THE CONSTITUTIONAL RIGHTS AND RESPONSIBILITIES OF STUDENTS AND ACADEMIC PERSONNEL IN PUBLIC COMMUNITY COLLEGES, AS DETERMINED BY FEDERAL AND STATE COURT DECISIONS

by

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NATURE AND SCOPE OF THE STUDY

Introduction

Community colleges, their faculties, and their students have increased dramatically in numbers over the past fifteen years. The 1970 Carnegie Commission report on community colleges commented on the significance of this growth by stating: ". . . the Community College has proved its great worth to American society."[1]

This great worth to American society is demonstrated in California, where 88 percent of all college students have attended a community college. Community colleges seem to be the wave of the future, offering programs such as adult or continuing education which appeal to a broader spectrum of society than do regular university programs.

The growing complexity of the community college is not, however, without its pains. The diverse populations served by community colleges today have resulted in increased divergence of interests, life styles, and goals on community college campuses. This in turn has lent itself to conflicts

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[1] Carnegie Commission on Higher Education, The Open-Door Colleges: Policies for Community Colleges (New York: McGraw-Hill, 1970), p. 1.

which seem resolvable only through litigation.

Educational institutions have dramatically increased their dependence on judicial settlements since 1948. The United States Supreme Court has handed down more than 25 cases on educational controversies since that time. Yet, in the 176 years of Supreme Court existence before 1948, it handed down only 25 cases that concerned educational issues. Community colleges have not been immune to this increase in litigation. Student rights and academic personnel rights have been the areas most frequently disputed at all educational levels.

This study will analyze disputes relating to constitutional rights and responsibilities of community college students and academic personnel that have been litigated in federal and state courts. Such analysis will be of interest to researchers of school law and of practical concern to those actually on community college campuses.

Historical Review

The first viable public junior college was established in 1901 in Joliet, Illinois. Since that time, public junior colleges have steadily expanded their numbers and their enrollments. By 1959 there were 390 public junior colleges, with an enrollment of 551,760 students.[2]

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[2]Leslie Koltai and Alice S. Thurston, American Junior Colleges, 8th ed., edited by Edmund J. Gleazar, Jr. (Washington, D.C.: American Council on Education, 1971), pp. 3-10.

Sixteen years later, this number had increased to over 1,000 community/junior colleges, and the enrollment had increased to 3.8 million students.

Early community colleges were established as extensions of the public school system. This was the result of a philosophical struggle in higher education as to the essential purpose of the university. One school of thought believed that universities should devote themselves to professional training and graduate research. It wanted to consign the first two years of a university curriculum to expanded programs in local high schools; to become, therefore, grades 13 and 14. This system approximated the German gymnasia as only the most promising students would then transfer to the universities.

This elitist view of education, imported from Germany, was rejected, eventually, by American educators and society. This rejection was supported by the establishment of land grant colleges in the latter half of the nineteenth century.[3] Land grant colleges made the first significant steps to develop programs of study to serve the needs of middle and working class people. The philosophy of land grant colleges led to the expansion of vocational programs at the high school level for middle and working class people. The comprehensive high school was developed to provide these

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[3]Frederick Rudolph, The American College and University, Vintage Books, New York, 1962.

programs as well as to continue to provide an academic curriculum. Soon, educational opportunities for all beyond the high school became a demand, and the public junior college, or community college, became the answer. The supporters of public junior colleges believed in low cost, open admissions, and today, easy commuting distance for its clientele.

As first conceived, public junior colleges were to be academically oriented with the same standards as the universities. Society's needs and interests changed this concept and community colleges now offer both academic and vocational programs. Most community colleges have curriculums designed to offer students numerous options in choosing a program of study. Many students elect a program of study that blends academic and vocational courses into a curriculum that meets their needs and the demands of a literate, industrialized society. Individual goals and society's needs have contributed to the transformation of public junior colleges from academic institutions into complex, multipurpose institutions.

Local control of public junior colleges has been eroded since 1960 because of financial strains, increasing educational demands, the awareness for the need for state-wide program coordination and control, and population mobility. New state-wide organizations, such as the State University and Community College System of Tennessee, have

been established to articulate and to guide these needs.

As seen from this brief overview of the history of public junior colleges, or community colleges, in the United States, much room for confusion as to their place in education exists. For example, are community college faculty public school system teachers, or are they more on the level of a university professor? Are community college students to be governed as strictly as high school students in regard to personal behavior, or should they be allowed the freedoms of university students? In the past few years many court cases have been addressed, at least partially, to these questions. This study will attempt to find some order in these court decisions and possible answers to the confusion.

Statement of the Problem

The problem under consideration in this study was to review and summarize the impact of certain significant federal and state court decisions on the constitutional rights and responsibilities of public community college students and academic personnel.

The objectives of this study were (1) to determine which federal and state court decisions significantly pertain to the constitutional rights and responsibilities of public community college students and academic personnel; (2) to analyse these federal and state court decisions in order to ascertain the legal principles upon which the court decisions were based; (3) to determine how these selected

federal and state court decisions affect the constitutional rights and responsibilities of public community college students and academic personnel; and (4) to attempt to utilize the above analysis to form some basic recommendations for public community college students and academic personnel regarding their constitutional rights and responsibilities.

Significance of the Study

A preliminary review of the available literature and a computer search of Educational Resources Information Center (ERIC), preparatory to this study, revealed no current comprehensive research conducted on the constitutional rights and responsibilities of public community college students and academic personnel as determined by federal and state court decisions. With the burgeoning populations (both academic personnel and students) at community colleges around the country, it would seem that some sort of ordering of the federal and state court decisions pertaining to public community college students and academic personnel would be urgently needed.

Public community colleges are, by and large, no longer grades 13 and 14 of the local school system. Community colleges today generally offer varied programs to diverse populations ranging in age from the teenager to the senior citizen, and in interest from serious academic or technical student to dilettante. This diversity of back-

grounds and interests increases the possibility of disagreements and therefore of litigation. The contracting job market makes contract negotiations for academic personnel a much more sensitive area, inclined now more to litigation than to default to solve deadlocks.

The findings and conclusions of this study may have value to current and future public community students, faculty, and administrators by presenting legal and practical guidelines about federal and state court decisions which relate to their constitutional rights and responsibilities. These guidelines will be presented in chapter 5.

Research Method to be Used: Sources

The primary research method used in this study was an analysis of the law through the legal case method. Legal bibliography and research differ from other bibliographic and research methods. Legal research and analysis are based on previously decided cases and previously enacted statutes. To cope with the enormous body of law already established (nearly three million cases) a system of case digests has been developed. The West Publishing Company has the most comprehensive digest system for case law, and in many areas of the country their digests are accepted as the official court digest. The importance of the digest system to legal researcher and to legal practitioner is explained as follows:

> A digest to judicial decisions superimposes a subject classification upon chronologically published cases. The classification consists of an alphabetically

> arranged scheme of legal topics and subtopics which can be approached through a detailed index. Brief abstracts of the points of law in decided cases are classified by subject and set out in the digests under appropriate topical headings. They are then located and retrieved by the researcher through the index to the digest.[4]

A search was made of West American Digest System from the Fifth Decennial Digest through the current General Digest, Fourth Series. American Digest System is a digest of all reported American cases from 1658 to the present. Every case published in National Reporter System is briefed for significant points of law and classified in American Digest System under the appropriate legal topic. Thus, a researcher is able to brief the case in the American Digest System and through cross reference read the case in National Reporter System. These two digests contain virtually all appellate decisions handed down in the United States. Shepard's Citations was also consulted for appropriate cases.

The legal encyclopedias, Corpus Juris Secundum and American Jurisprudence, supplied many case citations. American Law Reports, Annotated, a digest based on 500 carefully chosen state and lower federal court decisions, which editorially discusses each case, supplied additional leads. The Index to Legal Periodicals, the Index to Periodical Articles Related to Law, and ERIC furnished other valuable leads. Looseleaf services such as the College Law Digest and the

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[4]Stanley V. Kinyon, Introduction to Law Study and Law Examinations in a Nutshell, (St. Paul, Minn.: West Publishing Co., 1971), p. 42.

College Student and the Courts were invaluable for current information regarding court cases of interest to this study. The major source of information, however, was the written records of the cases cited from the pages of the National Reporter System and/or the appropriate State Reports. Various law journals were consulted for appropriate articles.

Invaluable assistance was accorded this researcher through the reading of Kinyon's Introduction to Law Study and Law Examinations in a Nutshell, a succinct yet excellent explanation of the labyrinth of legal research.

Judicial System Explanation

The following explanation of the federal judicial system of the United States is based primarily on the work, The School in the Legal Structure, by Edward C. Bolmeier, one of the deans of school law research. Dr. Bolmeier quite accurately points out that in the past few decades more attention has been centered on the federal judiciary in regard to educational issues than on either the executive or legislative branches. The issues and the intensity of the spotlight on the federal courts have caused controversy across the nation, yet few educators understand the federal court system and why the federal courts have the responsibility to adjudicate certain education issues.

A constitutional provision established the legal basis for the federal judiciary by stating that the "judicial power of the United States shall be vested in one Supreme

Court and in such inferior courts as the Congress may from time to time ordain and establish." (Article III, Section 1.)

Dr. Bolmeier explains the current system structure of the federal judiciary:

> Immediately below the Supreme Court in authority are the courts of appeal (circuit courts). The United States is divided into 10 judicial circuits, plus the District of Columbia as an additional circuit. In each of these circuits is a United States court of appeals. Each of the states is assigned to one of the circuits. The purpose of the courts is to relieve the Supreme Court of considering all appeals in cases originally decided by the federal trial courts. They are empowered to review all final decisions of district courts, except in very rare instances in which the law provides for the direct review by the Supreme Court. Next in line of authority immediately below the appellate courts are the United States district courts. These courts are the trial courts with general federal jurisdiction. Each state has at least one district court, while some of the larger states have as many as four. Altogether there are 88 district courts serving the 50 states and the District of Columbia.[5]

As mentioned above, the district courts of the United States may completely by-pass the appellate courts in several instances in which education issues may be raised: (1) when a federal three-judge court issues an injunction restraining the enforcement, operation, or execution of (a) a state statute or order of a state administrative agency on the ground of unconstitutionality;[6]

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[5]Edward C. Bolmeier, The School in the Legal Structure, 2nd Edition, (Cincinnati: The W.H. Anderson Co., 1973), pp. 54-55.

[6]28 U.S.C.A., Sections 1253, 2281.

and/or (b) a United States statute on the ground of unconstitutionality;[7] (2) when a federal district court holds that a United States law is unconstitutional in a civil action to which the United States, its agency, officer, or employee, is a party;[8] and (3) when the highest court of a state makes a final decision in which said decision could draw in question the validity of a United States Statute, or the United States Constitution or laws; or where any title, right, privilege, or immunity is specially set up or claimed under the Federal Constitution, or statute of, or commission held or authority exercised under, the United States Code Annotated, Volume 28, Section 1257.[9]

Two methods are used by the federal court system to decide what cases merit legal review by the Supreme Court: (1) the writ of certiorari and (2) the appeal.

> The writ of certiorari is an order issued by a higher tribunal to an inferior body ordering it to certify up to it the record in a case before the inferior court. Certiorari is obtained in the case of the United States Supreme Court upon petition to the Court by the parties. Appeal is the second method of obtaining review by the Supreme Court of a lower court case. This is handled by a party filing a jurisdictional statement which sets forth the reasons why the case qualifies for Supreme Court review and why it has sufficient merit to warrant further hearings by the Supreme Court.[10]

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[7] 28 U.S.C.A., Sections 1253, 2282.

[8] 28 U.S.C.A., Section 1252.

[9] From a West Publishing Co. wall diagram, The Courts.

[10] Bolmeier, ibid., p. 56.

Almost all cases coming to review before the Supreme Court are scrutinized on their merits under the legal analysis of writ of certiorari or appeal.

In the earlier years of our republic, educational policy had a smaller audience and clientele and did not often clash with provisions of the Federal Constitution (although it did frequently conflict). An expanded interest in education and increased sensitivity for the expansion of constitutional rights to all segments of our society, have contributed to a tremendous boost in litigation over the past thirty years in education.

Every citizen of the United States has been connected, is now connected, or will be connected with the educational system of the United States. Because of the increase in litigation it is to the system's and to society's advantage that at least a minimal understanding of the relationship between the federal judiciary and the educational system be maintained.

Definition of Terms

For the purpose of this study certain words and terms require definition for the understanding of their implications. These words and terms are as follows:

1. A community college is a publicly owned and operated coeducational, generally open-admissions college, that usually offers both the first two years of a four-year university program, and technical "certificate" programs.

American Law Reports states that junior colleges (a term interchangeable with community colleges) are not "common schools"

> . . . within the meaning of a constitutional provision that no sum shall be raised or collected for education other than in common schools without submission of the proposition to the legal voters.[11]

Thus, community colleges are not part of the community's elementary and secondary school systems.

2. A constitutional right is a right guaranteed to a person by the Constitution of the United States or a state constitution and so guaranteed as to prevent legislative interference with that right.[12]

3. The term defendant is applied to the party put upon a defense or summoned to answer a charge or complaint.[13]

4. A defense is that which is offered and alleged by the party proceeded against in an action or suit as a reason in law or fact why the plaintiff should not recover or establish what he seeks. It may also refer to what is put forward to diminish plaintiff's cause of action or defeat recovery.[14]

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[11] American Law Reports, 113 ALR 717 (IV, a.).

[12] James A. Ballentine, ed. by Wm. S. Anderson, Ballentine's Law Dictionary, 3rd Edition (Rochester, New York; The Lawyers Cooperative Publishing Co., Bancroft-Whitney Co., San Francisco, California, 1969), p. 254.

[13] Henry Campbell Black, Black's Law Dictionary, 4th Edition, by the Publisher's Editorial Staff, (St. Paul, Minn.: West Publishing Co.), 1951, p. 507.

[14] Black, ibid., pp. 507-508.

5. An injunction is a judicial process operating in personam and requiring the person to whom it is directed to do or refrain from doing a particular thing.[15]

6. In personam is an act or proceeding being done or directed against or with reference to a specific person.[16]

7. A plaintiff is a person who brings an action: the party who complains or sues in a personal action and is so named in the record.[17]

8. The term academic personnel in this study refers to the administrative staff who are professionals (e.g., President, Academic Vice-President, Dean of Student Life) and to the faculty of the community college.

9. A remand is an order to send back the cause to the same court out of which it came for the purpose of having some action taken on it there.

10. Statutory law is that body of law which is the result of an act of a legislative body.

Delimitations of the Study

This study, which assesses the constitutional rights and responsibilities of public community college students and professional personnel as determined by federal and state court decisions, is delimited as follows:

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[15]Black, ibid., p. 923.

[16]Black, ibid., p. 899.

[17]Black, ibid., p. 1309.

1. This study is limited to public community colleges as defined in the Definition of Terms section of the study, thus excluding business schools, technical schools, beauty colleges, private junior colleges, and other post-secondary institutions that cannot be classified as community colleges.

2. The study is also limited to public community college students and to public community college academic personnel as defined in the Definition of Terms section of this study.

3. The legal documentation of the study is limited to appropriate (a) federal court decisions, (b) state court decisions, (c) federal constitutional provisions and statutory laws, and (d) law journal articles and books on constitutional issues relating to academic personnel and to students on college campuses.

4. The legal interests of this study have been confined to the effect of federal and state court decisions on the constitutional rights of public community college students and academic personnel, in particular Amendments I, IV, and XIV of the United States Constitution.

5. The worth of the constitutional rights is not discussed, only the interpretation of said rights by the courts. It should also be noted here that this study is not written as a legal analysis of the development of the constitutional values of Amendments I, IV, and XIV and

their "penumbras and emanations." Rather, this paper is an attempt to review and to evaluate all federal and state court decisions that have dealt with the legal rights of public community college students and academic personnel. In constitutional law analyses, one follows the constitutional value through case after case to determine the courts' expansions or contractions of the value. Although analysis is important, this study in no way purports to be an exhaustive, constitutional treatise on the constitutional values herein discussed. Rather, this is a study of how public community college students and academic personnel have fared in federal and state court decisions.

Overview of the Following Chapters

A brief description of chapters two through five will give the reader a cursory outline of those chapters. Chapter 2 pursues the First Amendment constitutional rights of the public community college academic personnel regarding constitutional and academic freedoms, loyalty oaths, classroom and political activities. The appropriate decisions affecting community college academic personnel are discussed.

Chapter 3 concerns tenure. The requirements for attainment of tenure, the dismissal of tenured faculty, due process for non-tenured faculty, and any legal distinctions between four-year college academic personnel and community college academic personnel regarding these matters

recognized by the courts are reviewed. Again, the appropriate federal and state decisions affecting public community college academic personnel are discussed with each subject.

Chapter 4 concerns the constitutional rights of community college students; the legal relationship between the community college and the community college student; and First, Fourth, and Fourteenth Amendments, search/seizure rights, due process rights, and equal protection rights in particular. Any distinctions which have arisen in law between the community college student and the four-year student will be examined.

Chapter 5 covers a summary, conclusions, and policy recommendations.

Summary

The purpose of this chapter has been to introduce the problem to be investigated, to outline the historical evolution of the public community college in the United States, to show the importance of the study, to explain the legal methods of research used, to define specific terms used in the study, to specify delimitations of the study, and to preview the subsequent chapters.

CHAPTER II

FIRST AMENDMENT RIGHTS OF ACADEMIC PERSONNEL

Freedom of expression has been an honored concept in this country, in theory at least, since before the Revolutionary War. Only in the last 55 years though has the Supreme Court of the United States decided freedom of speech controversies.[1] The concept remains a complex and explosive issue in American life even today after the more than fifty-five years of litigation before the highest court in the land. This is understandable because most First Amendment cases

> . . . involve more than one value of constitutional dimensions, and the resolution of value clashes cannot be a mechanical process. But, after a half century of First Amendment litigation, there is special justification for an effort to examine the complex and diffuse materials in an orderly manner.[2]

In this chapter is presented an ordered view of one area of First Amendment rights, that is, the First Amendment rights of academic personnel in public community colleges.

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[1]The first significant First Amendment case decided by the Supreme Court was Schenck v. United States, 249 U.S. 47 (1919).

[2]Gerald Gunther and Noel T. Dowling, Cases and Materials on Constitutional Law, 8th Ed. (The Foundation Press, Inc., Mineola, N. Y. 1970), p. 1050.

Academic Freedom

As mentioned in chapter one, the German tradition of education has been an important source of influence in American higher education. One of the greatest gifts from German universities was the concept of academic freedom which developed in Germany as universities became enclaves of free thought and expression in an autocratic society. This freedom was accorded university professors in Germany only in an academic situation. Outside the university they were as restricted as other Germans were in their exercise of speech.[3] This concept of academic freedom was transported to American universities in the nineteenth century where it encountered and adapted itself to characteristics peculiar to the American system of education. American society was not nearly so autocratic as that of Germany. The basic concept of freedoms guaranteed by the Constitution existed in the United States for all citizens regardless of occupation or background. Another characteristic involved the difference between the American and the German academic's concept of scholarship.

> The German idea of 'convincing one's students, of winning them over to the personal system and philosophical views of the professor' was not condoned by American academic opinion. Rather, as far as classroom actions were concerned, the proper stance

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[3]See Walter P. Metzger, "The Age of the University" in Richard Hofstadter and Walter P. Metzger, The Development of Academic Freedom in the United States, pp. 367-417, (Columbia University Press, New York, 1955), p. 527.

> for American professors was thought to be one of neutrality on controversial issues, and silence on substantial issues that lay outside the scope of their competence.[4]

Finally, the German extension of academic freedom to students was thwarted in this country by the concept of in loco parentis (see page 80).

Perhaps the most important aspect of the Americanization of academic freedom was the idea that the teacher should be able to speak freely, not only as a teacher but also in the capacity of private citizen, without fear of administrative or judicial restrictions. This concept has been institutionalized at all levels of American education through the system of tenure which will be discussed in chapter three.

Judicial protection of academic freedom is a relatively recent phenomenon. Although the concept of academic freedom has existed in educational communities (as described above) since the nineteenth century, courts have been reluctant to involve themselves in controversies originating from the educational sphere. The courts often reasoned that by allowing educational institutions to solve their own controversies academic freedom would be better served.[5] Another reason that has been advanced to explain

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[4] Ibid., p. 400.

[5] 81 Harv. L. Rev. 1045, "Developments in the Law-Academic Freedom," p. 1050 (hereinafter cited as 81 Harv. L. Rev. 1045).

the lack of judicial review, until recently, rests on the well known traditional behavior of courts to rely on precedent. Since little legal precedent was available to settle controversies deriving from academic freedom

> . . . there has never developed a unified legal theory of academic rights and duties derived from an assessment of the unique institutional demands, social policies, and personal interests involved in the educational situation. Rather, problems encountered under the non-legal rubric of academic freedom have been assimilated to other established legal categories, such as contract or due process, and resolved subject to their limitations.[6]

In theory at least, the academic personnel of a public community college have the same protections from academic and constitutional freedoms that their colleagues at four-year institutions are accorded. A review of cases involving public community college academic personnel will show that the judiciary has increasingly supported and strengthened the safeguards of academic and constitutional freedoms for public community college academic personnel.

The faculty and administrative personnel of a public community college have essentially the same legal relationship to their institutions as do their colleagues at four-year institutions. The relationship rests on three basic characteristics:

> . . . (a) individual rights or freedoms which a teacher might possess in his capacity as teacher

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[6]Ibid., p. 1050.

> or person; (b) statutory requirements which must be followed by both institution and employee; and (c) contractual conditions of employment agreed upon between teacher and institution.[7]

The first characteristic will be discussed in this chapter, while the second and third will be discussed in chapter three. The most difficult of the three to conceptualize and to delineate is the first characteristic, because it involves not only all the individual rights (with their "penumbras and emanations") guaranteed by federal and state constitutions, but also the perplexing concept of academic freedom. Courts traditionally have been reluctant to deal with substantive issues surrounding internal scholastic matters, such as curriculum, research, and classroom activities, that many academic circles would contend are protected by the concept of academic freedom. A 1972 California case addressed itself to the conduct of a junior college English teacher who used an allegedly obscene poem composed by the defendant herself. It contained many Anglo-Saxon obscenities and was used in a freshman English class by the defendant in conjunction with pamphlets that contained pictures of entwined nude couples.[8] Although the court refused to discuss whether the teacher's activities were

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[7]Kern Alexander and Erwin S. Solomon, College and University Law, The Mitchie Publishing Co., Charlottesville, Virginia, (1971).

[8]Board of Trustees v. Metzger, 104 Cal. Rptr. 452, 453, (1972).

protected under the traditional penumbra of academic freedom, it did concede that

> . . . the trial court found the evidence insufficient to show either that defendant acted with an improper motive, that her use of the poem and brochure was 'out of line' with modern academic practice, or that any student was harmed by exposure to these materials.[9]

The Court of Appeals made it clear in this case that it was not happy that a judicial tribunal rather than an administrative hearing of the school board was deciding the case:

> In the case of permanent teachers under the law in effect at the time of the proceedings herein, the responsibility for determining the truth of the dismissal charges and their sufficiency as grounds for dismissal was vested in the trial court, not the governing board. . . . Whether this rather unique procedure amounts to superior court review of an administrative determination or an ordinary decision of the superior court, the scope of our (appellate) review is the same (citations omitted). We must determine only whether the findings and conclusions of the trial court, as a matter of law, lack support in the record. . . . The Legislature has chosen to leave to our trial courts the delicate task of determining whether, in a particular case, discipline may be imposed (emphasis added).[10]

The court in this case seems to be experiencing the traditional split feelings of courts called upon to settle educational controversies that may involve constitutional freedoms. On the one hand the court recognizes that it must settle the controversy as instructed by the law, but on the other hand the court seems to feel that such controversies

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[9]Ibid., p. 454.

[10]Ibid., pp. 455-456.

should be settled by educators, not by judges. Other court opinions discussed later in the chapter will evidence judicial differences of opinion on this issue.

In another case a junior college teacher in Alabama contended that his reassignment from day classes to night classes was influenced by the desire of the college administration to restrict his First Amendment activities.[11] An ad hoc faculty committee ruled in favor of the teacher's assertions and right to relief. Using only the material (700 pages) gathered by the ad hoc committee, the State Board of Education ruled against the teacher. Clearly troubled by the complexities of the case the court said

> . . . the evidence shows that some of the actions of the college in its general treatment of Rowe were founded on a less than delicate sense of the essential role of academic freedom under the guarantees of the First Amendment. However, this court is not convinced that Rowe's assignment to night classes--the action complained of in this case--was motivated by a desire of the junior college administration to restrict activities protected by the First Amendment (emphasis added).[12]

The court clearly chastised the junior college administration in footnote five of the decision:

> The court's disposition of this case should in no way be construed as approving what appears to be a very narrow-minded approach---on the part of President Forrester and other members of the junior college administration--to problems of academic freedom and the critical role of the First Amendment's guarantee

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[11] Rowe v. Forrester, 368 F. Supp. 1355 (1974).

[12] Ibid., p. 1357.

> of free speech and open debate on a state college campus.[13]

In another footnote to the decision the court indicated its disappointment with certain other actions of the junior college administration and stated that it cannot offer relief because the plaintiff failed ". . . to demonstrate a nexus between the action complained of--assignment to night classes--and the exercise of his First Amendment rights" (emphasis added).[14] Perhaps the plaintiff's other allegations--that the administration harassed him by excluding him from all faculty committees, refused to allow him to sponsor the Afro-Student Union, refused to allow him to serve as Master of Ceremonies for the school's Founder's Day program, and sent a student to "spy" on him--would have made a stronger charge of violation of First Amendment rights and academic freedom and therefore a stronger argument upon which to base relief.

In Rowe the court tartly informed the defendants that it did indeed have jurisdiction over the case (in apparent answer to a defendant motion that the Federal District Court had no jurisdiction over this State Board of Education decision):

> It should be observed initially that under 42 U.S.C., Sec. 1983, this court has original jurisdiction of this case and thus is not bound by the findings of

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[13]Ibid., pp. 1355-57.

[14]Ibid., p. 1356, fn. 2.

> the Board. Rather, this court must review the entire record for itself to determine if the Board's decision is supported by substantial evidence.[15]

The court continued to chastise the defendants by obliquely criticizing the Board's handling of the affair:

> Moreover, in this case, there are no specific findings of the Board. Evidence was taken before a three-member ad hoc committee . . . the majority of the committee concluded that the issues of fact favored Mr. Rowe, and he was entitled to relief. Without taking any additional testimony, or making any findings of its own, the State Board reversed the panel's decision. Consequently, in its present posture, the Board's conclusion is not entitled to substantial weight; it is up to this court to weigh independently the conflicting evidence and to resolve the controversy between these parties (emphasis added).[16]

Although, as stated, the court did not find enough evidence to support Rowe's specific charge, it can be seen from the quotes from Rowe in carefully defined situations courts do feel justified in entering disputes of academic freedom between teachers and school authorities.

The opinion in Metzger supports the assertion that many courts are still uncomfortable with the role of arbiter of controversies in the sphere of education. In recent years when the courts have been forced to enter the controversies, teachers in higher education have almost invariably been accorded substantial protection through constitutional concepts incorporating academic freedom.[17] In 1957 the Supreme

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[15] Ibid., p. 1355.

[16] Ibid., p. 1355.

[17] 81 Har. L. Rev. 1045, pp. 1065-76.

Court of the United States addressed this question squarely in Sweezy v. New Hampshire:[18]

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[19]

Students' retention of the substantive rights guaranteed by the Constitution was enunciated clearly in Tinker[20] and it is no less logical to assert from a reading of Sweezy, Pickering, (infra), Tinker and others that academic personnel are afforded the same protection.

In 1968 the United States Supreme Court decided another landmark First Amendment case, Pickering v. Board of Education.[21] Pickering, a teacher, was dismissed by the school board for writing and publishing a letter criticising the board's financial allocations in the school district and the board's handling of two recent bond referendums. The

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[18] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[19] Ibid., p. 250.

[20] Tinker v. Des Moines, 393 U.S. 503 (1969).

[21] Pickering v. Board of Education, 391 U.S. 563 (1968).

board maintained that the letter's contents were false and that its publication was ". . . detrimental to the best interest of the school." The Illinois courts upheld the dismissal, claiming that Pickering's position of teacher precluded him from making any statements about the school's operation. The Supreme Court rejected this assertion of special restraints on the constitutional rights of teachers since,

> . . . to the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this court.[22]

The Supreme Court of the United States also "unequivocally" rejected the school board's assertions that Pickering could be dismissed because even though his comments might be true they were highly critical in tone and therefore disrupted the necessary working harmony of the school system. The Supreme Court stated:

> . . . no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.[23]

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[22]Ibid., p. 568.

[23]Ibid., p. 570.

The Supreme Court carefully pointed out that if Pickering had a close working relationship with the board and/or the superintendent the case might have been decided differently. The Court also stated that a board might be justified in dismissing an employee who makes statements or performs activities that are detrimental to the normal functioning of the schools.

The Supreme Court further said that Pickering's letter covered issues of public domain, and although several charges were found to be false it could not be shown that his statements in any way interfered with his duties as a teacher or with the school's general operation. His statements were thus covered by the same constitutional rights of free speech as any other citizen, absent proof that his false statements were knowingly or recklessly made.

In 1972 the Seventh Circuit Court decided a case, Hostrop v. Board of Junior College District,[24] that raised the question of whether or not another class of academic personnel--administrators--had the same rights of free expression as those traditionally given to teachers. The court based its decision directly on the rationale used by the United States Supreme Court to decide Pickering:

> . . . it has been consistently held that a government cannot punish a person for his speech alone,

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[24]Hostrop v. Board of Junior College District, 471 F. 2d, 488 (1972).

> but only for speech that causes substantial disruption or that hinders the functioning of the state. In this perspective Pickering should not be read to authorize the discharge of a college president merely because he expresses an opinion that could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, Pickering holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements . . . (citation omitted). We find that Dr. Hostrop's suggestions about the ethnic studies program which appear in the complaint cannot, on their face and by themselves, be taken as a serious impairment of the effectiveness of the working relationship between him and the board that the defendants could discharge him merely for making the suggestion (footnotes omitted).[25]

The court in Hostrop emphasized that educators could not be silenced on educational policy because administrators disagreed with what was said. Indeed, the majority opinion of the court acknowledged that educators are in a unique position to discuss such policy:

> . . . Dr. Hostrop, because of his background and leadership position as college president, sought to contribute to the discussion of a curriculum issue that would be decided by vote of the board. To silence 'vigorous and robust debate' in the formulation of educational policy on the administrative level would certainly be contrary to the spirit of the Pickering decision.[26]

However, the court qualified its holding on the First Amendment rights of college administrators by adding

> . . . Pickering recognizes that the position of the person seeking to express his views and the nature of the controversy to which he is directing

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[25]Ibid., p. 492.

[26]Ibid., pp. 493.

> his comments are important factors to consider in determining whether his freedom of expression should be protected. . . . We recognize that there are differences between college administrators and teachers so that the board may have different justifiable grounds for dismissing its president. A court that may be called upon to review the findings of an administrative hearing which results in the discharge of a college president will have to take the particular duties of the president and his working relationship with the school board into account.[27]

The court in Hostrop thus decided that the protections of academic freedom and First Amendment rights extend to academic administrators also but it will depend upon the particular situation, in light of Pickering, how far these protections will extend to them. It can be maintained, therefore, that the holding in Tinker that students do not lose their substantive constitutional rights by passing through the school entrance can be applied to academic personnel as well.

Loyalty Oaths

Many teachers over the years have objected to the requirement of loyalty oaths by government. The phobias of the McCarthy era caused much litigation across the country on this issue. In the 1950's teachers were often required to sign loyalty oaths eschewing membership in the Communist Party and to answer questions regarding membership in the Communist Party as required by state law. In 1957 the Fourth District Court of California held that:

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[27]Ibid., pp. 493-495.

> . . . The Board of Trustees of a school district could require a teacher, as a condition of continued employment, to state under oath that he was not knowingly a member of the Communist Party.[28]

The teacher in this case was dismissed from his job as a tenured junior college faculty member for refusing to answer under oath the question regarding Communist Party membership. In the decision the court somewhat murkily declared that by answering said question the professor would be defending academic freedom.

> Academic freedom, upon which the appellant relies, does not mean much unless the teacher is willing to accept the responsibility which is an inherent part thereof, and is willing to cooperate in maintaining the conditions which make such a freedom possible.[29]

The judges in St. John felt strongly that the board was entitled to inquire into certain philosophical beliefs of teachers because of their relationship to the young.

> What the teacher thinks and believes along these lines are proper subjects of inquiry in relation to such employment, and his refusal to give to the board the required information may properly and lawfully be treated as insubordination and as sufficient evidence of his lack of one of the essential qualifications for this employment.[30]

The opinion in St. John was strengthened in 1958

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[28]Orange Coast Junior College v. St. John, 303 P. 2d 1056 (1956).

[29]Ibid., p. 1061.

[30]Ibid., pp. 1060-61.

by the Supreme Court of the United States in Beilan v. Board of Education.[31] In the Beilan decision the Supreme Court upheld a teacher's dismissal for failure to furnish information to his superior about allegedly subversive activities. The teacher was charged with "incompetency."

In a similar case the Supreme Court upheld another dismissal, that of a transit employee, for failure to answer questions concerning Communist Party membership. The transit authority charged that this failure cast the employee in a light of doubtful trust and reliability.[32]

A 1958 California court decision found no fault with a state statute authorizing inquiry into Communist Party membership of school district employees after September 10, 1948. It did, however, hold that composite questions by a legislative committee referring to periods both before and after the time authorized by statute were duplicitous and unfair, and that the teachers could not be dismissed for refusing to answer compound questions.[33] The court chided the legislative committee by reminding it that

> . . . it is to be noticed that the Legislature, for reasons best known to it, . . . fixed a demarcation point at September 10, 1948. . . . It is only with

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[31] Beilan v. Board of Education, 357 U.S. 399 (1958).

[32] Lerner v. Casey, 357 U.S. 468 (1958).

[33] Board of Trustees v. Schuyten, 326 P. 2d 225 (1958).

> regard to membership in the Communist Party at any time since September 10, 1948 that a teacher must file the affidavit required by Education Code Section 12602, and it is only the refusal to answer questions concerning membership in the Communist Party since September 10, 1948, which is made grounds for dismissal by Education Code Section 12604.[34]

Again, in California in 1965 the court found no fault with state laws similar to the above case.[35] An unusual aspect of this case was that although the defendant had declared his desire to rejoin the Communist Party in 1957, after an absence of six years, the Communist Party refused to accept him. The court said

> Membership is not consummated by mere application or by unilateral thought that one is a member of the Communist Party. Mutuality is necessary, the desire of a person to belong to the Communist Party and the recognition by the Party that he is a member.[36]

The three California cases mentioned are no longer valid because of a 1971 United States Supreme Court decision which affirmed a Florida district court decision in part and then seemingly extended protection against unconstitutional loyalty oaths even further than the lower court. The district court and the Supreme Court both held valid the first part of the Florida oath that stated:

> I, . . ., do hereby solemnly swear . . . that I will support the Constitution of the United States and of the State of Florida.[37]

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[34] Ibid., p. 225.

[35] Governing Board v. Phillips, 41 Cal. Rptr. 608, (1965).

[36] Ibid., p. 611.

[37] Connell v. Higgenbotham, 403 U.S. 207, 208 (1971).

The Supreme Court declared that ". . . the validity of this section of the oath would appear settled."[38] The district court also ruled invalid the phrase ". . . that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party."[39] This phrase is controlled by a 1961 Supreme Court case.[40] The district court proceeded to two other phrases in the oath: ". . . that I am not a member of the Communist Party" and ". . . that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence, . . ." and declared them unconstitutional by authority of a "legion" of Supreme Court decisions.[41]

The phrase that the district court upheld as constitutionally valid and that the Supreme Court decision struck down was ". . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."[42] The Supreme

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[38]Ibid., p. 208.

[39]Connell v. Higgenbotham, 305 F. Supp. 445, 450.

[40]Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[41]Connell, 305 F. Supp. 445, 451, citing inter alia.

[42]Connell, 403 U.S. 207, 208.

Court held that this phrase ". . . falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process."[43]

Justice Marshall chided the court for this residue of uncertainty in a concurring opinion:

> The Court has left the clear implication that its objection runs, not against Florida's determination to exclude those who 'believe in the overthrow,' but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebuttable proof of the proscribed belief. Due process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof. But in my view it simply does not matter what kind of evidence a state can muster, to show that a job applicant 'believe(s) in the overthrow.' For state action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he 'believe(s) in the overthrow' or has any other belief. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.[44]

Marshall's concurring opinion would strengthen the 1967 Supreme Court decision, Keyishian v. Board of Regents of the State University of New York,[45] that struck down a New York loyalty oath because it was overly vague and excessively broad. In Keyishian the Court maintained that knowledgeable membership in a "subversive" organization was not enough. The Keyishian line

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[43]Ibid., p. 208.

[44]Ibid., pp. 209-10 (Marshall, J., concurring).

[45]Keyishian v. Board of Regents of the State University of New York, 385 U.S. 589 (1967).

> . . . suggests that the state, in administering its loyalty program, must rely principally on overt acts or other direct evidence of specific illegal intent. Although evidence of an employee's associational affiliation may be relevant to the purpose of his acts, it seems unlikely after Keyishian that otherwise lawful general membership activities such as dues paying or voting could be made the basis for disqualification even when combined with 'knowing' membership.[46]

It can thus be asserted that any and all disclaimers regarding association required of public school teachers are unconstitutional unless a compelling state interest can be supported. The old view that employment was a privilege, dependent upon state restrictions that could limit First Amendment freedoms, was thoroughly discredited in Keyishian, Connell, Pickering, Sindermann (infra), and other recent Supreme Court decisions. Justice Brennan in Keyishian, forcefully supported the importance of academic freedom to American higher education and society in general:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[47]

It is a legitimate concern of the government to maintain its existence and to insure that its citizens are not being subjected to propaganda in the schools to effect such a discredited goal as the overthrow of the government.

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[46] 81 Harv. L. Rev. 1045, p. 1067.

[47] Keyishian, ibid., p. 603.

Loyalty oaths, though, seem to be a rather empty and pernicious way of ensuring these governmental goals, but if an oath is to be utilized, the simple sentence approved in Connell[48] would seem to be constitutionally acceptable and therefore the least objectionable.

Political Activity

Before the 1960's most teachers avoided any tinge of political interest or activity. The upheavals of the 1960's resulted in vastly increased interest and activity by teachers across the country. However, surprisingly few cases litigating the political activities of teachers have reached the courts.[49]

Two landmark Supreme Court cases, Pickering and Tinker, apply in this instance. While ". . . it is clear that a teacher's First Amendment rights are not absolute. . .," the Supreme Court in Pickering held that

> . . . the problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[50]

When this balance is considered and the plaintiff has proven that dismissal was based on the exercise of First Amendment rights, the burden of proof justifying dismissal shifts to

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[48] Cf. fn. 31.

[49] Alexander, ibid., p. 348.

[50] Pickering, 391 U.S. 563, 568 (1968).

the defendants, who must show by clear and convincing evidence that the plaintiff's activities and speech ". . . materially and substantially interfere(d) with the requirements of appropriate discipline in the operation . . ."[51] of the school.

The holdings in Pickering and Tinker significantly determined the decision in a 1973 Utah case involving a non-tenured junior college professor. In this case, Smith v. Losee, the court found that the President and Dean of Academic Affairs of the junior college acted with actual malice in denying plaintiff Smith permanent status and employment and that these actions

> . . . were taken for the purpose of punishing him for having supported a particular candidate in a state political election, for having opposed the college administration in his capacity as president and member of the executive committee of the faculty association, and for having expressed opposition to some administration policies during meetings of the Dixie College Faculty Association.[52]

The court weighed the entire record and applied the "balancing test" prescribed by the Pickering and Tinker decisions when it stated:

> . . . it is apparent that the plaintiff's exercise of his First Amendment rights in the manner in which he did far outweigh the interest of the defendants in promoting the efficiency and harmony of Dixie College by the means they chose to do so.[53]

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[51] Tinker, 393 U.S. 503, 509 (1969).

[52] Smith v. Losee, 485 F. 2d 334, 339 (1973).

[53] Ibid., p. 340.

Although, in the opinion of the court, Pickering applied to Smith, the court made one vital distinction of particular interest to administrators and faculty chosen to serve as faculty representatives.

> The instant case presents a slightly different problem in that the statements here complained of were not made to the public, as in Pickering, but were made at meetings at which only Dixie College administrators and faculty were present. Furthermore, most of the statements complained of were made in Smith's capacity as president or member of the executive committee of the faculty association. These statements by Smith that are criticized were expressions of opinion, or the position of the faculty association, rather than intended to be statements of fact, as in Pickering.[54]

In 1961 the Florida Supreme Court, in a decision that relied heavily on the rationale advanced in the Federal Hatch Act,[55] held that reasonable rules in the interest of the public could restrict the political activities of public employees. In this case, the specific issue was a ". . . rule prohibiting university employees from seeking election to public office . . ." which rule the court held was ". . . not an unconstitutional abridgement of academic freedom or denial of substantive due process."[56]

The Hatch Act prohibits Federal Civil Service employees from taking ". . . any active part in political management or in political campaigns . . ."[57] and thus

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[54]Ibid., p. 338.

[55]Jones v. Board of Control, 131 So. 2d 713, (1961).

[56]Alexander, ibid., p. 349.

[57]81 Harv. L. Rev. 1045, p. 1070.

attempts to protect federal employees from partisan involvement and possible aspersions on the integrity and efficiency of federal employees. These goals have been urged to legitimate restrictions on the partisan activities of teachers.[58] While the Hatch Act forbids any partisan involvement by federal employees, whether as a vocal supporter or as an actual candidate, most court decisions regarding teachers only proscribe actual candidacy by a public employee.[59]

While the Utah Supreme Court acknowledged that Smith was maliciously punished for having supported a particular candidate in a state political election, nowhere did the majority opinion discuss any connection the Hatch Act may have had with the issues in Smith. The majority opinion in Smith did not refer to the 1961 Florida Supreme Court decision in Jones.

A minority opinion in Smith, concurring in part and dissenting in part, disagreed vociferously that Smith's First Amendment rights had been violated. This opinion declared that President Losee was "well aware" that Smith's political support of a particular candidate would create a "backlash" that

> . . . might well affect. . . requests for necessary funding from the Utah Legislature on behalf of Dixie College. . . . I refuse to conclude that the evils of creating the 'chilling effects' in the

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[58]Ibid., p. 1070.

[59]Ibid., p. 1070.

> areas of First and Fourteenth Amendments rights prohibits or restrains any of the defendants--appellants before us here to formulate good faith judgments relative to Smith's tenure and contract renewal status predicated upon his known methods and philosophy. . . . Smith was loudly, actively and unreasonably anti-administration and disloyal to the requirements leading to the maintenance of a higher standard of morale . . . at Dixie College. . . . He was in fact a troublemaker on the campus (emphasis added).[60]

This judge's dissent seems to have completely misunderstood the role of a faculty senate (of which Smith was president of the executive committee) on a college campus and the holdings in Pickering and Tinker. The judge did not seem to understand a basic premise of the American political system--that free debate by all citizens is essential to the maintenance of a free political system. It is especially important that the intellectual elite of our country be free to debate public issues since they are often consulted for their views on concerns of importance to the public and are sometimes expected to take public stances on controversial issues.[61]

The majority opinion in Smith would seem to indicate that public community college academic personnel should be accorded the same freedom from restrictions on partisan political involvement that their colleagues at four-year

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[60] Smith, 485 F. 2d 334, 348-50.

[61] 81 Har. L. Rev. 1045, p. 1070.

institutions have and that other public employees have.[62]

Classroom Activities

Although two significant cases involving classroom activities primarily concerned elementary and secondary levels, the holdings affect college level activities also. In Meyer v. Nebraska[63] the Supreme Court held that

> . . . a criminal statute prohibiting the teaching of German in a parochial school denied the teacher liberty without due process of law. . . . In Meyer the Court indicates that teaching is a protected liberty, not absolute, but one which may be restrained only through the proper and reasonable exercise of police power of the state. The Court acknowledged the State's power to prescribe the school curriculum, but held that the State's purposes were not sufficiently adequate to support the restriction upon the liberty of teacher and pupil (to teach and to learn German).[64]

In 1968 the Supreme Court handed down an opinion in Epperson v. Arkansas[65] and held that an Arkansas statute making it unlawful to teach evolution in any state-supported school or university was clearly unconstitutional and ". . . contrary to the mandate of the First Amendment, and in violation of the Fourteenth Amendment to the Constitution."[66]

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[62]Cf. Fort v. Civil Serv. Comm., 61 Cal. 2d 331, 392 P. 2d 385, 38 Cal. Rptr. 625 (1964) (striking down a prohibition on political activities of public employees).

[63]Meyer v. Nebraska, 262 U.S. 390 (1923).

[64]Alexander, ibid., pp. 350-51.

[65]Epperson v. Arkansas, 393 U.S. 97 (1968).

[66]Ibid., p. 109.

In both Meyer and Epperson the Court agreed that the state has a general right to set curriculum standards. It cannot, however, proscribe a private educational institution from teaching a specific foreign language (Meyer). In Epperson, Justice Stewart commented on state restrictions on curriculum in public schools:

> The States are most assuredly free 'to choose their own curriculums for their own schools.' A State is entirely free, for example, to decide that the only foreign language to be taught in its public school shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not.
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> It is one thing for a State to determine that 'the subject of higher mathematics, or astronomy, or biology' shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth.[67]

In light of Meyer and Epperson it would seem that constitutional and statutory provisions that establish general curriculum standards for education would probably be constitutional. What would be unconstitutional and therefore unacceptable would be statutory or constitutional proscriptions on legitimate courses, such as German or biological evolution. This problem rarely occurs at the higher education level, though, because most people recognize

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[67]Ibid., pp. 115-16 (Stewart, J., concurring opinion).

that college-age students possess greater experience, knowledge, and maturity to assess the "marketplace of ideas" which exists in higher education. Also, academics at the higher education level accord one another a respect based on the assumption that each discipline and its academic followers should be the best judges of what the curriculum should cover in each course of the respective discipline.

This assumption is not always honored at all institutions of higher education. "Immoral conduct" in the classroom was the charge levied in two California cases in the 1970's that dealt with junior college professors. In Hensey the Court of Appeals held that the evidence that the teacher removed the school public address system loudspeaker from the classroom and used vulgar language and made vulgar gestures during class constituted a substantial basis for the trial court's determination that charges of immoral conduct and evident unfitness for service were true and constituted adequate cause for dismissal.[68]

While most of the alleged actions of Hensey were not in themselves "immoral" or "evidence of the teacher's unfitness for service," the court chose to view them in the aggregate. In light of one incident the court considered immoral, and of several incidents the court considered to be proof of the teacher's unfitness for service, the court

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[68]Palo Verde v. Hensey, 88 Cal. Rptr. 570 (1970).

upheld the teacher's dismissal. The teacher's actions in this case had no legitimate connection to the educational purposes of his classroom nor his subject area and were basically vulgar and improper.

In the other case, the alleged immoral conduct and evident unfitness for service charges were directly linked to the educational goals of the teacher's classroom and of the English curriculum.[69] Professor Metzger used an allegedly obscene poem[70] in a first-year junior college class in English in conjunction with the textbook entitled Contemporary Moral Issues. The poem was specifically used with a unit on censorship, pornography, and obscenity. Before distributing the poem Professor Metzger determined that all of her students were 18 years of age or older and gave her students the option of a substitute lesson. ". . . neither the Board, the college administration, nor defendant's immediate superiors had adopted regulations . . . restricting the types of supplementary teaching materials."[71] After twice using the poem Metzger was instructed not to make further use of it, and she obeyed this directive, ". . . nevertheless, the Board proceeded to dismiss her."[72] At her trial, fourteen professors of English attested to the

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[69]Metzger, ibid., p. 453.

[70]Ibid., p. 453.

[71]Ibid., p. 453.

[72]Ibid., p. 454.

educational validity of the poem in Metzger's classroom curriculum. She also produced evidence

> . . . showing that her teaching record was otherwise unblemished; that she had received the highest possible rating upon the quality of her teaching and ability to teach, and that she ranked first out of 80 applicants on the English qualifying examinations.[73]

The court affirmed that Metzger's conduct was neither immoral nor evidence of unfitness to serve, but cautioned, in light of Hensey, that

> . . . we emphasize that our ruling should not be viewed as insulating permanent teachers from discipline on account of their classroom use of indecent or profane works or writings. . . . Such conduct may, under appropriate circumstances, constitute 'immoral conduct' justifying such discipline.[74]

It would seem, then, in light of Hensey and Metzger that the use of allegedly indecent or profane works in the classroom would be protected only when they related to the educational purposes and goals of the classroom curriculum. As noted previously, though, Epperson should guarantee a basic freedom of scholarly choice in the classroom at the college level.

Summary

The decisions of Keyishian, Pickering, Epperson, and others should be clear indications that the Supreme Court has totally discarded the old notion that state

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[73] Ibid., p. 454.

[74] Ibid., p. 456.

employment is a privilege dependent upon state employees surrendering their rights to constitutional freedoms guaranteed to all citizens by the Constitution. First Amendment freedoms are particularly hallowed in this country and restrictions on the exercise of these freedoms on certain citizens because of their state employment status seem particularly objectionable to many members of the Supreme Court.

Pickering and Keyishian guarantee the state employee the freedom to publicly express his or her views as long as this expression does not substantially disrupt the activities of the state or its agencies. The opinion in Epperson clearly shows that the Supreme Court believes in the exercise of First Amendment rights in the classroom and the scholar's right to explore freely and completely his or her subject in an educational situation.

Although it has been only 55 years since the Schenck case was decided by the Supreme Court, First Amendment rights are now definitely established in the legal rubric of this nation.

CHAPTER III

TENURE AND DUE PROCESS

Contrary to popular belief, tenure is not restricted to the teaching profession. Indeed, the first professionals to obtain legal tenure were United States judges in 1787. Not only were federal judges the first tenured professionals but they were given the most binding type of tenure--that is, lifetime tenure. Nearly every other extant tenure system accepts the principle of automatic retirement because of age, usually age sixty-five.

It can be inferred from the tenure granted federal judges that a basic goal of tenure is job security. The tenure system was devised to protect judges, and later teachers, from capricious and/or arbitrary dismissal practices of superiors. Both professions are often subjected, unfortunately, to political pressures, and therefore are susceptible to political "spoils" systems and the uncertainties attendant to such systems. Tenure helps to thwart such evils.

Other workers have developed tenure systems also. "Seniority" in blue collar jobs may be thought of as a type of "tenure" since both systems usually guarantee jobs except

for serious reductions in the labor force for valid economic setbacks or for "cause."

A lower court decision in Pickering explained the intent of tenure:

> While tenure provisions . . . protect teachers in their positions from political or arbitrary interference, they are not intended to preclude dismissal where the conduct is detrimental to the efficient operation and administration of the schools. . . . Its object is to improve a school . . . by assuring teachers of experience and ability a continuous service based upon merit, and by protecting them against dismissal for reasons that are political, partisan or capricious (citations omitted).[1]

This security of employment permits the teacher to be freed from the worries of contract renewal, allowing the teacher to concentrate on teaching and research. Tenure helps create an atmosphere for academic freedom by providing substantial legal safeguards for the protection of academic freedom. This chapter explores how tenure and its constant companion, "due process," provide such legal safeguards to public junior/community college academic personnel.

Tenure

According to two landmark Supreme Court decisions, both argued and decided on the same day,[2] teachers do not have a constitutional right to a system of tenure. Chief

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[1] Pickering v. Board of Education, 225 N.E. 2d 1, 6 (1967).

[2] Board of Regents v. Roth, 408 U.S. 564, (1972); Perry v. Sindermann, 408 U.S. 593, (1972).

Justice Burger carefully clarified this point in a joint concurring opinion for Sindermann and Roth:

> . . . the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for non-renewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply: Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.[3]

Thus, the tenure of state-employed teachers is essentially controlled by state statute. If a state has neither statutes relating to the contractual rights of teachers nor ". . . implied . . . (or) unwritten 'common law'"[4] tenure formulas that exist in practice, then the state-employed teacher has no right to continued employment. However, if a contractual or an implied system of tenure does exist, then a tenured teacher under either system has a right to continued employment and must be afforded due process on any dismissal action. Chief Justice Burger commented that ". . . the availability of the Fourteenth Amendment right to a prior administrative hearing (before

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[3]Roth and Sindermann, ibid., pp. 603-04, (Burger, J., concurring opinion).

[4]Sindermann, ibid., p. 602.

termination or dismissal) turns in each case on a question of state law."[5] The opinion in Roth also acknowledged that a state tenured teacher who is dismissed is always entitled to a written notice of the reasons for dismissal and a hearing, if requested. A non-tenured, state-employed teacher is not accorded the same protections if non-renewed, unless state statutes so specify. If the non-tenured teacher is dismissed before end of the contract period, it would seem that written notice and a due process hearing would be accorded the dismissed non-tenured teacher, if requested.[6]

As the above quotations from Chief Justice Burger emphasized, the state-employed teacher in a state with neither contractual nor implied tenure is still protected from the dismissal that deprives the teacher of

> . . . interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.[7]

The Court in Roth explains that the terms "liberty" and "property" are exceedingly difficult to delineate but must be attempted. Justice Stewart quoted from an earlier holding of the Court which demonstrated its early concern with the concepts:

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[5]Roth and Sindermann, ibid., fn. 61.

[6]Roth, ibid., p. 567.

[7]Roth, ibid., pp. 569-70.

> While this Court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[8]

A state-employed, non-tenured teacher who is non-renewed is entitled to a due process hearing if the teacher can show that the non-renewal deprived him of an interest in "liberty" or that he has a "property" interest in continued employment despite the lack of tenure or a formal contract or show charges against him of stigma or disability foreclosing other employment.[9] As the Supreme Court acknowledged, controversies will often be difficult to rule on because of the nebulous definitions attached to "liberty" and "property" but Justice Stewart noted that this difficulty arises from the Constitution itself: "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[10]

Controversies that involve charges of dishonesty, immorality, or disability that place a stigma on the person

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[8]Meyer, 262 U.S. 390, 399 (1923).

[9]Roth, ibid., p. 571.

[10]Ibid., 408 U.S. p. 572.

or foreclose other employment are a different matter. If such charges were involved, the Supreme Court acknowledged that notice and an opportunity to be heard in a due process setting would be essential.[11]

A California case involving junior college academic personnel predates by 31 years Justice Burger's concern regarding the importance of state statutes concerning tenure. In Brintle v. Board of Education of the City of Long Beach, the court took pains to emphasize that ". . . statutes enacted to establish tenure for state employees must be strictly construed."[12]

If a tenured, state-employed teacher is dismissed or if a non-tenured, state-employed teacher is non-renewed and can justify demands for a due process hearing, the following steps are suggested by several sources:

> . . . (1) The faculty committee is to be given notice in writing of the proposed dismissal in sufficient time to ensure an opportunity to prepare for a hearing; (2) the teacher is to reply in writing within a given time whether he wishes to have a hearing; (3) a hearing is given the faculty member during which he should have an opportunity to testify and present evidence and witnesses and hear and question adverse witnesses; (4) the results of the hearing are made (available)

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[11] Ibid., 408 U.S. pp. 573-74.

[12] Brintle v. Board of Education of the City of Long Beach, 110 P. 2d 440, p. 443 (1941).

to the faculty member for possible appeal to the courts.[13]

No court has suggested that a due process hearing for tenured or non-tenured teachers be the equivalent of a legal trial. Rather, courts have emphasized that a due process hearing should be predicated on fairness. As the Supreme Court acknowledged in the famous Hannah decision, ". . . due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."[14] With the increased awareness of constitutional rights that exists on college campuses today, administrative officers and board members would be prudent to ensure that all tenure decisions follow the minimal due process suggestions enumerated above.

The "Statement on Procedural Standards in the Renewal or Non-renewal of Faculty Appointments" in the Summer, 1971 AAUP Bulletin sets forth the general standards, criteria, and procedures which the American Association of University Professors (AAUP) maintains should be followed in tenure decisions. The AAUP asserts that its recommendations accord fair treatment to everyone concerned in a decision.

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[13]Alexander, College and University Law, pp. 356-57. See also 81 Harv. L. Rev., pp. 1080-90; consult also Hostrop, ibid., and Slochower, infra; also the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, (hereinafter referred to as 1940 Statement); also 1971 AAUP "Statement on Procedural Standards in the Renewal or Non-Renewal of Faculty Appointments" in the AAUP Bulletin (Summer, 1971).

[14]Hannah v. Larche, 363 U.S. 420,442 (1960).

Requirements for Tenure

The AAUP recommends that the precise terms and conditions of an institution's academic tenure "track" ". . . be stated in writing and be in the possession of both institution and teacher before the appointment is consummated."[15] Thus, the teacher and the institution both understand what is entailed in the process of the tenure "track," consequently lessening conflict over any future tenure decisions.

Some form of tenure exists in most states and on most campuses. The components of these tenure systems vary from state to state, from campus to campus, and frequently from department to department. The attainment of tenure implies a certain level of scholarship and teaching ability, but the measurement of these is exceedingly difficult. Thus, it has been impossible to establish mathematical standards that would determine at what point a person has attained enough stature in the area of scholarship and teaching ability to qualify for "tenure."

Statutes and regulations do exist, however, which establish the format by which tenure decisions are made. The AAUP recommends a certain set of procedures for evaluating those teachers on the "tenure track" and many colleges and states have incorporated the recommendations into their

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[15] AAUP, 1940 Statement.

own regulations.

An interesting case involving tenure requirements, Vittal v. Long Beach Unified School District, was decided in California in 1970.[16] The junior college school district contended that state education statutes decreed that a teacher serve 75 percent of the days of the school year, and that Professor Vittal had not done so. The court found that Vittal had not served 75 percent of the days but had served more than 75 percent of the hours of a full-time professor at the junior college. In its opinion the court said ". . . the legislature cannot reasonably be expected to anticipate every conceivable problem of construction that may arise when it enacts a statute."[17]

The court further says that the statute was contemplating the public school elementary and secondary teacher, and that the court must interpret statutes reasonably and fairly. College teachers are not subject to the same daily class schedules that elementary and secondary teachers are, and therefore are not necessarily holding classes every day. But, if they hold 75 percent of the class hours that a junior college board acknowledges distinguishes a full-time position from a part-time position, the teacher should be given full-time status.

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[16]Vittal v. Long Beach Unified School District, 87 Cal. Rptr. 319 (1970).

[17]Ibid., p. 323.

Vittal was used as a controlling case in a 1975 California case which involved a dispute between a junior college teacher and a junior college board and administration.[18] The board maintained that the teacher did not have tenure, but if he did it was only part-time tenure. The court found that the school board was trying to circumvent the teacher's earned right to a full-time tenured position by dividing a full-time position in his field into part-time positions. The board argued that budgetary demands forced them to offer part-time positions instead of one full-time position. The court rejected this argument as invalid in this circumstance and chided the board for its unethical behavior in the controversy:

> It also appears to us that the college is, in effect, asking for judicial aid in circumventing teachers' rights guaranteed by the tenure theory. Tenure is a device to secure a teacher's position. The college's suggested interpretation of section 13448 (of the Education Code) would, in effect, turn the shield of tenure into a sword for use against the teachers while (other court cases) . . . recognize part-time tenure only for the benefit of teachers. This court will not apply the college's peculiar 'part-time tenure' theory so as to play off tenured teachers, who have already taught in the district, against newly-arriving ones . . . .[19]

Another California court maintained in 1974 that tenure in a junior or community college may be attained by teaching in other than regular day-time classes. The

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[18] Ferner v. Harris, 119 Cal. Rptr. 385 (1975).

[19] Ibid., p. 389.

court chastised the school board in this case for attempting to avoid tenure for its night instructors by arbitrary dismissal practices.[20] The court acknowledged that while school administrators must be afforded wide discretion and latitude in operating routine and daily affairs, this does not grant them the right to use this necessary discretion as a shield for arbitrary dismissal practices.[21]

In a similar case the court ruled that junior college teachers who had served two and a half years as day-time instructors and one-half year as night-time instructors were eligible for tenure. The court held that there was no requirement that the three consecutive teaching years necessary for tenure be served in the same classification (day-time or night-time).[22]

It seems evident from the cases discussed above that public junior/community college teachers need the safeguards of tenure as much as other levels of education to protect themselves from the arbitrary and sometimes illegal practices of administrations and boards. While dismissal practices were often tied to legitimate college concerns of maintaining or reducing costs, the courts have

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[20]Balen v. Peralta Junior College District, 114 Cal. Rptr. 589 (1974).

[21]Ibid.

[22]Curtis v. San Mateo Junior College District, 103 Cal. Rptr. 330 (1972).

maintained that this cannot be done by denying teachers basic legal rights. The AAUP maintains that ". . . termination of a continuous appointment because of financial exigency should be demonstrably bona fide."[23]

Dismissal of Administrative Personnel

As mentioned previously, courts have distinguished between academic administrative personnel and academic faculty by delineating a somewhat different relationship to academic freedom/First Amendment rights between the two groups. But like faculty, administrative personnel cannot be dismissed for the rational, good-faith exercise of their substantive constitutional rights. State-employed, academic administrative personnel cannot be dismissed before the end of their respective contracts without cause, and are entitled to a hearing if they request one. As the court in Hostrop stated, the weighing of the interests of the board versus those of the administrator must be attempted. The court concluded that

> . . . the board's interest consists of maintaining efficiency through the prompt removal of its chief administrator when it reasonably believes that it can no longer work effectively with and through that person. But . . . it is questionable whether

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[23]AAUP, 1940 Statement; see also, Levitt v. Board of Trustees of Nebraska State Colleges, 376 F. Supp. 945 (1974); Johnson v. Board of Regents of University of Wisconsin System, 377 F. Supp. 227 (1974); Am. Assn. of Univ. Prof., Bloomfield College Chapter v. Bloomfield College, 322 A. 2d 846, (1974); Ducorbier v. Board of Supvrs. of Louisiana State Univ., 386 F. Supp. 202 (1974).

> efficiency is a compelling interest, so that this consideration should work to deny a hearing for one college president when courts have rejected it as a rationale for denying hearings to thousands of other employees (citations omitted). Dr. Hostrop's interests lie in protecting his First Amendment rights and future employment prospects, and in avoiding dismissal when it is not justified by the facts. We find that the resolution of these interests requires that plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing.[24]

A 1971 New York case, Powell v. Board of Higher Education,[25] involved the dismissal of a junior college president, as in Hostrop, but is distinguished upon the grounds that Hostrop was dismissed before the end of his contract, whereas Powell was apparently employed "at will" by the board, did not have tenure as president, and ". . . consequently the Board of Higher Education had the power to remove him without preferring charges and holding a hearing."[26] No charges were levied by the board against Powell, so there was apparently no ". . . stigma or disability foreclosing other employment." Also, no allegations were made by Powell, in the court record, that he was dismissed for exercising his constitutional rights. Thus, he was entitled to no due process hearing under state or federal law.

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[24]Hostrop, 471 F. 2d p. 495.

[25]Powell v. Board of Higher Education, 327 N.Y. S. 2d 292 (1971).

[26]Ibid., p. 294.

An unusual case was decided in January of 1975 by the Supreme Court of Washington. The plaintiffs were all teachers and department chairmen at a local community college.[27] In 1973 the administration informed each plaintiff that the chairmanships had been abolished in an administrative reorganization. After exhausting administrative channels, the plaintiffs filed suit, charging that their chairmanships were tenured faculty appointments, subject to non-renewal only through procedures established by statute and regulation, and that these procedures were not followed. The Washington court ruled that state law did not establish department heads as tenured positions and quoted an AAUP statement adopted in 1966 to support their decision:

> The chairman or head of a department who serves as the chief representative of his department within an institution, should be selected either by departmental election or by appointment following consultation with the members of the department and of related departments; appointments should normally be in conformity with department members' judgment. The chairman or department head should not have tenure in his office; his tenure as a faculty member is a matter of separate right.[28]

The preceding case and quotations seem to indicate that both the courts and the teaching profession itself would agree that administrative positions in themselves

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[27] Barnes v. Washington State Community College District No. 20, 529 P. 2d 1102 (1975).

[28] Ibid., p. 1104.

should not be tenured. Administrators in many institutions do have tenure but the AAUP would prefer it flow from membership on the faculty, not from the office itself. It also seems evident that an administrator's employment rights as an administrator depend upon the specific contract, and if employed in the administrative post at the will of the board, may be dismissed, as in Powell, at any time, absent any violations of the administrator's constitutional rights.

Dismissal of Tenured Faculty

The most important cases to date in the dismissal of tenured faculty are the previously mentioned cases, Perry v. Sindermann and Board of Regents v. Roth, both decided in 1972. In 1956 Slochower v. Board of Education[29] held that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing. Sindermann extended the concept of tenure from those who have explicit tenure positions to those who have "implicit" tenure positions:

> A teacher, . . . who has held his position for a number of years, might be able to show from the circumstances of the service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure. . . . There may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college

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[29]Slochower v. Board of Education, 350 U.S. 551, (1956).

> or university . . . that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.[30]

Although no explicit tenure system existed, Sindermann proved the existence of an implicit system of tenure at his college and therefore his "expectancy" of reemployment. Because of this proof he was entitled to a ". . . hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency."[31]

The Supreme Court in Sindermann strongly reiterated the principle that the government at any level (federal, state or local) ". . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech."[32] And the teacher's status as non-tenured or tenured is immaterial to this denial. The court emphasized the point:

> Indeed, twice before, this court has specifically held that the non-renewal of a non-tenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. Shelton v. Tucker, supra; Keyishian v. Board of Regents, supra. We reaffirm those holdings here.[33]

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[30]Sindermann, 408 U.S. p. 602.

[31]Ibid., p. 603.

[32]Ibid., p. 597.

[33]Ibid., p. 598.

Sindermann alleged that his non-retention was due to testimony before state legislative committees and other public statements critical of the Regents' policies. The Supreme Court agreed that his allegations presented a ". . . bona fide constitutional claim . . ." to the Court. It added:

> . . . this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. Pickering v. Board of Education, supra.[34]

In a Texas case, Zimmerer v. Spencer,[35] the court found that the

> . . . College Board of Regents had deprived her of procedural due process by refusing to renew her contract without sufficient notice of charges against her and without a sufficient hearing.[36]

The board insisted that a reading of Sindermann would require a reversal, not affirmation, of the above finding. The court in Zimmerer rejected the board's contention, stating that the board misconceived Sindermann.

> In Perry (v. Sindermann) the Supreme Court held that a merely subjective expectancy of reemployment by a non-tenured teacher was not such an interest that the threatened loss of it was protected by the due process clause of the Fourteenth Amendment. It is at least arguable whether the prior 'expectancy of employment' cases were ever wholly subjective. Certainly many of them embraced objective facts

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[34]Ibid., p. 598.

[35]Zimmerer v. Spencer, 485 F. 2d 176 (1973).

[36]Ibid., p. 177.

> concerning prior actions and usages. Perry does not reject but rather requires analysis of such objective facts, discarding only the mere subjective expectancy of the teacher as the predicate for procedural due process. The Supreme Court recognized that the absence of an explicit written contractual provision did not always foreclose the possibility that the teacher had the necessary 'property' interest in reemployment, arising from the employer's words and actions whose meaning would be found in the usage of the past.[37]

Acceptable reasons for the dismissal of tenured faculty include professional incompetence, moral turpitude, or gross neglect of professional responsibilities.[38] Professional incompetence is the most difficult to prove. But once agreed upon by a legitimate university committee through proper due process procedures, it is the charge with which courts are most reluctant to interfere.[39]

Moral turpitude is another matter. In cases of moral turpitude that are placed on court dockets, judges do not seem to be reluctant to make decisions independent of school boards' recommendations. In Metzger, supra, the court disagreed with the school board's ruling that Professor Metzger had been guilty of immoral conduct. In a 1971 California case the court emphatically agreed that the junior college teacher was guilty of moral turpitude for being found in a parked car in a state of undress with one of his students,

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[37] Ibid., p. 177.

[38] Sindermann, 408 U.S. p. 600.

[39] Bowing v. Board of Trustees, 521 P. 2d 220 (1974).

also in a state of undress, by a policeman. The teacher also attacked the policeman, and then attempted to escape by car at a high rate of speed.[40] Another California court in 1967 held that cohabitation by a junior college professor with one of his students was valid ground for his dismissal for immoral conduct.[41]

Depending upon state law, tenured teachers may also be protected when consolidation of two school districts occurs. In two separate California cases, the courts were of the opinion that under California law tenured teachers could not lose their tenure status upon school district consolidation.[42]

Junior/community colleges have many off-campus programs. A 1953 California case addressed itself to the problem of the tenure of faculty who teach principally in these off-campus programs. The court maintained that teaching in an off-campus or on-campus program made no difference in the attainment of tenure as long as the program was considered a valid part of the junior college program.[43]

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[40]Board of Compton Junior College District v. Stubblefield, 94 Cal. Rptr. 318 (1971).

[41]Board of Trustees v. Hartman, 55 Cal. Rptr. 144 (1967).

[42]Flewelling v. Board of Trustees, 2 Cal. Rptr. 891 (1960); Kast v. Board of Trustees, 34 Cal. Rptr. 710 (1963).

[43]Beseman v. Remy, 325 P. 2d 578 (1958).

Sindermann has significantly strengthened the Slochower decision by protecting the employment rights of tenured teachers even more explicitly. It is a clear statement to college boards and administrators that tenure, once attained through either an implicit or explicit system, is constitutionally protected. If a school decides to dismiss or non-renew a tenured professor, Sindermann explicitly holds that such a step is subject to due process procedures.

Procedural Due Process for Non-Tenured Faculty

Alexander and Solomon in College and University Law stated that ". . . in the absence of tenure a teacher's employment rights are limited to the conditions embodied in his contract with the institution."[44] In light of Roth and Sindermann this statement needs clarification. A more precise statement today would be the following: "In the absence of state statutes implicitly or explicitly providing tenure, or university practice implicitly or explicitly providing tenure, a teacher's employment rights are limited to the conditions embodied in the teacher's contract with the institution."[45]

In Roth the Supreme Court found that non-renewal of Roth's one-year contract, absent any showing that his

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[44]Alexander, College and University Law, p. 360.

[45]See, for example, Stautz v. Pence, 517 F. 2d 111 (1973) and Shaw v. Board of Trustees, 194 N.W. 2d 558 (1971).

First Amendment rights of free speech or his Fourteenth Amendment rights of due process had been violated, did not deprive him of any liberty or property interest protected by the Fourteenth Amendment. His contract clearly stated that he would be hired for one year only and nowhere in state statute or university policy was created any expectancy of further employment beyond the one-year contract. In Sindermann the Court found a definite "expectancy" of reemployment in the Faculty Manual (which is usually specified reading in teacher contracts). The Court held that Sindermann's Fourteenth Amendment protection of a property interest was therefore violated by the lack of procedural due process regarding the non-renewal of his contract. The Court held that Sindermann's procedural due process rights guaranteed a hearing for him because of his Fourteenth Amendment property interest in his employment as a professor in the Texas junior college system.

The majority opinions in Roth and Sindermann emphasized that lacking implicit or explicit tenure, a teacher has no right to continued employment, per se, as a teacher in a state institution. Tenure is immaterial, however, to the exercise of the substantive rights of the Constitution by the teacher and to the protection of the procedural rights of the teacher in the Constitution. The burden is upon the teacher to prove deprivation of procedural and/or violations of substantive rights, if the teacher alleges

that non-renewal was based on the exercise of constitutionally protected rights.

In Bradford v. Tarrant County Junior College District[46] the Court held that a non-tenured teacher's non-renewal was based on professional reasons and not upon her exercise of free speech, and that since the reason was communicated to her privately and not placed in her personnel file, no "stigma," professionally or personally, had been attached to her.

In Wellner v. Minnesota State Junior College Board,[47] serious charges of racism against a non-tenured teacher had been placed in his personnel file and had been the basis for his non-renewal. The court found these charges to be unsubstantiated and that

> . . . the presence of racist charges against Wellner was the principal cause of his non-reappointment and this deprived Wellner of an interest in liberty which entitled him to a prior hearing, despite his non-tenured status.[48]

Although the Court of Appeals agreed with the trial court's reasoning that a hearing in Wellner's case ". . . could not now adequately reflect the actual circumstances surrounding the making of the racist charges, . . ."[49] it held that

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[46]Bradford v. Tarrant County Junior College District, 492 F. 2d 133 (1974).

[47]Wellner v. Minnesota State Junior College Board, 487 F. 2d 153 (1973).

[48]Ibid., p. 156.

[49]Ibid., p. 156.

> . . . nevertheless, we are governed by Roth and Sindermann which dictate that upon the requisite showing of deprivation of an interest in liberty the appropriate remedy is a hearing ordered by the trial court. That is, in such a case due process requires that a party be given notice of the charges against him and a reasonable chance to be heard. The Supreme Court in Roth, supra, 408 U.S. at 573, n. 12, 92 S. Ct. at 2707, n. 12, observed: 'The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course may remain free to deny him future employment for other reasons.'[50]

In Francis v. Ota[51] the court found that charges of dishonesty aired publicly by the president of the college system against a non-tenured junior college professor attached a "badge of infamy" to Francis, and that this, in combination with his expectation of future employment by the community college system, deprived Francis of his Fourteenth Amendment rights. District Court Judge King ordered that Francis be reinstated to his former position and that ". . . he should be evaluated for tenure in accordance with criteria and procedures established for this purpose at the college."[52]

Judge King reprimanded the college for its ". . . Byzantine personnel practices . . ." regarding tenure and its handling of the Francis case. The defendants had maintained the tenure was denied because of "reasonable doubt"

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[50] Ibid., pp. 156-57.

[51] Francis v. Ota, 356 F. Supp. 1029 (1973).

[52] Ibid., p. 1034.

of Francis' qualifications. The judge found this "reasonable doubt" was based on

> . . . the absence of any material in Francis' personnel file at the college upon which to base an evaluation for tenure. . . . It seems reasonably clear that this absence of evaluative material would have presented no serious obstacle had the decision to deny tenure not already been made. In any event, it was the responsibility of the college, and not of the individual faculty member, to secure the necessary evaluations (emphasis added).[53]

In Smith v. Losee, supra, the court found that Smith had been dismissed and denied tenure for the ". . . relatively harmless exercise of his constitutional rights." Smith brought a damage suit under the 1871 Civil Rights Act so the court did not order a due process hearing, nor his reinstatement, but instead awarded him damages.

Courts generally are reluctant to question the professional opinion of a school board that a teacher is unsuited professionally and personally to serve as a teacher at a certain educational level. In the mid-1960's a junior college board had ruled that a professor was professionally and personally unsuited to teaching and counselling at the junior college level.[54] A 1966 California court decision ruled against the non-tenured junior college professor's challenges to his dismissal. However, the court, in Raney, did indicate its disapproval of the board's decision:

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[53]Ibid., p. 1032.

[54]Raney v. Board of Trustees, 48 Cal. Rptr. 555 (1966).

> If this Court were at liberty to supervise the judgment of the members of the school board and to reverse their decision as to the retention of appellant on the basis of his ability and merits as a teacher, we might well reach an opposite conclusion. . . . The record evidences qualities of the petitioner which are desirable in the profession.[55]

The dismissal of tenured teachers because of a reduction in programs and/or funds has been litigated and as of now the courts say that legitimate program reductions may result in the dismissal of tenured faculty.[56] Two 1974 cases involving non-tenured junior college professors both held in favor of the right of a college to non-renew a non-tenured professor because of a program reduction.[57] The court emphasized in Krausen, though, that tenured teachers would automatically be entitled to a due process hearing if dismissed because of a program reduction.

In Collins the judge rejected the professor's allegations that his non-renewal for no other reason than as a result of the program reduction was a "stigma" on his professional reputation.

> In fact, by definition, a reduction in force means that someone who otherwise would likely be invited to stay must be relieved. Employing admittedly general criteria or guidelines is thus confined to determining who among qualified

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[55] Ibid., p. 557.

[56] Cf. fn. 23.

[57] Krausen v. Solano County Junior Coll. Dist., 114 Cal.Rptr. 216 (1974); Collins v. Wolfson, 498 F. 2d 1100 (1974).

> instructors is more or less expendable, rather than deciding who on the faculty has so misbehaved as to warrant dismissal for cause. There is simply no 'stigma' or 'badge of infamy' associated with this sort of non-renewal.[58]

If a non-tenured professor is dismissed before termination of a contract, the professor should be able to request a due process hearing under a system's grievance procedure. If one does not exist, or if the professor has exhausted all of its administrative possibilities, the professor is entitled to bring suit at law for breach of contract.[59]

In at least one case, the court upheld a school board's non-renewal of a professor for his alleged violation of the contract (not reporting all of his sick days).[60] In other instances the courts have strictly held to the date of notification of non-renewal, either specified in the contract[61] or in the faculty handbook or calendar.[62] In Raney the court chided the board for attempting to circumvent the procedural safeguards of the tenure policy that

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[58]Collins, ibid., p. 1103.

[59]Barden v. Junior Coll. Dist., 271 N.E. 2d 680 (1971); also Jackson v. Board of Trustees, 317 N.E. 2d 318 (1974); also Katz v. Board of Trustees, 310 A. 2d 490 (1973).

[60]Curbelo v. Board of Trustees, 196 N.W. 2d 843 (1972).

[61]Raney v. Des Moines, 216 N.W. 2d 345 (1974); see also Stewart v. San Mateo Junior College District, 112 Cal. Rptr. 272 (1974); also Barrett v. Eastern Iowa Community College District, 221 N.W. 2d 781 (1974).

[62]Pima College v. Sinclair, 496 P. 2d 639 (1972); also Alberti v. County of Erie, 360 N.Y. S. 2d 343 (1974).

they themselves had selected and enforced.

Summary

It seems clear, then, from Roth and Sindermann, that absent any showing of the deprivation and/or violation of constitutional rights, non-tenured, state-employed teachers must rely on the wording of their contracts and of state law in regard to the renewal or non-renewal of their employment contracts. It is apparent from the briefs of amicus curiae filed in Roth that the National Education Association (NEA), the American Association of University Professors (AAUP), and the American Federation of Teachers (AFT) are unhappy with the decision in Roth, since they concurred in urging affirmation of a lower court decision granting Roth a due process hearing. Professor William Van Alystyne, who was President of the American Association of University Professors at the time, in an appearance at Vanderbilt University in the spring of 1975 deplored the Roth decision because it goes directly against an AAUP recommendation that non-tenured teachers be given notice of non-renewal with a statement of reasons. The Supreme Court in Roth explicitly stated that non-tenured teachers are not entitled to a statement of reasons for their non-renewal.[63] Until the teaching profession can justify on legal grounds the need for a statement of reasons and due process hearings

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[63]Roth., ibid., 408 U.S. p. 569.

for non-tenured professors who are non-renewed, the judgment in Roth must stand.

Although the Roth decision is viewed as a setback by the teaching profession in their espousal of academic personnel employment rights, the Slochower, Pickering, and Sindermann decisions are definite statements by the Supreme Court that state-employed academic personnel do have employment rights and that these rights of freedom to exercise constitutional values without fear of employment-related retribution are available to all state-employed academic personnel, regardless of tenure status. These decisions further protect the tenured employee by maintaining that he cannot be deprived of his position without due process of law. Perhaps the Supreme Court will one day accept the reasoning of Justice Marshall, and of Justice Douglas (who retired in 1975), that this protection should be extended to non-tenured employees as well.

CHAPTER IV

CONSTITUTIONAL RIGHTS OF STUDENTS

Introduction

If one has read a history of higher education in the United States, it is apparent that discontent, turmoil, and riots are not new to the American campus scene. Discontent seethed on many campuses in the nineteenth century when the irritants were on-campus problems, such as deplorable living conditions and outdated academic practices relying on memorization instead of understanding.[1] These situations had improved by the twentieth century, and the first half of this century found college campuses relatively tranquil.

Discontent, turmoil, and riots once again erupted on college campuses across the United States in the 1960's. In contrast to the college turmoil of the 19th century, the irritants this time were off-campus issues, specifically the Vietnam War and civil rights. These issues emerged and escalated into campus controversies most college administrators were ill-prepared to handle. Complex legal issues began to confront college administrators across the country

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[1] Frederick Rudolph, The American College and University, Vintage Books, New York, 1962.

as a result of student activity and concern over these off-campus situations.[2]

Administrators were faced with the need to determine the individual rights of campus community members in juxtaposition to the interests of the university community as a whole. At the same time, college community members had become sophisticated in the area of civil rights and civil liberties. Because of this sophistication, campus administrators were forced to evaluate campus controversies in light of such traditionally constitutional terms as freedom of speech, due process of law, and equal protection.

Constitutional rights and issues confronted academic communities throughout the 1960's. The complexities arising from these controversies demanded legal, coherent determinations. Increasingly, college administrations, faculty, and students went to court to settle their differences. Courts traditionally had been relucant to interfere in controversies arising in educational circles. However, since the 1920's the Supreme Court had gradually expanded the scope of constitutional protections, and this expansion encouraged the legal community to adjudicate educational controversies in a constitutional context. As mentioned in chapter 2, the lack of legal precedent for cases concerned with education hampered the development of a

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[2]See, for example, Soglin v. Kaufman, 418 F. 2d 163 (1969); Brooks v. Auburn University, 412 F. 2d 1171 (1969).

unified legal theory. This difficulty was overcome by extensive use of established constitutional principles, e.g., freedom of speech, due process, equal protection, in adjudicating campus controversies.

The legitimacy of constitutional rights on college campuses was firmly and definitively established by the Supreme Court in 1969 in Tinker v. Des Moines.[3] This decision announced that ". . . [n]either students [n]or teachers shed their constitutional rights . . . at the schoolhouse gate."[4] Students and administrators found that the First, Fourth, Fifth, and Fourteenth Amendments did apply to college campuses. Students were entitled, for example, to due process in college disciplinary hearings and to freedom of expression both on and off campus.

Courts were still reluctant to interfere in a college's regulation of student academic standards unless the university action was undeniably arbitrary or capricious.[5] Thus far courts have found no constitutional right for a student to remain in college regardless of academic performance.[6]

As a result of this legal activity, courts have increased their interest in and authority over a college's

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[3]Tinker, ibid.

[4]Tinker, ibid., p. 506.

[5]Alexander, ibid., p. 410.

[6]Ibid., p. 411.

regulation of student activity outside of academics. Thus, six theories of the student-college relationship have been legally discredited in this surge of judicial intervention. The academic community also re-evaluated the relationship in light of the legal, moral, economic, and social issues that had come to the fore in the 1960's. Most of the theories were found inadequate by both the legal profession and academic community for the sophisticated public college populations of the sixties and seventies.

The six theories (in loco parentis, education as a privilege not a right, contract, trust, fiduciary and associational) are discussed briefly below. The legal explanations for their rejection by the courts are also delineated.

One of the oldest theories of the student-college relationship is in loco parentis. This theory accords a school as much control over a student's educational activities on campus (and often off campus) as a parent would have. Most of the college population is age 18 and over, and since the legal age in many legal situations is 18, courts have generally discredited this theory for college populations in recent years.

Another discredited theory is that school attendance is a privilege and not a right. Brown v. Board of Education thoroughly rejected the privilege theory at the elementary and secondary level: ". . . where the state has undertaken

to provide it, [education] is a right which must be made available to all on equal terms."[7]

In 1961 Dixon v. Alabama State Board of Education[8] applied the Brown reasoning to the college level. The court agreed that ". . . the right to attend a public college or university is not in and of itself a constitutional right."[9] However, the court went on to state that once the state has offered public higher education to its citizens

> . . . it none-the-less remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. See Slochower v. Board of Education, 1956, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (other footnotes and citations omitted).[10]

Although the court sidestepped the issue of whether citizens have a right to public higher education, it did decisively address the issue of the right to freedom from termination of a public higher education without due process:

> . . . the precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing (emphasis added).[11]

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

[8]Cert. denied, 368 U.S. 930 (1961). For a discussion of the importance of Dixon, see Charles Alan Wright, "The Constitution on the Campus," Vanderbilt Law Review, v. 22, no. 5, October, 1969, pp. 1027-88.

[9]Dixon v. Alabama State Board of Education, 294 F. 2d 150, 156 (1961).

[10]Ibid., p. 156.

[11]Ibid., p. 157.

The court in Dixon discussed another theory of the student-university relationship, the contract.[12] This theory is somewhat popular with courts since it is based on the relatively clear terms of traditional contract principles.[13] The problem, as the opinion in Dixon acknowledged, is that the contract theory applies more rationally to private universities than to public ones:

> . . . the public institution's relationship to the student cannot be termed purely contractual because the public school cannot freely choose the party with which it will contract, thus abrogating an essential ingredient of the contractual relationship.[14]

Two weak theories of the student-college relationship are trust and fiduciary. The trust theory derives from the traditional concept of charitable or educational trusts. The student is considered the beneficiary of the educational trust administered by the school. The legal weakness of trust theory is that

> . . . normally a trustee does not have the legal power to change beneficiaries as does the university when in its disciplinary function it is forced to expel a student.[15]

The fiduciary theory is also weak because it places too much reliance on the integrity and goodwill of the

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[12] Ibid., p. 157.

[13] Alexander and Solomon, ibid., p. 412.

[14] Ibid., p. 412. For an opposing viewpoint, see Gregory E. Michael, "The Unitary Theory," 1 Journal of Law and Education 411, 412, 413 (1972).

[15] Alexander and Solomon, ibid., p. 413.

parties involved. It is characterized by ". . . the confidence subsisting between two parties; where one party reposes confidence in the fidelity and integrity of another."[16] Neither theory has a viable legal position today.

The theory of an "associational" relationship between a college and a student is

> . . . grounded upon the idea of an academic community--a miniature society and political order--where members act in concert toward a common goal, presumably the teaching and learning experience. This theory also implies an equal balance of power between the students, school, and teachers, resulting in a rather communal approach to life within the academic community as a whole (emphasis in original).[17]

This theory would be more of a moral control than a legal control over the community, and thus has negligible legal validity.

Public Community College Court Cases
Legal Relationship Questions

Few court cases have litigated the question of how much control a public community college has over the personal lives and academic standards of its students. The few cases that have gone to litigation have been settled on the same principles as those applied to four-year institutions.

A case involving academic standards was brought to court in 1974 by a group of nursing students at a New York

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[16]Ibid., p. 414.

[17]Michael, ibid., p. 417.

community college.[18] The faculty of the community college implemented a new grading policy in certain required sequential nursing courses which resulted in raising the required grade for continuing in and finishing of the sequence of courses. This case is still under litigation at this point (winter 1975-1976). The pre-trial court refused to issue an injunction against the new policy, maintaining that even if the faculty changed the curriculum, it did so to establish ". . . minimum standards of academic competency in the public interest, since nursing graduates may have direct contact with the public prior to state certification."[19]

A case litigating the basis of the legal relationship between a student and a college was decided in 1971 in California.[20] The College of Marin, the county community college, refused to admit two emancipated, unmarried minors as students. The college alleged that students must be living in their "legal" residences to be admitted to the school. The junior college authorities interpreted "legal" residence under California statutes at that time to be that of the parents if the students were unmarried and under 21 years of age. The court held that a person over the age

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[18]Atkinson v. Traetta, 359 N.Y. S. 2d 120 (1974).

[19]Ibid., p. 121.

[20]Lev v. College of Marin, 99 Cal. Rptr. 476 (1971).

of 18 may select his own residence and attend the public community college of the county of residence. State law in California was changed subsequently, and it now gives 18-year-olds adult status. Anyone eighteen years of age or over may establish his or her residence independent of his or her parents. The decision in Lev relied upon the intentions of the 18-year-olds to reside permanently in a particular county as giving them the right to attend the public community college of that county.

In Cabrillo Community College District of Santa Cruz County v. California Junior College Association the court expanded the student-college legal relationship decision laid down in Lev. It held that intentions of permanent residence were not important to gain the right to attend a county's public community college:

> . . . it appears that California law is quite clear that any high school graduate shall be admitted to the community college of his or her choice irrespective of the length of time that student resides in a particular community college district.[21]

Whatever the intentions of the counties were in limiting entrance to their public community colleges, the state law in California now gives anyone eighteen years of age or older the legal right to move to any county in the state and to attend that county's community college.

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[21]Cabrillo Community College District of Santa Cruz County v. California Junior College Association, 118 Cal. Rptr. 708, 711 (1975).

First Amendment Tests

Only in the last 55 years has the Supreme Court decided freedom of speech claims. First Amendment cases have involved varied and controversial issues that have resulted in several judicial approaches in court analyses. As mentioned in chapter 2, this is understandable because of the conflicting values inherent in every constitutional issue, resulting in agonizing appraisals by the Supreme Court of these constitutional issues. After more than a half-century of litigation, it is important to analyze systematically the current stance of the court on freedom of expression cases on college campuses.

A judicial standard used frequently in college campus freedom of expression cases came from the first significant First Amendment case before the Supreme Court, Schenck.[22] In this decision Justice Holmes articulated the standard of "clear and present danger" in adjudicating First Amendment cases:

> . . . the character of every act depends upon the circumstances in which it is done. . . . the most stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre and causing a panic. . . . the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree (emphasis added).[23]

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[22] Schenck, ibid.

[23] Ibid., p. 52.

"Clear and present danger" has been a prominent and controversial standard since Schenck. Justice Holmes did not believe in an absolute right to speech (shouting "fire" in a theatre) nor did he believe that ". . . any tendency in speech to produce bad acts, no matter how remote, would suffice to validate a repressive statute."[24] Holmes was trying to balance the right to free speech with the state's need to maintain peace and order. Even so, the test of "clear and present danger" has been seriously criticized as too simplistic, too insensitive to legitimate state interests for curtailing speech. On the other hand, it has been criticized as too flexible, too injurious to the concept of freedom of speech, too weak to sustain concentrated attacks against freedom of speech.[25] In Abrams v. United States[26] Justice Holmes clarified his "clear and present danger" standard by commenting that this means the "present danger of immediate evil" (emphasis added).

In 1925 the Supreme Court heard another free speech case, Gitlow v. New York,[27] and based its decision in the case on the "bad-tendency doctrine." The proponents of this theory say that the government need not wait until a "clear and present danger" situation flowing from speech

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[24]Gunther, ibid., p. 1056.

[25]Ibid., p. 1057.

[26]Abrams v. United States, 250 U.S. 616 (1919).

[27]Gitlow v. New York, 268 U.S. 652 (1925).

presents itself. The adherents of the bad-tendency doctrine argue that government may outlaw any speech that has a tendency to lead to a substantive evil. This doctrine is quite different from the "clear and present danger" theory articulated by Holmes. Its use in the majority opinion in Gitlow elicited a strong minority dissent from Justice Holmes. He argued that "every idea is an incitement" and that the Gitlow decision should have been based upon his theory of "clear and present danger." The "bad-tendency" doctrine is generally discredited now by the Supreme Court.

Another test used extensively by the Supreme Court in the 1940's and popular with several of the Supreme Court justices is the "preferred-position doctrine." This doctrine flows from the "clear and present danger" position of Holmes in Schenck, Abrams, and Gitlow. Those who espouse this theory claim that First Amendment freedoms are the most important in the constitutional hierarchy and that no laws may abridge those rights unless the government can show that imminent substantive evils would result.[28]

The practice of prior restraint has been used by many colleges to control outside speakers and student newspapers. However, the Supreme Court has never upheld any prior restraint cases except for alleged obscenity problems

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[28]Justice Black was a fervent believer of this position.

in motion pictures.[29]

Other tests the Supreme Court uses to decide First Amendment cases are vagueness, overbreadth, and least means. A law is declared unconstitutional if it is so vague that it is open to differing interpretations and if "reasonable men" must guess at its correct interpretation. Related to this is the test of overbreadth. Statutes found unconstitutional under this test restrict protected First Amendment activities as well as allegedly unprotected activities because of the broadness of the law. The least means test requires laws to be specifically aimed at possible abuses with restrictions on such abuses that do not impinge on any First Amendment freedoms.

Another test used by the Justices is the balance of interest test. According to one authority, this test

> . . . is a protest by those who think the First Amendment should not be read in absolute terms, who reject the notion that First Amendment freedoms are any more sacred than any other constitutional freedoms, who believe that judges should not apply standards to measure the constitutionality of laws impinging on First Amendment freedoms that differ from those that are used to measure any other kinds of laws, and who think that judges have no mandate to protect these freedoms that is any different from their responsibilities in any other area.[30]

This test was used in Barenblatt v. United States[31] in 1959.

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[29]James MacGregor Burns and J. W. Peltason, Government by the People, 8th edition (Prentice-Hall, Inc., Englewood Cliffs, New Jersey, 1972, pp. 107-08).

[30]Ibid., p. 109.

[31]Barenblatt v. United States, 360 U.S. 109 (1959).

The Court ruled that the nation's interest in self-preservation overbalances a teacher's claim of First Amendment freedoms.

In recent years the Court has not adopted any one test to decide free speech cases. It has used the balancing of interest formula, least means, vagueness, and prior restraint in different cases. But in the view of many respected authorities, the Court has an ambivalent stance on First Amendment freedoms.[32]

Limits of Student Freedom

Unlike four-year institutions, public community colleges have experienced few riots and demonstrations like those that disrupted many campuses during the 1960's and 1970's. Different explanations have been advanced for this phenomenon. Community college students usually live at home and/or work part-time. Many are married with families to support. Perhaps more significantly most community college campuses are "commuter" schools. Rarely do public community colleges have dormitories, although some private junior colleges have dormitory facilities. Thus, the tendency of community college students is to come to campus for classes and then depart for other activities elsewhere (work, play, study). Consequently,

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[32]Burns, ibid., p. 110; Martin Shapiro and Douglas S. Hobbs, The Politics of Constitutional Law, (Winthrop Publishers, Inc., Cambridge, Mass.) 1974, p. 381; also Dowling, ibid.

there are only two cases on the state and federal levels which involve attempts by community college students to demonstrate or riot on campus.[33]

Even though few serious confrontations (that is, any resulting in litigation) between students and administrators have occurred, it would be prudent for community college administrators to understand fully the constitutional rights to freedom of expression as distinguished from the freedom of action. Professor Wright, supra, quoted from an article which offered one of the more enlightening explanations of this distinction:

> To some extent expression and action are always mingled; most conduct includes elements of both. Even the clearest manifestations of expression involve some act, as in the case of holding a meeting, publishing a newspaper, or even merely talking. At the other extreme, a political assassination includes a substantial measure of expression. The guiding principle must be to determine which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental? The answer, to a great extent, must be based on a common sense reaction made in light of the functions and operations of a system of freedom of expression.[34]

The article also explained that the state (this includes the state educational system) cannot prohibit freedom of speech because it disagrees with the content of the speech:

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[33]Board of Trustees of Community College District Number 6 v. Krasnowski, 487 P. 2d 231 (1971); also Furutani v. Ewigleben, 297 F. Supp. 1163 (1969).

[34]Wright, ibid., p. 1039.

> Expression must be wholly free. . . . reasonable and nondiscriminatory regulations of time, place, and manner are the only restrictions that can be put on expression. . . . The nature of the university, and the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable, but the First Amendment is no bar to reasonable regulations of that kind.[35]

Wright did contend, and cited many cases to support his assertion, that a university does not have to tolerate interference with its normal activities:

> On this view, the quiet of the library reading room, the decorum of the classroom, and the pageantry and drama of the stadium are given preference, not because these are more or less 'education' than a 'teach-in' on Vietnam would be, but because these are the 'normal activities' of the university as defined by those to whom the state has entrusted the governance of the university. Other activities, to the extent that they are protected by the First Amendment, must be permitted but they need not be permitted at a time or place that will interfere with the normal activities.[36]

School officials in the "black armband" case maintained that the armband worn by the Tinker children would disrupt school activities, but the Court found that

> . . . there is here no evidence whatever of petitioners' (the Tinkers) interference, actual or nascent, with the schools' work. . . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . any word spoken, in class, . . . or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk (footnotes omitted).[37]

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[35]Wright, ibid., pp. 1039-42.

[36]Wright, ibid., p. 1042.

[37]Tinker, ibid., p. 508.

The Court dicta from Tinker indicated that the action of wearing the black armbands was proscribed by school authorities not because of the fears of disturbance, but because of what the black armbands symbolized. The Court held this to be an unacceptable prohibition.

> In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[38]

During the 1960's many educational institution activities were disrupted because of riots and/or demonstrations. Disruptions of the normal functioning of an educational institution are not constitutionally protected.[39] Principles of free speech that every educational institution should be aware of and should adhere to are as follows:

> (1) Expression cannot be prohibited because of disagreement with or dislike for its contents. (2) Expression is subject to reasonable and nondiscriminatory regulations of time, place, and manner. (3) Expression can be prohibited if it takes the form of action that materially and substantially interferes with the normal activities of the institution or invades the rights of others.[40]

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[38] Tinker, ibid., p. 509.

[39] For further discussion of cases involving these disruptions see Alexander, ibid., pp. 418-420, and Wright, ibid.

[40] Wright, ibid., p. 1043.

Regulations should be flexible enough to accommodate obviously spontaneous demonstrations, such as those that occurred after Dr. Martin Luther King's assassination. Educational institutions should also examine institutional policies towards students and their rights guaranteed by the Constitution, e.g., freedom of speech and assembly.

> It is far preferable that institutions accept the Constitution on their own initiative rather than wait until it is forced upon them by a court. . . . The courts have not entered this field willingly or cheerfully. They have been forced to do so, and to draft rules on an ad hoc, case by case, basis, because many universities have failed to put their own houses in order and have left the matter by default to the courts.
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> A court decision that a university rule or procedure is unconstitutional is an unhappy event, which can only deepen distrust within the academic community. Voluntary acceptance of wise rules, going in many instances beyond the minimal requirements of the Constitution, is a constructive act, calculated to ensure the confidence of all concerned with student discipline.[41]

A court decision in Texas in 1972 obliquely addressed the same problem. The Circuit Judge was unhappy that the court once again had to rule on a haircut regulation. In the dicta the judge commented:

> Except in a relative handful of cases where unique situations exist, it is a delusion and a pretense to imagine that the decision in hair length regulation cases can be based upon an objective determination gleaned from testimony by administrators, students or experts. Pragmatically and realistically, the result of the process embodies a particular judge's subjective selection among what he views as competing values. . . . So long as these ad hoc

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[41] Wright, ibid., p. 1037.

> appraisals continue, the only hope that both students and school officials who are identically situated will receive meaningful and consistent adjudications of their constitutional positions lies in whatever compulsion for general conformity that may fortuitously exist among independent life-tenured federal judges. This is too faint an anticipation to be acceptable.[42]

The admonitions of Professor Wright and the pessimism of Justice Clark regarding court adjudication of controversies originating on the college campus should serve as warnings to campus administrators. College administrators would be wise to promulgate campus regulations that thoroughly and thoughtfully acknowledge the constitutional rights of students. Such regulations would help to minimize campus disharmony, and to minimize arbitrary decisions by life-tenured federal judges.

One of the decisions dealt with a disturbance on a community college campus which occurred in Seattle in 1969.[43] A dispute between certain student organizations and Seattle Community College resulted in a demonstration that caused some damage to the campus. A temporary restraining order was sought by the Board of Trustees to forestall any more disruptive activity by the students. Each of the appellants received notice of the order, yet three days later engaged in another demonstration that attempted to block ingress to and egress from the campus. The court found the students

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[42]Lansdale v. Tyler Junior College, 470 F. 2d 659, 662, (1972).

[43]Krasnowski, ibid.

guilty, citing Tinker as partially controlling:

> Peaceful picketing, as a method of persuasion, is an exercise of free speech. However, when peaceful picketing ceases to be persuasive and becomes coercive, it loses the protections of the First Amendment. . . . the temporary restraining order herein was not intended to prohibit peaceful picketing. Its prohibitive terms were clearly and expressly limited to conduct calculated to disrupt the work and discipline of the school. Prohibition of this type of conduct through the injunctive process does not violate the appellants' First Amendment rights (footnotes omitted).[44]

The court cited several other important Supreme Court decisions to emphasize that the students' First Amendment free speech rights were not being violated. The court said, ". . . demonstrations lose their constitutional protection if the participants engage in violence."[45] The court also commented on the need for flexibility in this area, specifically noting that college administrations must be allowed to exercise discretion in free speech cases. No abuses of the students' constitutional rights occurred in the Krasnowski case, according to the Seattle court.[46]

Outside Speakers

Much of the above discussion on students' freedom

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[44]Krasnowski, ibid., p. 233.

[45]Krasnowski, ibid., p. 234.

[46]Further discussions of student demonstrations can be found in 32 ALR 3d 551, which discusses breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense; and 32 ALR 3d 864, which discusses expulsion or suspension as a result of student participation in a demonstration.

of speech and expression applies as well to the subject of outside speakers. Jeffrey F. Ghent, in an article in American Law Reports, Annotated, Federal, cautioned that

> . . . college administrators in drafting a rule to regulate speaking, must give primary consideration to students' rights entitled to comprehensive protection under the First Amendment.[47]

Mr. Ghent maintained that rules may indeed be drafted regarding outside speakers, but they may regulate only the form of the speech by the outside speaker--time, place, manner--and not the content of such speeches. Professor Wright in The Constitution on the Campus agreed with this judgment, citing Tinker as one of the controlling cases. He lamented the lack of adherence to this constitutional value by educational institutions. He cited some statistics to support his contention that many college administrators do not understand this constitutional issue and warned administrators that

> . . . given the contrast between the demands of the Constitution and the practices of the universities, it is hardly surprising that I cannot find a single case decided on its merits in this decade (the 1960's) in which a speaker ban has been upheld by a court. Perhaps a university might bar all off-campus speakers, but the issue is hardly worth pursuing since no educational institution worthy of the name can or does follow such a policy.[48]

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[47]Jeffrey F. Ghent, "Validity, Under Federal Constitution, of Regulation for Off-Campus Speakers at State Colleges and Universities--Federal Cases," 5 ALR Fed. 841, 843. See also American Civil Liberties Union v. Radford College, 315 F. Supp. 893, (1970), esp. pp. 896-97.

[48]Wright, ibid., p. 1051.

Both Professor Wright and Mr. Ghent emphasized that no one has an absolute constitutional right to speak on a college campus (just as no one has an absolute right to speak anywhere at anytime about anything).[49] Educational institutions may limit speakers to those invited by a legitimate campus group--students, faculty, or administrators. But

> . . . once a state college or university opens its doors to visiting speakers, it cannot deny either the speakers or the listeners equal protection of the laws by discriminating among speakers according to the orthodoxy or popularity of their views; the right to speak can be denied only if the requirements of the clear and present danger test are met.[50]

An important clarification regarding the clear and present danger test must be stated here. The university may prohibit a speaker's appearance if the speaker could reasonably be expected to advocate in his speech the following courses of action:

> . . . (1) violent overthrow of the government of the United States . . . or any political subdivision thereof;
> (2) willful destruction or seizure of the institution's buildings or other property;
> (3) disruption or impairment, by force, of the institution's regularly scheduled classes or other educational functions;
> (4) physical harm, coercion, intimidation or other invasion of lawful rights of the institution's officials, faculty members or students; or
> (5) other campus disorder of violent nature.[51]

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[49]See Gunther and Dowling, ibid., chap. 15, "Freedom of Expression and the Risks of Crime, Disorder and Revolution."

[50]Ghent, p. 845.

[51]Stacy v. Williams, 306 F. Supp. 963, 973 (1969).

In Stacy v. Williams[52] the judge cautioned that the advocacy of the above must be oriented to immediate action. It is constitutionally impermissible to proscribe the ". . . abstract espousal of the moral propriety of a course of action by resort to force."[53]

The university may not proscribe a speaker's appearance, though, merely because his presence presents a clear and present danger of causing a riot among the audience:

> One simply cannot be restrained from speaking, and his audience cannot be prevented from hearing him, unless the feared result is likely to be engendered by what the speaker himself says or does. In such circumstances . . . attendant law enforcement officers must quell the mob, not the speaker. . . . that the speaker may hold views disliked by the campus community is not a permissible basis for denial of the students' right to hear him (citations omitted).[54]

It is also important to note that a college or university may not refuse permission for a speaker's appearance

> . . . because he has been convicted of a felony or is under indictment for murder, or because he urges or advocates violation of the laws, or because he is an admitted member of the Communist Party. . . . A forum cannot constitutionally be denied to 'subversive elements' (footnotes omitted).[55]

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[52]Stacy, ibid.

[53]Stacy, ibid., p. 973.

[54]Stacy, ibid., p. 977.

[55]Wright, ibid., p. 1051.

In 1969 the Board of Grossmont Junior College refused a request by a legitimate campus student group, the Open Forum, for a member of the Communist Party of the United States to speak on Vietnam in a debate with a member of the John Birch Society. The court commented:

> . . . because of First Amendment rights being involved, we are not permitted to indulge the usual deference by courts to the wisdom and judgment of administrators acting in a quasi-legislative capacity.[56]

The court found that since the board encouraged and allowed other speakers to appear on campus, since the Open Forum was a legitimate campus group, and since they had gone through the proper channels set up by the board itself, the board could not deny permission for the Communist Party member's appearance.

The Dunbar decision contained several dubious judgments. At one point, Judge Brown in Dunbar quoted another California case[57] which stated,

> . . . the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable.[58]

However, in the same opinion the court seemed to contradict itself as evidenced by the following comment:

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[56]Dunbar v. Governing Board of Grossmont Junior College District, 79 Cal. Rptr. 662, 664 (1969).

[57]Danskin v. San Diego Unified School District, 28 Cal. 2d 536; 171 P. 2d 885 (1946).

[58]Dunbar, ibid., p. 665.

> . . . we can envisage the school authorities acting within their discretion by rejecting a speaker because the subject matter to be discussed is trivial or the speaker lacks expertise, intelligence or other qualification which would materially bear on his ability to make a contribution to the educational program.[59]

This would seem to be at variance with the important Supreme Court decisions regarding First Amendment rights, such as Tinker and Cox v. Louisiana,[60] and with other federal court rulings on First Amendment rights on campus.[61] Unfortunately, the court in Dunbar has managed to confuse the issue by using the term "educational program" loosely. Few people question the authority of the school administrators to establish the school curriculum. The issue in Dunbar, however, does not revolve around the curriculum of the school but around a speakers' program. Apparently for the convenience of the community college students, the school authorities had established time for the speakers' program in the middle of the day instead of the usual nighttime hours. They had also issued a resolution in 1964 which stated,

> . . . on the subject of controversial issues of any nature, as well as those of partisan politics, the Board believes that college policy should recognize the need for presentations by guest

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[59] Dunbar, ibid., p. 665.

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

[61] See, for example, Brooks v. Auburn University, 296 F. Supp. 188 (1969); Snyder v. Board of Trustees of University of Illinois, 286 F. Supp. 927 (1968); Smith v. University of Tennessee, 300 F. Supp. 777 (1969); Dickson v. Sitterson, 280 F. Supp. 486 (1968).

> lecturers, political personalities, forums, assembly programs, etc., dealing with controversial topics of significant interest and concern so long as reasonable effort is made to make clear the conflicting viewpoints in an equitable manner.[62]

As the quote from Dunbar indicates, once the school authorities establish a forum for the free expression of ideas (and the Grossmont Board itself acknowledged that controversial and partisan issues could be presented) ". . . it may not exceed constitutional limitations in picking the ideas it wishes to be freely expressed."[63] In light of the rulings at the federal level, it would be unwise to use some sections of the Dunbar opinion as an authoritative guideline in outside speaker controversies.[64]

Another California case[65] in 1970 involved a student's expulsion for not following school rules on speaker invitations to the campus. The college administrators were willing to allow a group of Socialists to speak on campus as long as the correct forms were filled out. The student refused to fill out the forms and was suspended for three days. The court ruled that the suspension was correct. The college authorities were not regulating the content of the speech but rather the form

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[62]Dunbar, ibid., pp. 663-664.

[63]Dunbar, ibid., p. 664.

[64]Mr. Thomas R. McCoy, Associate Professor of Law, Vanderbilt Law School, an expert on constitutional law, agrees with this assessment of Dunbar.

[65]Perlman v. Shasta Joint Junior College District Board of Trustees, 88 Cal. Rptr. (1970).

of the speech.

Freedom of the Press

Few cases involving the freedom of the press on college and university campuses have been litigated before the Supreme Court. Papish v. University of Missouri Curators is the most important Supreme Court student press case to date. It held in March 1973 that the expulsion of a graduate student for distributing a newspaper on campus with allegedly obscene speech was a violation of her First Amendment free speech rights. The Court cited Tinker, reiterating its stand that First Amendment rights are retained by students enrolled at state educational institutions. The Court, in Papish, in light of the absence of any disruption of the normal educational activities of the college, said,

> . . . the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution.[66]

The Supreme Court reversed the lower court's holding against defendant Papish, stating that university officials were regulating the content of the newspaper rather than the form of the paper's distribution. The Supreme Court thus held that the university's action against Papish had been unconstitutional:

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[66]Papish v. Board of Curators of the University of Missouri, 410 U.S. 667, 670.

> . . . since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state university's action here cannot be justified as a non-discriminatory application of reasonable rules governing conduct.[67]

The Papish opinion does not mention Dickey v. Alabama State Board of Education[68] even though it was the most important student press case prior to Papish. As editor of the student newspaper, Dickey wanted to publish an editorial he had written praising the president of the University of Alabama for his stand on academic freedom, a position criticized by some state legislators. The administration at Dickey's college had promulgated a rule against any editorials critical of the governor or legislators of Alabama and refused permission for Dickey to print his editorial. He, in turn, refused to print the substitute material, writing "censored" across the page, and was subsequently suspended for this act. A federal district court found that the college's suspension of Dickey for "insubordination" was unreasonable because in fact he was being punished by the college administration for the exercise of his "constitutionally protected right of expression."[69]

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[67] Ibid., p. 671.

[68] Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (1967).

[69] Wright, ibid., p. 1056.

A community college "student press" case was decided in New York in 1971. The court held that the newspapers of colleges had been

> . . . established as a forum for the free expression of the ideas and opinions of the students who attend these institutions of higher learning. . . . once having established such a forum, the authorities may not then place limitations upon its use which infringe upon the rights of the students to free expression as protected by the First Amendment, unless it can be shown that the restrictions are necessary to avoid material and substantial interference with the requirements of appropriate discipline in the operation of the school.[70]

The court understood the reluctance of the community college administration to allow the community college newspaper to print editorial attacks against established religion, but held that the student newspaper's actions were protected by the First Amendment.

It is difficult to formulate many policy recommendations on the strength of so few decisions, but Alexander and Solomon have attempted a lucid summation. They suggest that

> . . . (1) The constitutional presumption is in favor of the student's freedom of press;
> (2) restraint, to be valid, must be protected by evidence showing a reasonable forecast of material and substantive interference with a legitimate school activity;
> (3) mere apprehension of disruption or annoyance is not sufficient to restrict individual freedom;
> (4) showing of an intention to unite or disrupt is not sufficient reason for restraint, unless potential for disruption exists;
> (5) where acts of students create a 'clear and present danger' which would bring about 'substantial

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[70]Panarella v. Birenbaum, 327 N.Y.S. 2d 755, 37 A.D. 2d 987 (1971).

> evils' to the institution or where it can be shown that the students' activities would materially and substantially disrupt the work and discipline of the school, school officials are not required to sit idly by and watch a riot or demonstration destroy school property or school functions.[71]

Search and Seizure

Fourth Amendment problems do not seem to be an issue on community college campuses. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

There are no cases that have litigated Fourth Amendment rights on community college campuses at the state or federal level. One reason for this may be that junior/community colleges are not dormitory campuses as are most four-year institutions. They are more often "commuter" campuses and some do not even provide a locker for the use of each student. Consequently, the opportunity for Fourth Amendment disputes is drastically reduced, since students leave few possessions on campus.

Issues centering on Fourth Amendment rights have become increasingly complex in the last ten years. No cases litigating students' Fourth Amendment rights at any educational level have produced definitive rulings by the

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[71] Alexander and Solomon, ibid., p. 425.

Supreme Court. It would seem, then, that Tinker might be used here to emphasize again that students do not lose their constitutional rights "at the schoolhouse gate." This view was foreshadowed in 1968 by a New York court in People v. Cohen,[72] that held that university officials, accompanied by police without a search warrant, and without the consent of the student, could not enter the student's room and use the evidence found, in criminal proceedings against the student. The court ruled the search to be in violation of the Fourth Amendment. The Cohen line was strengthened in 1970 in Pennsylvania where a court threw out evidence in a criminal proceeding against a student because it was the "fruit" of an illegal search of the student's dormitory room.[73] A similar ruling was made in Alabama in 1971 in Piazzola v. Watkins.[74] In this case the federal district court strengthened the judgments of the courts in Cohen and McCloskey that students occupying college dormitory rooms retain the protection of the Fourth Amendment in searches of dormitory rooms for evidence to be used against them in criminal prosecution.

An earlier decision by the same court, basing its opinion on a different factual situation, held that a college

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[72]People v. Cohen, 292 N.Y.S. 2d 706 (1968).

[73]Commonwealth v. McCloskey, 272 A. 2d 271 (1970).

[74]Piazzola v. Watkins, 442 F. 2d 284 (1971).

had the right to promulgate reasonable rules regarding the conduct, discipline, and maintenance of an "educational atmosphere" on its campus.[75] The rules in this instance specifically stated that the college reserved the right to enter dormitory rooms for inspection purposes. The court's opinion waved aside the issue of whether or not the student's Fourth Amendment rights had actually been violated by the search conducted by university officials and based its decision on its analysis of the "special" relationship that exists between a college and its students. The court thus held that the important point was whether or not the inspection regulation was a reasonable exercise of the college's supervisory authority over its students. An important distinguishing point between the Moore and Piazzola cases was that the Moore search and seizure was instigated by and conducted by university officials and the seized material was subsequently used in college disciplinary proceedings and, allegedly, only incidentally in criminal proceedings against Moore, whereas the Piazzola search and seizure was instigated by and conducted by the police to obtain evidence to be used in criminal proceedings against Piazzola, with the college proceedings being incidental in this case. Thus, a search for university purposes must be conducted by university officials, with

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[75] Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (1968).

police purposes being secondary; the search and seizure must also be done according to valid and reasonable college rules.

A New York court in 1969[76] held that a high school vice-principal, presented with a "bad" search warrant (that is, incorrectly drawn up) by the police, legally obtained the consent of the student to have his locker searched. The United States Supreme Court refused to hear argument, but vacated the judgment and remanded the case for further consideration in light of Bumper v. North Carolina.[77] This case involved a dispute on whether "real" consent was given for a search or whether the defendant was so intimidated that she had no option but to grant "consent." It seems reasonable that in light of the Supreme Court's vacating and remanding Overton in light of Bumper that the lower court would have decided that the student had been coerced into giving consent for the locker search. It did not so rule.[78]

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[76]People v. Overton, 301 N.Y.S. 2d 479 (1969).

[77]Bumper v. North Carolina, 391 U.S. 543 (1968).

[78]Donald Hall, Associate Professor of Law, Vanderbilt University Law School, contends the N.Y.S. court decision was wrong. As an expert on the Fourth Amendment, he believes school authorities of state educational institutions should be permitted to search a student's belongings and seize evidence for criminal proceedings or serious school action (suspension, expulsion) against the student only with a valid search warrant. As noted above, the search warrant in Overton was a "bad" one. Mr. Hall would recommend that school authorities, especially at the college level, who wish to inspect a student's locker, room, or other belong-

Other authorities seem to indicate that the Overton decision may not remain long as a reliable authority on student search and seizure cases. The Gattis, in their book on school law, stated:

> . . . it should be pointed out that in actuality there is no logical reason why the Fourth Amendment protections should not be applied in the school environment, and it is possible that in the future more courts will grant students these protections.[79]

The Supreme Court has long held that searches by private citizens for private reasons do not come under Fourth Amendment restrictions.[80] Many courts have held that school officials acting on their own initiative may be classified as private citizens in searching students' belongings.[81] Authorities today indicate that these allowances will no longer be viable at the college level where almost all students are of adult age and the theory

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ings on campus, for any reason, always obtain a valid search warrant to do so. (Off-campus the Fourth Amendment applies to everyone.) For additional views consult Alexander and Solomon, ibid., pp. 429-30.

[79]Richard D. Gatti and Daniel J. Gatti, Encyclopedic Dictionary of School Law, (Parker Publishing Co., Inc., West Nyack, N.Y.) (1975), p. 241. See also Mr. Hall's comments in fn. 78. For review of Fourth Amendment rights see Gunther, ibid., chap. 12, sec. 3, "Procedural Rights in the Administration of Criminal Justice: Search, Seizure and Eavesdropping."

[80]Burdeau v. McDowell, 256 U.S. 465 (1921).

[81]For a competent review of cases at the juvenile student level see Samuel M. David, "School Searches of Students" in Search and Seizure Law Report, vol. 2, no. 5, May 1975, pp. 1-3.

of in loco parentis has been generally discarded. It would seem more probable from a perusal of the literature and recent Supreme Court cases on students' rights that college level officials should be quite careful about search and seizure issues. They are increasingly being considered state officials and could be subject to civil liability suits under authority of the Civil Rights Act of 1871.

Due Process of Law

Both the Fifth and Fourteenth Amendments of the United States Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law. Without this guarantee of due process all other rights protected by the Constitution would be meaningless. Justice Frankfurter succinctly stated this reasoning in one of his most famous sentences, "The history of liberty has largely been the history of observance of procedural safeguards."[82] Professor Wright heartily supported this line of thought as evidenced by the following statement:

> . . . without procedural safeguards the substantive protections would be virtually useless. There would be no point in an elaborate doctrine that students may be disciplined for disruptive action but not for mere expression if some administrator were permitted to make an ex parte and unreviewable determination that particular behavior was 'disruptive action' and that a particular student had participated in it. In

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[82] McNabb v. United States, 318 U.S. 332, 347 (1943).

> a system of ordered liberty, therefore, it is essential that substantive rules be applied through fair and reliable procedures.[83]

Substantive Due Process

Due process has been expanded by the courts to include not only procedural due process, but also substantive due process. In Corpus Juris Secundum substantive due process

> . . . is interpreted to mean that the government is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power.[84]

Substantive due process relies on the due process clause of the Fourteenth Amendment for its theoretical justification. It includes the carefully enumerated rights in the Bill of Rights, but also has come to include other individual liberties not enumerated. One of the more famous individual liberties cases relying upon substantive due process is Griswold v. Connecticut,[85] which announced the right of marital privacy as a "fundamental" individual liberty protected by the Federal Constitution. Other recently enunciated substantive constitutional rights are those of the right to travel to foreign countries and the

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[83] Wright, ibid., pp. 1057-58.

[84] 16A Corpus Juris Secundum 539, "Constitutional Law," Section 567.

[85] Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

right to travel interstate.[86]

"Substantive rights" have been interpreted in litigation over educational concerns, although infrequently. In Meyer v. Nebraska, supra, the concept has reaffirmed the academic freedom of teachers. In another case it was used to support parents' right to choose to send their children to private instead of public schools.[87]

Procedural Due Process

A rigid definition of "due process" seems to be impossible. It is a term that connotes reasonableness and fairness but what these are in each instance is difficult to say. A 1960 Supreme Court decision expressed its dilemma over the concept:

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[88]

Courts have been as reluctant to adjudicate due process questions on a college campus as they have been with other constitutional issues on campuses. Dixon v.

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[86]Karr v. Schmidt, 460 F. 2d 609, 614-615 (1972).

[87]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[88]Hannah v. Larche, 363 U.S. 420, 442 (1960).

Alabama State Board of Education[89] was the landmark case in which the court ruled against a public university's extant disciplinary proceedings and held that the expelled students must be given a constitutionally proper due process hearing. The court did not establish any rigid procedural steps but did require that notice and a fair hearing be given the students. Specifically, the court demanded that

> . . . 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.[90]

The weight of authority recommends that colleges provide more than the bare minimum of safeguards in disciplinary proceedings. Authorities have observed that the four fundamental safeguards, now the essential minimum required in every college proceeding that may lead to a serious penalty against the student, are:

> . . . the student must be advised of the grounds of the charge, he must be informed of the nature of the evidence against him, he must be given an opportunity to be heard in his own defense, and he must not be punished except on the basis of substantial evidence.[91]

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[89]Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961).

[90]Dixon, ibid., p. 159.

[91]Wright, ibid., pp. 1071-72.

A checklist of procedural points that goes beyond this bare minimum, ensuring fairness for the student and retaining flexibility for the university, is:

> . . . (1) written notice should be provided the student, allowing him a reasonable amount of time to prepare his defense;
> (2) prior to the hearing the student should be given a list of witnesses and a copy of their statements or complaints along with other evidence and affidavits which the university intends to submit against him;
> (3) the university should give the student the opportunity to choose between a public or private hearing;
> (4) the hearing should be conducted by the appropriate tribunal;
> (5) the student should be permitted to have counsel present at the hearing and to seek advice during the course of the proceedings;
> (6) the student should be permitted to confront his accusors and to hear all witnesses;
> (7) it is fundamental that the hearing should provide the student with the opportunity to present his own case, his version of the facts, and any exhibits, affidavits, or witnesses on his behalf;
> (8) the student should have the right to remain silent to avoid self-incrimination;
> (9) a full and complete record of the hearing should be made;
> (10) the student should be given the right of appeal within the administrative structure of the university;
> (11) the student should not be suspended before a hearing.[92]

It is also recommended that colleges review their rules and formulate specific regulations that adhere to the constitutional rights of students, both on and off campus. This is admittedly a difficult task, but leading scholars in the field maintain that it is necessary for the well-being of the university. They also assure those concerned with such a task that the rules need not be drawn with

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[92]Alexander and Solomon, ibid., pp. 434-36.

mathematical precision. The Supreme Court, in Cox v. Louisiana,[93] maintained that the word "near" in a criminal statute was sufficiently precise for its purpose. Rules need to be clear and specific but do not need the specificity of a mathematical formula to be valid.

Few community college due process controversies have reached the courts. The few that have accord community college students the same procedural rights enumerated in Dixon. One community college case[94] relies on Dixon in part of its decision. The community college student was suspended for a minor infraction of the rules of the community college. His hearing on this suspension consisted of an oral notice from the Dean of Students to be in the President's office in an hour. At that time the President and Dean of Students discussed the situation with Perlman, the student, and suspended him for the minor infraction. A letter was subsequently sent tc Perlman verifying his conviction for violating the minor rule, and setting forth the penalty of suspension. This was shortly amended to probation. While on probation Perlman deliberately and knowingly violated other school rules, and the junior college board expelled Perlman upon recommendation of the administrative authority.

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[93]Cox v. Louisiana, 379 U.S. 559, 564 (1965).

[94]Perlman v. Shasta Joint Junior College District Board of Trustees, 88 Cal. Rptr. 563 (1970).

The court held that the hearing in the President's office resulting in suspension was sufficiently adequate for the situation, since the offense and the penalty were so mild.

> We find nothing in Dixon requiring quite so much formality in disciplinary proceedings for minor infractions of college rules which may be dealt with, as here, by the President of the college.[95]

The court also found that Perlman was given due process in the steps leading up to the board meeting, i.e., adequate notice of details on the hearing and his rights at the hearing. What the court found unacceptable in the situation was that the board members had apparently agreed among themselves to expel Perlman before the hearing even commenced. The court found the board to be biased and prejudiced against Perlman, and commented:

> . . . if the record of such proceedings shows bias and prejudice upon the part of the administrative body, its decision will not be upheld by the courts (citations omitted).[96]

Several recommendations may be made from the holding in Perlman. College administrators should provide fair and reasonable notice and hearing for a student accused of even a minor infraction of a college rule, but this need not consist of written notice nor of a hearing before the board. This recommendation applies as long as the penalty is a mild

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[95]Perlman, ibid., p. 567.

[96]Perlman, ibid., p. 570.

one. When both the infraction and the penalty become more serious, more formal procedures should be followed. What constitutes "serious" is difficult to define, but certainly any expulsion or major suspension would qualify as "serious." The notice given the student in Perlman of the charges against him, of the hearing, and of his rights regarding the hearing were certainly adequate and are recommended. Discussion of the merits of the case before the hearing is to be avoided because of the possibility of the charge of a "biased and prejudiced" hearing. Board members should be aware that their actions and decisions may be subject to judicial review, and as representatives of the state they must recognize and respect the constitutional rights of the students.

In another case, the court decided that a haircut regulation for males at a community college violated the due process clause of the Fourteenth Amendment.

> In the absence of a showing that unusual conditions exist, the regulation of the length or style of a college student's hair is irrelevant to any legitimate college administrative interests and any such regulation creates an arbitrary classification of college students. . . . the instant case violates both the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.[97]

Thus, the court decided that the community college hair code for males lacked a rational relationship to the edu-

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[97]Lansdale v. Tyler Junior College, 470 F. 2d 659, 664.

cational goals of the school and could not be sustained as a course of state action. The court maintained that citizens have a right ". . . to go into the world as they please"[98] and that the Tyler Junior College dress code violated that right of its male students. On its face it deprived them of their personal liberty, a violation in itself, and did so without due process of law, another violation. This right of personal liberty is not a "fundamental" right, such as free expression or the right of association, but it is a lesser liberty

> . . . that may be invaded by the state subject only to the same minimum test of rationality that applies to all state action (citations omitted).[99]

Another junior college case involved suspended junior college students who sought to enjoin school officials from conducting expulsion hearings until criminal actions, arising from the same activities that resulted in the suspensions, had been completed. The students also asked to have the junior college authorities reinstate them pending completion of both college and criminal proceedings.[100]

The students asked for the injunction against any college proceeding, and for their immediate reinstatement,

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[98]Lansdale, ibid., p. 663.

[99]Karr, ibid., p. 615.

[100]Furutani v. Ewigleben, 297 F. Supp. 1163 (1969).

on the grounds that their suspensions were causing irreparable delays in their educational careers. They also said that immediate college proceedings would force them to testify about their activities, which would violate their Fifth Amendment rights, as this testimony might be used against them later in criminal proceedings. The court responded:

> . . . if plaintiffs wish prompt hearings on their suspensions, they need only notify the college authorities. If, at such hearings, they are forced to incriminate themselves to avoid expulsion and if that testimony is offered against them in subsequent criminal proceedings, they can then invoke Garrity in opposition to the offer. Therefore, expedited college hearings pose no threat to Fifth Amendment rights.[101]

The Garrity[102] case was a decision by the Supreme Court reversing the convictions of police officers who had testified at a state investigation on alleged fixing of traffic tickets on the guarantee of impunity, and subsequently had their testimony used against them in criminal proceedings arising from the investigations.

The use by the state of the discredited actions against the students would thus violate their Fifth Amendment rights against self-incrimination and their Fourteenth Amendment rights of a fair and reasonable hearing under the

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[101]Furutani, ibid., p. 1165.

[102]Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

due process clause. Professor Wright agreed that since there are no other state proceedings ". . . in which persons can be compelled to confess their guilt of a crime, there is no reason to think that the university disciplinary proceedings can be an exception."[103]

Equal Protection

Fairness is a basic tenet of the American system of justice. Equal protection is one of the concepts, along with due process, that has evolved from this tenet. In Corpus Juris Secundum equal protection is explained as ". . . the basic principle on which rests justice under the law."[104] The equal protection clause of the Fourteenth Amendment of the Constitution of the United States expressly forbids any state to

> . . . deny to any person within its jurisdiction the equal protection of the laws. This clause . . . means . . . that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed; but it guarantees only the protection enjoyed by other persons or classes in the same place and under like circumstances. . . .[105]

As the above quotation indicates, classification or discrimination by the state based on a reasonable distinction may be valid.

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[103] Wright, ibid., p. 1077.

[104] 16A Corpus Juris Secundum 296, Section 502.

[105] 16A C.J.S. 297, 298, Section 502. See also Gunther, ibid., chap. 14, sec. 1, "Equal Protection, Old and New," p. 989.

The Fourteenth Amendment was passed by Congress in 1868 to bridge ". . . the constitutional gap between the guarantees of the Bill of Rights and unconstitutional action by state government."[106] Not until almost 100 years later did the Supreme Court regularly begin to use the equal protection clause of the Amendment as a judicial tool to protect "fundamental" rights not specified in the Constitution[107] from state encroachment. The most important result so far of this clause has been its use in the dismantling of racial segregation in this country. Other issues have utilized the reasoning of the equal protection clause, most notably the controversy over sex discrimination. Besides the problems of sex and race discrimination that have existed in educational institutions, the recurring irritant of student appearance disputes continues to plague different levels of education. This section will review how the equal protection clause applies on community college campuses to discrimination based on sex, race, and appearance.

Sex Discrimination

"Sex," unlike race, is not yet a "suspect" category in judicial decisions. If and when the 26th Amendment to the Constitution of the United States is passed, sex as a

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[106] Alexander and Solomon, ibid., p. 438.

[107] Gunther, ibid., p. 983.

classification will then become as constitutionally "suspect" as race. Until that time sex discrimination controversies that reach judicial litigation must usually be decided on the basis of the equal protection clause. This clause does not afford as much protection against the problem of sex discrimination as the 26th Amendment would, if and when it is passed.[108]

This researcher is unaware of any public community college that excludes women from their programs on the basis of sex. This may be the result of the general dedication of community colleges to serving all the people of a community. On the four-year institutional level, a federal district court has held that regulations at the University of Virginia limiting admission to males only is unconstitutional, and ". . . that such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment."[109]

A different federal district court came to the opposite conclusion in a case in South Carolina. The case in this instance rested on slightly different facts than the Virginia case. The University of Virginia is the most prestigious institution in Virginia and has the most ex-

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[108]For more thorough discussions of this controversy see any and/or all issues of Women Law Reporter, dating from September 1, 1974.

[109]Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. 184, 187 (1970).

tensive educational offerings. The South Carolina case involved a more "ordinary" four-year institution of the state's college system. The male students seeking admission to the South Carolina college were doing so for the alleged reason of the convenience factor rather than the prestige factor. In light of the circumstances in South Carolina the court held that it could not

> . . . declare as a matter of law that a legislative classification, premised as it is on respectable pedagogical opinion, is without any rational justification and violative of the Equal Protection Clause.[110]

If and when the 26th Amendment is passed this case will probably become obsolete.

Race Discrimination

The discreditation of racial segregation in the educational system of the United States is well known. Race is a "suspect" category under the Constitution of the United States and is therefore constitutionally impermissible in all public institutions.[111] The position of the Supreme Court on racial segregation evolved from

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[110] Williams v. McNair, 316 F. Supp. 134, 138 (1970).

[111] For a recent Supreme Court ruling that seems to indicate that racial discrimination in private colleges is dubious, see Bob Jones University v. Simon, Secretary of the Treasury, 416 U.S. 725 (1974).

years of debate and as a result of many court cases.[112]

Only two community college cases have litigated the issue of racial discrimination.[113] In both cases the federal district courts ruled that the regulations prohibiting Negroes from attending their communities' community colleges to be unconstitutional. These decisions were reached before the landmark Supreme Court case of Brown v. Board of Education[114] which definitively discredited racial segregation in public education in the United States.

Appearance Discrimination

Male hair grooming controversies at the junior/community college level have produced more litigation than either race or sex discrimination issues. At least four junior/community college cases arguing male student grooming standards have reached federal courts. One of the cases reached the Supreme Court, and although denied certiorari, received a strong dissent by Justice Douglas against

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[112]For a discussion of the evolution of the Supreme Court's stand on racial discrimination see Gunther, ibid., chap. 18, "Two Problems of Equal Protection: Race and Reapportionment," pp. 1399-1454. For review of racial segregation in higher education see Alexander and Solomon, ibid., chap. 9, pp. 511-589.

[113]Wilson v. City of Paducah, 100 F. Supp. 116 (1951); and Wichita Falls Junior College Dist. v. Battle, 204 F. 2d 632 (1953).

[114]Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

denial of certiorari.

The first case appeared in Alabama in 1967. The court ruled:

> . . . the equal protection clause of the Fourteenth Amendment prohibits classification upon an unreasonable basis. This court is of the firm opinion that the classification of male students attending Jefferson State Junior College by their hair style is unreasonable and fails to pass constitutional muster.[115]

The opinion of the judge in this case evidenced strong annoyance with the junior college administration over its male hair grooming standards and, in particular, with its handling of this situation. Zachery and the other plaintiffs were excellent students as well as members of a successful musical group. None had ever been disciplinary problems. Chief Judge Lynne delivered the memorandum opinion of the court and expressed his annoyance:

> It is crystal clear from the admissions of defendants as witnesses that their insistence upon the withdrawal of plaintiffs from the college was motivated altogether by their dislike of what they considered exotic hair-styling. There is no suggestion that the page-boy haircuts affected by plaintiffs had any effect upon the health, discipline or decorum of the institution. Zachery was a candidate for the office of president of the freshman class and under the undisputed evidence in this case he would have been elected had he not been forced to withdraw. It may fairly be conjectured that the prospect of a young man with a page-boy haircut serving as president of his class triggered the action of defendants.[116]

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[115] Zachery v. Brown, 299 F. Supp. pp. 1360, 1362 (1967).

[116] Ibid., p. 1361.

In 1969 a case reached federal district court in Texas disputing a male student's beard. The court acknowledged that grooming regulations may be justified, but

> . . . the school officials are under a burden to justify this effort to regulate personal appearance whether that attempted justification be in terms of discipline, health, morals, physical danger to others, or 'distractions' of others from their school work. . . . It must be demonstrated that the exercise of the forbidden rights would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school (citations omitted).[117]

The court was able to find that none of the above possibilities for regulating male grooming standards were present at San Jacinto Junior College. Indeed, that court held that

> . . . the regulation was basically enacted to implement the personal distaste of certain school officials for beards and certain hair styles and for the beliefs and attitudes which they thought these beards and hair styles represented.[118]

The record before the court showed neither existing nor potential problems resulting from males with long hair and/or beards (mustaches were allowed because they were "worn by all people" according to a school official). The court held

> . . . that the regulation in question constitutes an unreasonable classification in violation of the

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[117]Calbillo v. San Jacinto Junior College, 305 F. Supp. 857, 859 (1969).

[118]Calbillo, ibid., pp. 861-862.

> equal protection clause of the Fourteenth Amendment.[119]

A California court ruled against a junior college student attempting to nullify a college hair grooming rule for males. It held that

> . . . there was no evidence of unequal protection other than the assertion that boys were treated differently than girls; i.e., girls could have long hair and boys could not. We do not consider the latter difference in treatment or classification as creating any substantial constitutional question.[120]

This case reached the Supreme Court but was denied certiorari. Justice Douglas dissented, saying:

> It seems incredible that under our federalism a state can deny a student education in its public school system unless his hair style comports with the standards of the school board.[121]

Although the above quotation applies more directly to the companion case of Olff, which was a high school male hair style controversy, it can be inferred that Justice Douglas felt the same way about college hair style regulations. Douglas maintained that ". . . a serious question of equal protection of the law is raised."[122] Justice Douglas was also upset with the denial of certiorari because

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[119]Calbillo, ibid., p. 861.

[120]King v. Saddleback Junior College District, 445 F. 2d 932, 939 (1971).

[121]Olff v. East Side Union High School District, 404 U.S. 1042, cert. denied (1972).

[122]Ibid., p. 1045.

> . . . the federal courts are in conflict and the decisions in disarray. We (the Supreme Court) have denied certiorari where the lower court has sustained the school board and also where it has overruled the board. The question tendered is of great personal concern to many and of unusual constitutional importance which we should resolve (footnotes omitted).[123]

A Texas case was argued before a federal court of appeals with a panel of fifteen judges. The court majority held

> . . . in the absence of a showing that unusual conditions exist, the regulation of the length or style of a college student's hair is irrelevant to any legitimate college administrative interests and any such regulation creates an arbitrary classification of college students.[124]

Nine judges concurred in the result, although not all agreed with the written opinion of the court. Six of the judges dissented. The majority opinion held that the regulation violated the equal protection clause of the Fourteenth Amendment.

It seems reasonable to conclude from a review of the preceding cases that in the future most federal courts will rule against any junior college regulations that specify the style and length of male students' hair.

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[123]Ibid., pp. 1045-46.

[124]Lansdale v. Tyler Junior College, 470 F. 2d 659, 664 (1972).

Summary

A perusal of the cases discussed in this chapter would seem to support the contention that the courts accept a constitutional view of the relationship that exists between and among community college academic personnel, students, the administration, and society in general. This means that the dicta laid down by the Supreme Court in Tinker must be seriously and carefully accepted by all elements of society concerned with the constitutional rights and responsibilities of public community college students. Students do retain their constitutional rights when they cross the school threshold.

Although community colleges have been relatively free from the strife and turmoil that existed on many four-year college campuses, college authorities should be cognizant of every student's constitutional right to freedom of expression, which must be distinguished from freedom of action. As Tinker illustrated, students do have the right to express their views, no matter how unpopular they may be with other students, faculty, and/or society in general. They do not, however, have the right to disrupt substantially the organization and maintenance of normal school activities. Tinker has also been used to reaffirm the constitutional right of students to hear any outside speaker, regardless of the views espoused by the speaker, subject to reasonable restrictions on the format

of the speech. The important reference point here is that the school may constitutionally regulate this format but may not constitutionally regulate the content.

Freedom of press on college campuses has also been supported in Papish. No matter how distasteful and objectionable the subject matter may be to some or all of the members of the college community, Papish firmly established the constitutional right of the students to publish their own material.

Search and seizure is currently a complex issue with no definitive rulings by the Supreme Court on controversies that occur on college campuses. The wisest attitude of college authorities toward this potentially explosive problem would seem to be to follow the advice of Professor Donald Hall (see footnote 78 of this chapter) and always obtain a valid search warrant before searching a student's belongings. This is the most cautious approach and may be the constitutional line finally chosen by the Supreme Court if they ever rule specifically on a college student's rights on campus under the Fourth Amendment. The weight of authority in the field seems to indicate that the Supreme Court might eventually rule that college students do have the full protections of the Fourth Amendment as much on campus as they already have off campus.

Due process in school disciplinary proceedings is a firmly established principle for almost every level of

student in the United States today. Recent court cases have upheld the rights of secondary students to due process in any disciplinary proceedings leading to any suspension or expulsion.[125] It can be safely maintained that these rights established in a secondary school setting are entirely relevant in a post-secondary situation. The constitutional guarantees of due process set forth in the Fifth and Fourteenth Amendments fully apply on the college campuses of today.

A principle of law, as basic to the Constitution as due process, is equal protection. Its application on the college campus, though, is not as clear as due process. Discrimination on the basis of race, national origin, or ethnic origin is almost completely discredited in educational circles. Unfortunately, discrimination based on sex and/or appearance is still prevalent on many campuses. The United States Government is making great strides in eradicating sex discrimination through congressional legislation, and the Supreme Court seems more amenable to accepting sex as a suspect category under equal protection along with race,[126] but their stance is still somewhat murky and

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[125]Wood v. Strickland, 420 U.S. 308 (1975); Goss v. Lopez, 419 U.S. 565 (1975).

[126]For a complete analysis of the Supreme Court's past and current position on the connection between equal protection and sexual discrimination, see Women Law Reporter, all issues, beginning September, 1974, to the present.

needs further clarification. The denial of certiorari by the Supreme Court in the King and Olff cases leaves the area of appearance discrimination undecided. If such an appearance case is ever decided by the Supreme Court, it seems probable that Justice Douglas' line of argument--that appearance should make no difference in the educational process--would be accepted by the members of the Court.

From a review of the cases presented in this chapter there is no doubt that the judiciary overwhelmingly views the current relationship between college and student as one based on solid constitutional principles.

CHAPTER V

SUMMARY, DISCUSSION, AND RECOMMENDATIONS

It is important in this final chapter to summarize the analysis of this study, to discuss implications of the study, and to provide recommendations for those interested in and concerned with the constitutional rights and responsibilities of public community college students and academic personnel.

Summary

1. It is clear from the Supreme Court's decisions on constitutional issues in landmark cases originating in educational institutions (Sweezy, Keyishian, Epperson, Pickering, Connell, inter alia) that the justices view the protection of First Amendment rights of teachers as essential to the democratic ideals and goals of the United States.

2. State employment is not a privilege dependent upon state employees surrendering their rights to constitutional freedoms guaranteed to all citizens by the Constitution.

3. As long as the teacher's expression of views does not substantially disrupt the activities of the state

or its agencies, the belief and exercise of views are protected by the First Amendment of the Constitution.

4. The United States Supreme Court has struck down state loyalty oaths that prohibit political associational activities on the grounds that the Constitution proscribes any and all disclaimers on political associations by public school teachers.

5. A reading of Pickering and Tinker seems to indicate that community college academic personnel should be given the same freedom from restrictions on partisan political activity that their colleagues at public four-year institutions enjoy.

6. Statutory provisions that establish general curriculum standards seem to be constitutional but community college professors should be accorded the same freedom of scholarly choice as their colleagues at public four-year institutions exercise.

7. The use of allegedly obscene material in the classroom will be protected only when such materials relate to the educational purposes and goals of the classroom curriculum.

8. The Roth and Sindermann decisions clearly show that a state-employed, tenured teacher who is dismissed is always entitled to a written notice of the reasons for dismissal and a hearing, if requested.

9. A non-tenured, state-employed teacher is not entitled to a written notice of the reasons for non-renewal and a hearing, unless state statutes so specify.

10. If a non-tenured teacher is dismissed before end of the contract period, it would seem that written notice and a due process hearing would be accorded the dismissed non-tenured teacher, if requested. If no grievance procedure exists for faculty members, or if the professor has exhausted all administrative possibilities, the professor is entitled to bring suit at law for breach of contract.

11. In Roth the Supreme Court maintained that any charges of dishonesty, immorality, or disability that placed a stigma on the faculty member or foreclosed other employment would require notice and an opportunity to be heard in a due process setting, regardless of the tenure status of the faculty member.

12. State-employed, academic administrative personnel are protected under the Fourteenth Amendment from dismissal before the end of their respective contracts without cause, and are entitled to a hearing if they request one for such an occurrence.

13. The courts have recognized the legitimacy of the dismissal of tenured and non-tenured teachers because of a bona fide financial exigency and/or the discontinuance or reduction of a particular academic program.

14. Students do retain their constitutional rights when they cross the school threshold.

15. The relationship between community college students and the community college rests firmly on constitutional principles.

16. Students do retain their First Amendment rights of freedom of expression through the student newspaper, student assemblies, and choices of outside speakers. Freedom of expression and freedom of action must be differentiated, though, since the Supreme Court in Papish and Tinker, inter alia, made it clear that while school authorities may regulate the time, place, or manner of these First Amendment rights, they may not regulate the content of such expression.

17. College authorities may regulate the content of legitimate campus activities if such activities present an immediate, clear danger to the safety of individuals, campus buildings, and/or campus functions.

18. College authorities may search a student's belongings--as long as the search is instigated by and conducted by university officials for university purposes and according to valid and reasonable university rules.

19. Students are entitled to due process when suspension or expulsion proceedings are initiated against them.

20. Discrimination based on race, sex, or appearance would seem to be proscribed by the equal protection principle of the Fourteenth Amendment.

Discussion

The constitutional rights and responsibilities of public community college students and academic personnel have been recognized and greatly strengthened by judicial decisions over the past twenty-eight years. Although the focus of this study has been on the students and academic personnel of public community colleges, it is apparent from a review of the previous chapters that the constitutional principles discussed apply equally to four-year institutions. The cases presented in this study have shown that the four-year educational institutions generally recognized and accepted the validity of constitutional protections on the college campus before the two-year institutions did. This slower recognition on community college campuses of the constitutional rights of students and academic personnel flows from the beliefs of the professional of the two systems directly concerned with such rights--the educational and judicial systems. For many years neither profession was certain what position, if any, community colleges had in higher education, and from this uncertainty flowed the confusion of how, or even whether, constitutional rights could be exercised on a community college campus.

The determination of the proper place of public junior colleges in the educational system has been a source of confusion and disagreement among educators since the establishment of the first successful public junior college in 1901. Advocates of the German tradition of education argued that junior colleges should be part of the secondary level of education, separate from the elite university level. This debate contributed to the uncertainty among educators, and in society generally, to the proper place of community college students and academic personnel in the educational hierarchy. Were they to be treated as public school students and teachers, with the customary restrictions and controls exercised over those groups? Or were community college students and academic personnel to be accorded the greater freedoms of those at the university level?

The German view of an educational hierarchy was eventually rejected as incompatible with the democratic beliefs of American society, and the public junior college--or community college--gradually became accepted as a part of the higher education system in this country. Yet a residue of confusion remained as to the legitimate place of community college students and academic personnel in the educational hierarchy. This confusion increased the difficulties of those who argued for the same extension of constitutional protections existing on the campuses of four-year institutions to the campuses of two-year institutions.

Recognition of the legitimacy of constitutional rights on community college campuses was stymied also by the nature of the judicial system. Courts are traditionally reluctant to debate issues that have no obvious legal precedents. Since the judicial system had rarely involved itself in controversies originating in the educational sphere before the second half of the twentieth century no unified legal view of constitutional issues affecting education existed.

Another factor explaining the reluctance of the judicial system to enter the debate over constitutional rights on college campuses was the traditional notion that public employment and public education were privileges of the citizenry. Since these were privileges, the State could limit the constitutional rights of those enjoying the privileges of either public employment or public education through "reasonable" regulations.[1]

Two landmark Supreme Court cases thoroughly discredited these notions. In 1967 in Keyishian v. Board of Regents[2] the Supreme Court rejected the idea that public employment was a privilege and that those in the public

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[1]This reasoning is generally attributed to Justice Holmes' famous statement in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892): "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

[2]Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

employ would have to accept abrogation of some of their constitutional rights. Twenty-three years earlier in Brown v. Board of Education[3] arguments that public lower education was a privilege not a right had been totally rejected by the Supreme Court. A lower court decision extended the Brown line of reasoning to the college level in 1961.[4] Although the court did not address the issue of whether a state's citizens have a right to public higher education, the decision was solidly based on the constitutional principle of due process. Thus, once a particular state had elected to provide a system of public higher education for its citizens, public higher education became less of a privilege and more of a right, and thus could not be withdrawn without the constitutional protection of due process.

In 1969 the United States Supreme Court ended a long period of judicial indecision by firmly and decisively establishing the constitutional rights, on and off the campus, for the recipients of public education in the landmark decision, Tinker v. Des Moines.[5] The retention

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

[4]Dixon v. Alabama State Board of Education, cert. den. 368 U.S. 930 (1961). For an excellent discussion of the importance of Dixon, see Charles Alan Wright, "The Constitution on the Campus," 22 Vanderbilt Law Review, 1027 (1969).

[5]Tinker, ibid.

of constitutional rights for teachers in the public employ was clearly enunciated in the Supreme Court cases of Sweezy, Keyishian, Pickering, Epperson, and Sindermann, among others. Several of the Supreme Court cases delineating the validity of constitutional rights for publicly employed teachers specifically concerned the importance of constitutional rights on college campuses. For example, the majority opinion in Sweezy said

> . . . to impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. . . . Teachers and students must always remain free to inquire, to study, to evaluate.[6]

Thus the United States Supreme Court has clearly established that the judiciary has a legal right, and indeed a constitutional duty, to safeguard teachers and students of the public employ at all educational levels from any encroachment upon the free exercise of their constitutional rights.

Increased judicial interest in the constitutional rights of teachers and students was encouraged by a remarkable increase in interest over the past thirty years among the general citizenry in their constitutional rights. Several elements of United States society seem to have contributed to a rise in this interest. The increased sophistication of the general populace has been advanced by greater numbers of citizens attending college--many under the

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[6]Sweezy, p. 250.

benefits of the G.I. Bill. The greater geographic and socio-economic mobility of the United States population since World War II seems to have eroded the parochial, insular nature of many institutions, in particular the judicial system and the educational system. And the media--mainly television--have made citizens more aware of constitutional issues such as free speech, the right to demonstrate, the right to privacy, and equal protection under the law.

The societal element of greatest immediacy and importance to the public community college has been the tremendous rise in college enrollment since World War II. For example, community college enrollment has more than quadrupled since 1960. This extraordinary increase, taken in conjunction with the societal rise in socio-economic and geographic mobility, transformed the community college from a minor to a major component of the higher educational system.

In the past sixteen years the community college system has gained a respected place in the educational hierarchy of the United States as a legitimate and vital part of higher education. Few would now argue that the community college should be an extension of the secondary school system. The decades-long debate over the community college's correct level in the educational system has ended with its unquestioned placement at the level of

higher education.

Over the past few decades the judiciary has steadily lessened its reluctance to interfere in issues arising from the college campus. Thus constitutional rights controversies from two-year and four-year institutions have increasingly been settled in courts.

Few courts now recognize legal distinctions between community colleges and four-year institutions in the exercise of constitutional rights by an institution's students and academic personnel. In Sindermann the Supreme Court justices paid scant attention to the fact that Sindermann's tenure question originated on a community college campus. State statutes and implicit and/or explicit college tenure practices determined Sindermann's tenure situation. Indeed, in the opinion the justices made no distinction whatsoever between four-year and two-year colleges in the recognition of constitutional rights for state-employed teachers.

The professionals of both the educational and legal systems of this country have alternately influenced each other to view the community college system as a part of higher education, not of the secondary school system. Since both educators and judges now view community colleges as a definite part of higher education, a court decision on a controversy over constitutional rights from a two-year institution usually applies equally well to similar issues at four-year institutions and vice-versa.

For years, First Amendment freedoms have been viewed by educators and judges as vital to the democratic ideals of our nation and necessary for the protection of scholarly research at the college level. In Supreme Court cases the justices have written about the importance of academic freedom to the entire nation.[7] In Sweezy the justices declared that

> the essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.[8]

First Amendment freedoms are among the most precious rights of the Constitution. Political controversies of the past few years clearly show that the First Amendment rights of freedom of speech and freedom of expression are absolutely vital to the maintenance of a democratic system. Discussion and debate are essential for the compromises democratic societies must make and are crucial for their fairness and stability. Citizens of a democracy must not fear that the government will restrict the exercise of their First Amendment rights. Justice Marshall strongly addressed this particular issue in the important First Amendment case, Connell v. Higgenbotham.

> If there is any fixed star in our constitutional constellation, it is that no official, high or

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[7]Keyishian, ibid., p. 603. See also Epperson, ibid.

[8]Sweezy, ibid., p. 250.

> petty, can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.[9]

An organization that has been concerned about the issues of academic freedom and tenure since its inception is the American Association of University Professors. In 1934 the AAUP and the American Association of Colleges began a series of conferences designed to update a 1925 statement of academic freedom and tenure. These conferences culminated in 1940 with the "1940 Statement of Principles on Academic Freedom and Tenure." Both organizations agreed to the 1940 restatement and were the first professional groups to endorse it. Since that time over 85 professional groups, such as the Association of American Law Schools (1946), the American Association of Colleges for Teacher Education (1950), the American Association for Higher Education (1950), the Texas Junior College Teachers Association (1970), and the Massachusetts Regional Community College Faculty Association (1973), have endorsed the "1940 Statement of Principles." The AAUP recommendations are careful, thoughtful policy statements and have been incorporated into many faculty handbooks and state statutes.

The "1940 Statement of Principles" asserts that a faculty member's right to speak or write, as a citizen,

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[9]Connell, ibid., p. 210.

should be free from institutional censorship or discipline. At the same time every faculty member has a special responsibility arising from the position of teacher

> to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not an institutional spokesman.[10]

While a faculty member can be removed from a faculty position for irresponsible, extramural remarks, the academic community should be convinced that such remarks bear upon the fitness of the faculty member's position as a teacher. According to the AAUP the

> controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for . . . [the] position. Extramural utterances rarely bear upon the faculty member's fitness for . . . [the] position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar. In the absence of weighty evidence of unfitness, the administration should not prefer charges; and if it is not clearly proved in the hearing that the faculty member is unfit for . . . [the] position, the faculty committee should make a finding in favor of the faculty member concerned.[11]

Political activity by teachers may also involve political officeholding. In a 1969 "Statement on Professors and Political Activity"[12] the AAUP discussed this situation

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[10] AAUP Bulletin, "Committee A Statement on Extramural Utterances," Spring, 1965, p. 29.

[11] Ibid.

[12] AAUP Bulletin, "Statement of Professors and Political Activity," Spring, 1969, pp. 27-28.

and stated that

> the college or university faculty member is a citizen and, like other citizens, should be free to engage in political activities so far as . . . [the faculty member] is able to do so consistently with . . . obligations as a teacher and scholar.[13]

Some political offices require minimal activity, while others are major undertakings. With the former the AAUP believes that a faculty member can serve competently as a minor political officeholder while continuing as a full-time faculty member. The latter situation would probably require the faculty member to take a leave of absence. Such a leave of absence should be provided by institutional arrangement, according to the AAUP. At the same time, the AAUP reminds the faculty member of institutional obligations to other faculty members, the administration, and to students, and suggests that faculty members limit such political activity to a "reasonable period."[14]

The United States Supreme Court has struck down state loyalty oaths that prohibit political associational activities on the grounds that the Constitution proscribes any and all disclaimers on associations by public school teachers. It is certainly a valid interest of any government to insure its existence and to guard against propaganda in the schools which calls for the overthrow of the govern-

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[13] Ibid., p. 28.

[14] AAUP Bulletin, Spring, 1965, ibid.

ment. However, loyalty oaths seem to be a particularly empty way of attaining such goals. If an oath is required of public employees, the simple sentence in Connell would seem to be constitutionally acceptable and therefore the least objectionable.

Classroom activities are rarely regulated at the higher education level, although statutory provisions that establish general curriculum standards seem to be constitutional, from a reading of Epperson. Academic freedom is essential to academic excellence but teachers must be judicious about discussing material outside their academic area of expertise.

> The teacher is entitled to freedom in the classroom in discussing his subject, but . . . should be careful not to introduce into . . . teaching controversial matter which has no relation to . . . [the] subject. . . . [Also] the teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of . . . other academic duties. . . . The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for the teacher to avoid persistently intruding material which has no relation to . . . [the] subject.[15]

Two lower court cases that dealt with the classroom use of allegedly obscene materials correlate with the

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[15] AAUP Bulletin, "Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments," June, 1974, pp. 270-71. See also AAUP Bulletin, "1972 Recommended Institutional Regulations on Academic Freedom and Tenure," Winter, 1972, pp. 428-433.

suggestions of the AAUP. In Metzger the allegedly indecent material was found to relate to the educational goals of the professor's course and Professor Metzger was ordered reinstated by the court. In Hensey the court found that the allegedly indecent actions and material had no relation to the classroom subject matter and upheld Hensey's dismissal by the community college board. These two cases are a strong indication that the use of allegedly obscene material in the classroom will be protected only when such materials relate to the educational purposes and goals of the classroom curriculum. The Supreme Court case of Epperson clearly shows though, that the justices believe academic freedom guarantees scholarly choices in the classroom at the college level.

The first definitive United States Supreme Court case on First Amendment rights was decided only 55 years ago. Since that time the constitutional rights that emanate from the First Amendment have become solidly established among the constitutional and legal traditions of this country.

Although the Supreme Court has ruled that teachers do not have a constitutional right to a system of tenure, the Constitution does provide state-employed teachers with substantial legal safeguards for the protection of academic freedom and against "political, partisan or capricious"[16]

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[16] Pickering v. Board of Education, 225 N.E. 2d 1, 6 (1967).

dismissal. As mentioned, teachers are constitutionally protected under the First Amendment from dismissal for the exercise of any of their First Amendment rights.

The two landmark Supreme Court decisions on college faculty dismissal issues, Roth and Sindermann, held that a teacher's right to reemployment "is essentially a matter of state concern and state law."[17] This is because the relationship between a faculty member and a state institution rests on the property interest of employment which is "created" and "defined by existing rules or understandings that stem from an independent source such as state law."[18] Thus, state law controls whether faculty members are entitled to tenure. If a state has neither statutes relating to the contractual rights of teachers nor ". . . implied . . . (or) unwritten 'common law'"[19] tenure formulas that exist in practice, then the state-employed teacher has no right to continued employment. However, if a contractual or an implied system of tenure does exist, then a teacher does have a right to continued employment if the teacher has met the requirements for either contractual or implied tenure.

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[17]Roth and Sindermann, ibid., pp. 603-04 (Burger, J., concurring opinion).

[18]Ibid.

[19]Sindermann, ibid., p. 602.

The Roth and Sindermann decisions also clearly show that a state-employed, tenured teacher who is dismissed is always entitled to a written notice of the reasons for dismissal and a hearing, if requested. This opinion rests on the Fourteenth Amendment protection of due process for any deprivation of a state created property interest--in this case tenured employment--by the state. A non-tenured, state-employed teacher is not accorded the same protections if non-renewed, unless state statutes so specify.

These two decisions in no way negate the faculty member's panoply of constitutional rights and protections. Professor Van Alstyne commented that

> nothing in either Roth or Sindermann at all impairs the statutory right of a faculty member to secure full redress in an appropriate federal court upon proof of . . . [the] allegation that . . . non-reappointment was significantly influenced by considerations foreclosed by the Bill of Rights or the Fourteenth Amendment. In both Roth and Sindermann, the Supreme Court remanded the cases to the federal district courts to consider the merits of each faculty member's First Amendment claim that the decision of non-reappointment was in retaliation for critical public utterances which the faculty member alleged to be protected by the First Amendment. With no dissent to this proposition, Mr. Justice Stewart observed: 'The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.' In this respect, the decision fully confirmed prior holdings of Supreme Court cases that lack

of tenure has no effect upon the substantive equal protection of First Amendment rights.[20]

It is also important to note that in Roth the Supreme Court maintained that any charges of dishonesty, immorality, or disability that place a stigma on the faculty member or foreclose other employment would require notice and an opportunity to be heard in a due process setting, regardless of the tenure status of the faculty member.[21] These rights flow from the protections of liberty and property guaranteed by the Fourteenth Amendment.[22]

Although courts have distinguished between academic administrative personnel and academic faculty in regard to First Amendment rights neither group can be dismissed for the rational, good-faith exercise of their substantive constitutional rights. Academic administrative personnel usually do not have tenure as administrators. Indeed, the AAUP recommends that tenure flow only from the position of teacher. However, state-employed, academic administrative personnel are protected under the Fourteenth Amendment from dismissal before the end of their respective contracts without cause, and are entitled to a hearing if they request

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[20]William Van Alstyne, "The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann," AAUP Bulletin, September, 1972, p. 270.

[21]Roth, ibid., pp. 573-74.

[22]Ibid., pp. 569-70. See also Meyer, ibid.

one for such an occurrence.

Both the AAUP and the courts have recognized the legitimacy of the dismissal of tenured and non-tenured teachers because of financial exigency and/or the discontinuance or reduction of a particular academic program.[23] The AAUP and the courts both assert that such a financial exigency should be demonstrably bona fide "which cannot be alleviated by less drastic means."[24] The AAUP also recommends that stringent guidelines be followed in the determination of which faculty members and which programs are to be reduced. These should include the meaningful participation of faculty in such decisions, the continuance of service of a tenured professor over that of a non-tenured professor, the opportunity for tenured faculty members to readapt within a department or elsewhere within the institution. If termination of tenured or non-tenured faculty is seen as the only solution to the situation of financial exigency, both groups should be given at least a year of notice and fair financial compensation for any hardships caused by such a termination.[25] While dismissal

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[23] AAUP Bulletin, "Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons," Winter, 1974, pp. 411-413. Also AAUP Bulletin, "On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines," Summer, 1974, pp. 267-68; also, Am. Assoc. of Univ. Prof., Bloomfield College Chapter, ibid.; Ducorbier, ibid., Levitt, ibid., Johnson, ibid.

[24] AAUP Bulletin, Winter, 1974, p. 411.

[25] AAUP Bulletin, Summer, 1974, pp. 267-68.

practices are often tied to legitimate college concerns of maintaining or reducing costs, the courts have stated that teachers cannot be denied their basic legal rights because of financial problems.[26]

Whatever the reasons for non-renewal or dismissal, whether the faculty member is tenured or non-tenured, a fair decision for all concerned demands the minimal steps of due process. It would also be prudent practice for administrative personnel to insure that all faculty members are aware, early in their appointments, of what is entailed in the process of tenure and of all the "substantive and procedural standards generally employed in decisions affecting renewal and tenure."[27] Although it is impossible to establish mathematical standards that would determine at what point a faculty member had attained enough expertise in teaching and sufficient stature in scholarship to attain tenure, the AAUP recommends that the educational institution state in writing which aspects of the faculty member's career will be considered and the relative importance of each aspect. Careful evaluation procedures for tenure decisions are outlined by the AAUP and many institutions

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[26] Am. Assn. of Univ. Prof., Bloomfield College Chapter, ibid.; also AAUP Bulletin, "The Bloomfield College Case," Autumn, 1974, pp. 320-30.

[27] AAUP Bulletin, "Statement on Procedural Standards in the Renewal or Non-renewal of Faculty Appointments," Summer, 1971, p. 207.

have incorporated the recommendations into their own regulations. The recommendations are extensive but one of the most significant aspects of the AAUP guidelines should be noted here--that is, that the faculty member should be fully advised of all aspects of the tenure "track" procedures and regulations from the beginning and throughout the entire process.

A reading of the Slochower, Pickering, Sindermann, and Roth decisions shows that state-employed academic personnel do have employment rights under the Fourteenth Amendment of the Constitution, and are free to exercise all constitutional rights, open to any citizen, without fear of employment-related retribution. The essential constitutional right of due process is one of the most important protections of the state-employed, academic personnel's exercise of any of the Constitution's rights and privileges.

One of the most important Supreme Court cases of recent years has been the "black armband" case of Tinker v. Des Moines. It clearly held that public school students do retain their constitutional rights when they cross the school threshold, thereby strengthening the earlier decision of Brown v. Board of Education--that public education, once offered, becomes a right not a privilege. Tinker and Brown have been important legal reference points for judges in decisions about the constitutional rights of

college age students.

Perusal of these two decisions and other student rights cases analyzed in this study supports the view that the relationship between community college students and the community college rests firmly on constitutional principles. Thus, college officials should be knowledgeable about the rights accorded by the Constitution to all citizens since students of public higher education have these rights while off campus and retain them while on campus. Those rights most relevant to a college campus include freedom of expression (as distinguished from freedom of action), due process, and equal protection. Freedom of expression and freedom of action must be differentiated, since the Supreme Court in Papish and Tinker, inter alia, has made it clear that while school authorities may regulate the time, place, or manner of the First Amendment right of expression, they may not regulate the content of such expression. Both the courts and the AAUP assert that this does not grant the students complete freedom of action in that substantial disruption of a school's normal activities is not constitutionally protected. The AAUP comments that

> students and student organizations 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 by orderly means which do not disrupt the regular and essential operation of the institution. At the same time, it should be made clear to the academic and the larger community that in their

> public expressions or demonstrations students or student organizations speak only for themselves.[28]

Thus, if a public college has established procedures for a student press and/or outside speaker program, college authorities may not regulate the content in the school newspaper or the outside speaker program, but only the time, place, and manner of these activities. It is noteworthy to remember that this legal distinction between freedom of expression and freedom of action applies only to campus activities initiated by legitimate campus groups--students, faculty, or administrators. Off-campus groups have no constitutional right, at this time, to initiate on-campus activities without the sponsorship of an on-campus group. The only time college authorities may regulate the content of the legitimate campus activities is when such activities present an immediate, clear danger to the safety of individuals, campus buildings, and/or campus functions. Such a determination is difficult to make and it would be advisable for college authorities to consult counsel before any action is taken.

Fourth Amendment controversies have rarely occurred on community college campuses; probably because there are few dormitories at public two-year institutions. At this point, "search and seizure" legal decisions indicate that college

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[28] AAUP Bulletin, "Joint Statement on Rights and Freedoms of Students," Summer, 1968.

authorities may search a student's or professor's belongings--as long as the search is instigated by and conducted by university officials for university purposes and according to valid and reasonable university rules. Any police involvement in this type of search must be of a secondary, incidental nature.

Legal views of the Fourth Amendment have become quite complex in the last ten years. No Supreme Court cases on the Fourth Amendment have as yet dealt definitively with search and seizure on a school campus. School authorities at the college level should be cautious though, in any decision to search a student's or teacher's belongings precisely because of the legal murkiness surrounding the Fourth Amendment. They should be aware that recent Supreme Court rulings under a 105-year-old federal statute--the Civil Rights Act of 1871 (42 U.S.C., Section 1983)--may make them liable to civil liability suits for violating a student's or teacher's constitutional rights.

The number of civil liability suits filed under the Civil Rights Act of 1871 has increased substantially in only the past six years as more people have become aware of this obscure piece of legislation of the Reconstruction Era. It was enacted in 1871 by the United States Congress as a means of forcing Southern state government officials to extend full legal rights to blacks or face personal civil liability suits for violating a citizen's constitu-

tional rights. The legal justification for this statute was based on the wording of the Fourteenth Amendment which states that

> . . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This federal statute has been used as the legal basis in three important and controversial Supreme Court cases decided within the past two years.[29] Scheuer (the "Kent State" case) held that state officials (including the president of a state university) though not absolutely immune from liability under 42 U.S.C., Section 1983, were entitled to a qualified immunity depending

> . . . upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[30]

The Scheuer decision while admitting the validity of civil rights suits against individual state officials under Section 1983, was not definitive about educators' liabilities under the statute. A subsequent Supreme Court

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[29]Wood, ibid.; Goss, ibid.; and Scheuer v. Rhodes, 416 U.S. 232 (1974).

[30]Scheuer, ibid., pp. 247-48.

decision seemed to hand down a more precise answer to puzzled educators. The Wood decision stated that

> . . . in the specific context of school discipline we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[31]

The Supreme Court held that a school board member could be required to have a greater knowledge of a student's constitutional rights because

> . . . such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system.[32]

Since the definite rulings of Wood and Goss on school discipline issues, there is no question that due process is required in school disciplinary proceedings. Such precision of certitude is not yet available in equal protection issues.

College administrative officials have already been sued under Section 1983 and the Supreme Court has recognized the validity of such an action (Scheuer). College authorities would be prudent to become fully knowledgeable about consti-

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[31] Wood, ibid., p. 307.

[32] Ibid., p. 307.

tutional rights and their applicability on a college campus. At the same time a concerted effort by college authorities to formulate specific regulations that insure the free exercise by students and academic personnel of their constitutional rights would lessen the worries of many college authorities towards Section 1983 by decreasing the possibility of constitutional rights controversies. When in doubt an educator would be most prudent to consult counsel before action is taken.

In many instances educators have felt that the courts have intruded too much and/or too frequently on college campuses. The best way to stabilize that situation is for educators to understand fully what the constitutional rights and responsibilities of students and academic personnel are and how they apply to college campus situations. By establishing an atmosphere of knowledge and acceptance of constitutional rights and responsibilities on the college campus educators could greatly reduce the need for judges to become involved with such issues.

Recommendations

1. Educators should be fully cognizant of the extent of the constitutional rights of students and academic personnel.

2. Educators should attend in-service training on the legal rights of students and academic personnel.

3. Counsel should always be consulted when educators are uncertain of the legal issues involved in any controversy.

4. Educational institutions should state in writing which aspects of the faculty member's career will be considered in tenure decisions and the relative importance of each aspect.

5. Faculty members should be fully advised of all aspects of the tenure "track" procedures and regulations from the beginning and throughout the entire process.

6. Educators should rewrite any and all campus regulations on student conduct to accord with the constitutional rights enjoyed by the students.

7. It is recommended that when school authorities search the personal belongings of a student that extra care be taken and that school authorities seriously consider whether a search warrant is necessary.

8. Further studies should be made of a college student's rights under the Fourth Amendment because of the lack of clarity in case law.

9. Further study should be made of the financial and fiscal arrangements of community colleges because of the many court cases this researcher encountered that litigated the financial and fiscal arrangements of community colleges.

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THE CONSTITUTIONAL RIGHTS AND RESPONSIBILITIES OF STUDENTS AND ACADEMIC PERSONNEL IN PUBLIC COMMUNITY COLLEGES AS DETERMINED BY FEDERAL AND STATE COURT DECISIONS

by

Patricia Ryan Bond

(ABSTRACT)

The present study is an analysis of the constitutional rights and responsibilities of community college students and academic personnel as determined by federal and state court decisions.

The first chapter is a brief overview of the development of the community college. It demonstrates that the dubious position of the community college in higher education contributed to slow acceptance by many of the constitutional rights of students and academic personnel on community college campuses.

Chapter two covers the First Amendment rights of academic personnel: academic freedom, loyalty oaths, political activity, classroom activities. It explains that the United States Supreme Court cases of Keyishian, Pickering and Epperson are clear indications that state-employed teachers have complete freedom under the First Amendment to express their views, as long as this expression does not

substantially disrupt the activities of the state or its agencies. Epperson guarantees scholarly choices under academic freedom.

Chapter three discusses tenure and the need for due process in tenure decisions. The landmark United States Supreme Court cases reviewed here are Rowe and Sindermann. Although state-employed teachers have no right to a tenure system, they do have a right to due process in any tenure decision, if either an implicit or explicit tenure system exists. Teachers may also exercise their constitutional rights without fear of employment-related retribution.

Chapter four is an analysis of the constitutional rights of students under the First, Fourth, Fifth, and Fourteenth Amendments. The judiciary overwhelmingly rejects "in loco parentis" at the college level and views the student-college relationship as one based on constitutional principles. Tinker established that students retain their rights when they cross the school threshold. Papish showed that college student newspapers have complete freedom of expression, although college authorities may reasonably regulate the time, place, and manner of distribution. Fourth Amendment rights on the college campus are difficult to ascertain since no definitive Supreme Court ruling on search and seizure on a college campus

has been handed down. Due process in school disciplinary proceedings is a firmly established principle in the United States today. The 1975 decisions in Wood and Goss clearly show this. Race has been accepted as a suspect category under the Fourteenth Amendment right of equal protection--sex and appearance have not. Disparate treatment based on sex seems more likely to be declared unconstitutional than such treatment based on appearance.

In chapter five the summary shows that academic personnel and students of community colleges are now accorded the same constitutional rights as their respective colleagues at four-year institutions, although community college administrators were slower to recognize many of those rights than were administrators of four-year institutions. It is recommended that community college administrators review all existing rules and procedures in light of the constitutional rights accorded citizens by the Federal Constitution.