ACLU v. Houston Independent School Dist., Civil No. 25151 (5th Cir., Mar. 8, 1968), vacating an unreported decision from the southern district of Texas in light of James v. Gilmore, 374 F. Supp. 75 (N.D. Tex. 1967), *aff'd per curiam,* 389 U.S. 572 (1968). No reported cases can be found from midwestern circuits. Only one Fourth Circuit case can be found. *See* Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968) (not appealed).

each college campus. 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 spoke on hundreds of campuses, although they were excluded from several.[92]

It has been suggested that a college may "conceivably justify a uniform prohibition on the use of campus facilities by outside speakers as necessary to prevent the diversion of students' time and to preserve an intellectual atmosphere."[93] This is not persuasive. A blanket prohibition of outside speakers contracts the spectrum of knowledge available to students,[94] discriminates against political and intellectual figures from outside the campus,[95] and is an indefensibly sweeping means of regulating student time.[96] In any event, most colleges bring hundreds of speakers to their students each year, and there is almost no possibility that any institution would undertake to promulgate such a prohibition.

More difficult questions are presented by the exclusion of selected groups of speakers or those with special characteristics. The North Carolina speaker-ban law and regulations promulgated under its authority sought to exclude known members of the Communist Party, persons known to advocate violent overthrow of the federal or state government, and persons who had pleaded the fifth amendment before state or federal legislative committees investigating communist or subversive activities. A three-judge federal court found the regulations unconstitutionally vague,[97] relying in part on the loyalty oath cases[98] and other decisions emphasizing the requirement of statutory precision.[99] However, the court gave no indication concerning the content of regulations which would not be unduly vague.

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[92] A University of Alabama student group, after lengthy negotiations with the university administration, rescinded an invitation extended to Coffin to speak at its Emphasis '68 program. Dick Gregory was also excluded from the University of Alabama campus in the spring of 1968. A student organization invited Gregory and obtained a meeting place, but gave only one week's advance notice to the university when two were required.

[93] *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045, 1133 (1968).

[94] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

[95] *Cf.* Niemotko v. Maryland, 340 U.S. 268 (1951).

[96] *See, e.g.,* Elfbrandt v. Russell, 384 U.S. 11, 18 (1966): "[L]egitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965): "[I]n the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose."

[97] Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968) (not appealed).

[98] *E.g.,* Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964). The district court voided the provision against speakers who had invoked the privilege against self-incrimination, relying on Spevack v. Klein, 385 U.S. 511 (1967).

[99] *E.g.,* NAACP v. Button, 371 U.S. 415 (1963); Smith v. California, 361 U.S. 147 (1959).

Litigation in the California system followed a parallel trend with the California Supreme Court ultimately holding that a school could withhold the use of its auditorium from any organization refusing to guarantee in writing that they would not use the auditorium for commission of any crime or act prohibited by law.[100] New York cases have generally involved the exclusion of specific individuals rather than the requirement of an oath, and have uniformly held that public facilities made available for public gatherings cannot be closed in a discriminatory fashion.[101]

Neither the New York nor California cases suggest guidelines for the solution of such future problems as those presented by speakers with past histories of violence[102] or the variety of narrow but bothersome regulations which could be dreamed up by college bureaucrats in moments of vision. These issues will inevitably be placed before judicial tribunals, and their resolution will have more than a fanciful impact upon the quality of education received by the student as resident.

III. THE ROLE OF EDUCATORS AND THE LEGAL PROFESSION IN PROMOTING FREE INQUIRY ON THE COLLEGE CAMPUS

An appropriate conclusion for this Comment would be some statement of projected activity for educators, attorneys, and organizations concerning what steps can be taken to promote free expression on the campus. Such a statement, of course, will be decried by groups or individuals who fear either that students already have too much freedom or that they would somehow abuse further liberty, using it to disrupt "law and order" on the campus. My own experience, at least in the Deep South, has been that students have too little freedom and are seldom, if ever, encouraged to participate in movements to improve society. In Alabama, where the plagues 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. Students are actively discouraged from inviting speakers who might criticize the "Southern way of life." Few courses are offered and none required on topics of race relations, poverty, or improvement of state government. Institutions shuddered at the thought of lowering the American flag following the death of Dr. Martin Luther King, and no classes were suspended on that day of mourning.

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[100] ACLU v. Board of Educ., 59 Cal. 2d 203, 379 P.2d 4, 28 Cal. Rptr. 700, *cert. denied*, 375 U.S. 823 (1963). For additional California cases see note 90 *supra*.

[101] *See* cases cited note 89 *supra*.

[102] *Cf.* Terminiello v. Chicago, 337 U.S. 1 (1949).

Within this region, and to a lesser degree throughout the United States,[103] there is considerable room and rationale for encouraging increased free inquiry by students. Educators can update curricula to emphasize major issues of present and future national significance — contemporary foreign policy, poverty problems, race relations, public television, medicaid, problems of local governments, and many others. Perhaps even courses on the problems of political and academic freedom, with particular reference to concrete issues faced by the student on his own campus, might be instituted.[104] These courses could be supplemented by student field work to provide firsthand knowledge of problems which most students do not know exist. Most of all, educators can promote free inquiry by practicing it themselves. This is particularly critical for the administrator who may be subjected to pressure to curtail student activity, cancel speaker invitations, or harass vocal students and faculty members.

The legal profession, through individual and organizational activity, can also encourage free inquiry on the campus. Attorneys can provide administrators and students with free legal advice on civil liberties issues and suggestions for the establishment of fair disciplinary procedures for campus tribunals. The problem of the unpopular client is frequently the problem of the student client against the might and legal staff of a respected institution of higher learning. Attorneys can ensure that the rights of students are not sacrificed to administrative convenience while simultaneously advising students on ways to seek *peaceful* solutions to campus problems. Students and faculty members can also ally themselves with such national organizations as the American Civil Liberties Union and the American Association of University Professors, groups which are experienced in defending the rights associated with academic freedom and in instituting on-campus public education programs pertaining to student rights and responsibilities. Finally, students at large institutions could assess a small fee from each student, using this sum to retain a full-time civil liberties attorney to personally ensure that ignorance of the law will not thwart student expression.

The above are but a few of the ways in which free inquiry on the campus can be made more meaningful. Students today are continually and justifiably demanding that they be accorded greater freedom. However, only future developments can reveal the extent

[103] The most comprehensive study of student expression reveals that public and private institutions throughout the country almost universally indulge in some degree of questionable practices. *See* E. WILLIAMSON & J. COWAN, THE AMERICAN STUDENT'S FREEDOM OF EXPRESSION 150-70 (1966). The tradition of tolerance toward minorities and minority beliefs, however, has always been weakest in the South. *See* C. EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH (1964).

[104] For a similar suggestion by a Supreme Court Associate Justice see Brennan, *Education and the Bill of Rights*, 113 U. PA. L. REV. 219 (1964).

to which student freedom will become a greater reality and, more importantly, the degree to which this freedom can be used to advance the goals of the theoretical free society.