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# Colleges and Universities -- Constitutional Law -- Legality of Broad Rules Governing Student Behavior

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enter the field of law rather than discouraged. No one should feel that leftwing political leanings or associations might result in a denial of admission to the bar. As Judge Motley pointed out in his opinion in *Law Students*, "It is nothing short of a complete irony that lawyers who fought for and won constitutional protections for other professions are the last to receive protection for themselves."<sup>69</sup> It is true that only a very small percentage of all applicants are rejected by state bars on grounds of character.<sup>70</sup> However, the real problem to be confronted is not the denial of admission occasioned by political probing of bar examiners, but the "chilling effect" on freedom of speech and association. Until required by the courts, all bar examiners should voluntarily share the view of Robert E. Seifer, Secretary of the Missouri Board of Law Examiners in 1952:

Speaking solely for myself, I so not think that inquiry into political beliefs has any place in bar examination work. I think that the study of law is the best training anyone can have for becoming a good American and I do not think it should be cluttered up with investigations about political beliefs and whether or not the applicant happens to agree with what a majority of the people may or may not consider at the moment to be subversive.<sup>71</sup>

J. MICHAEL BROWN

### Colleges and Universities—Constitutional Law—Legality of Broad Rules Governing Student Behavior

It is clear that the federal courts are concerned about the standards of procedural fairness observed by colleges and universities at disciplinary hearings.<sup>1</sup> But the courts have been extremely reluctant to scrutinize substantive rules that govern student behavior and more reluctant still to void such rules because of constitutional infirmity.<sup>2</sup> Using *Esteban v.*

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<sup>69</sup> 299 F. Supp. at 146 (opinion concurring in part and dissenting in part).

<sup>70</sup> Estimates from New York, California, and Illinois bar admission rejections in 1952 indicates that only one-half of one per cent of all applicants were rejected on grounds of character. Brown and Fassett, *supra* note 3, at 497.

<sup>71</sup> *Id.* at 508. Quoting a letter from Robert E. Seifer.

<sup>1</sup> *E.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967).

<sup>2</sup> See *e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); Steiner v. New

*Central Missouri State University*,<sup>3</sup> a recent case by the Court of Appeals for the Eighth Circuit, as a framework for analysis, this note will consider the extent to which the courts can adequately protect students from arbitrary action by school administrations if judicial review is limited to procedural matters at the expense of substantive considerations. This examination will be done, first, by measuring the college regulations in *Esteban* against the constitutional standards of vagueness and overbreadth and, second, by considering the Eighth Circuit's application of the rules to the factual events of the case. Throughout the note, a comparison will be drawn between the court's handling of the students' acts in *Esteban* and the judicial treatment generally accorded similar occurrences in a non-college context.

On the evenings of both March 29 and 30, 1969, demonstrations took place on the campus of Central Missouri State College. During these incidents, six hundred dollars of damage was done to college property, a public highway was blocked, traffic was halted, and cars were rocked and their occupants forced out into the street.<sup>4</sup> On the basis of acts committed during these incidents, two students, Alfredo Esteban and Steve C. Robards, were suspended from school for two semesters after they were orally advised of the charges against them and were given an informal conference with the Dean of Men. Alleging a denial of due process, Esteban and Robards sought an injunction against their dismissal in federal district court. The district court directed the school to grant the plaintiffs a new hearing at which certain procedural rights were to be accorded, including the right to notice of charges, the right to rudimentary discovery, the right to presence of counsel, the right to confront adverse witnesses, the right to call friendly witnesses, and the right to record the proceedings.<sup>5</sup>

At the new hearing granted by the university, Esteban and Robards

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York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959); *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967); *Connelly v. University of Vt. and State Agricultural College*, 244 F. Supp. 156 (D. Vt. 1965); *Due v. Florida A.&M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963).

<sup>3</sup> 415 F.2d 1077 (8th Cir. 1969). The opinion of the court was written by then Circuit Judge Blackmun, whose future decisions may be of considerably more moment. On May 12, 1970, Judge Blackmun was unanimously confirmed by the United States Senate to a seat on the United States Supreme Court. A strong dissent was registered by Judge Lay both on the merits and on the procedural issue of whether a federal court should merely review a disciplinary proceeding by a state college rather than grant a trial de novo.

<sup>4</sup> *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1079 (8th Cir. 1969).

<sup>5</sup> *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967).

were given a full measure of procedural guarantees and were again suspended for two semesters. These suspensions were upheld by the district court<sup>6</sup> and, subsequently, by the Eighth Circuit.<sup>7</sup>

#### THE REGULATIONS

The following regulations of the college were quoted by the Eighth Circuit as pertinent to the suspension of Robards and Esteban:

All students are expected to conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College.

When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE.

Conduct unbefitting a student which reflects adversely upon himself or the institution will result in disciplinary action.

Mass Gatherings—Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College. Only a few students intentionally get involved in mob misconduct, but many so-called "spectators" get drawn into a fracas and by their very presence contribute to the dimensions of the problems. It should be understood that the College considers no student to be immune from due process of law enforcement when he is in violation as an individual or as a member of a crowd.<sup>8</sup>

The principles of due process contained in the fourteenth amendment require that before a state may fairly punish an individual, it must give adequate notice of the conduct that is prohibited.<sup>9</sup> A statute that does not properly describe illegal conduct is unconstitutionally vague.<sup>10</sup> If men of common intelligence must guess at the meaning of a statute or if they could reasonably differ as to its application, it must fail for vagueness.<sup>11</sup> When preferred freedoms such as speech, press, religion, and assembly are involved, the standard is more demanding:

<sup>6</sup> Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968).

<sup>7</sup> Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969).

<sup>8</sup> 415 F.2d at 1079.

<sup>9</sup> Niemotko v. Maryland, 340 U.S. 268 (1951). See generally Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MT. L. REV. 275 (1957); Note, *Uncertainty In College Disciplinary Regulations*, 29 OHIO ST. L.J. 1023 (1968).

<sup>10</sup> Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968).

<sup>11</sup> Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.<sup>12</sup>

Do the regulations in *Esteban* exhibit sufficient specificity to avoid the constitutional prohibition against vagueness? The first of the college rules under which Esteban and Robards were disciplined prohibited any mass gathering "which might be considered as unruly or unlawful." By definition, an "illegal gathering" must amount to conduct punishable under a properly explicit statute or state regulation; otherwise, the standard pertaining to vagueness is not satisfied. Whether a crowd is "unruly" is a question on which reasonable men could differ. Are spectators "unruly" if, at a sporting event, they boo the referee? Are the participants in a raucous fraternity party or an audience that hurls marshmallows at an unpopular speaker "unruly"? These questions are difficult, and answers are not likely to be uniform. The phrase "might be considered" in the regulation would further reduce expected uniformity of opinion because the inclusion of such language introduces additional elements of subjectivity.

The second regulation in issue in *Esteban* required students to "conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College." Are the social customs to which the regulation refers those accepted by the campus radicals, the "straight" students, the average Missouri citizen, or the faculty wives' association? Is it "befitting" a student to vociferously demand constitutional freedoms, or is it "unbefitting" to refrain from such actions? There is surely a quantum of vagueness and uncertainty in this regulation.

The court found no merit in the defendant's attack on the vagueness of the regulations, said that the regulations were not hard to understand, and expressed confidence that college students could find certainty in them.<sup>13</sup> The court further indicated that even if the rules were somewhat broad, they were still valid because "flexibility and reasonable breadth"<sup>14</sup> in student regulations are not constitutionally fatal. The court joined in the opinion of those "qualified and experienced" in the field of education who have felt it preferable for codes of student behavior to be general

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<sup>12</sup> *Smith v. California*, 361 U.S. 147, 151 (1959).

<sup>13</sup> 415 F.2d at 1088.

<sup>14</sup> *Id.*

rather than specific, and it cited as authority three articles—all written by and for college administrators.<sup>15</sup> It is not particularly startling that such individuals would prefer broad, general rules; for the writing of new codes would probably be their task, and any code with specific regulations would sharply curtail their discretion in matters of student discipline. The court failed to note that others “qualified” in the field of education<sup>16</sup>—such as the American Association of University Professors, the National Student Association, and the American Associations of Colleges—and some “experienced” in the field of law—such as Professors Wright,<sup>17</sup> Linde,<sup>18</sup> and Van Alstyne<sup>19</sup>—have argued that specificity<sup>20</sup> in student rules is preferred, if not required.

<sup>15</sup> *Id.*

<sup>16</sup> *Joint Statement on Rights and Freedoms of Students*, AM. ASS'N. OF UNIV. PROFESSORS BULL. (Summer 1968). The following organizations have approved the Joint Statement: U.S. National Student Association, Association of American Colleges, American Association of University Professors, National Association of Student Personnel Administrators, National Association of Women Deans and Counselors, American Association for Higher Education, Jesuit Education Association, American College Personnel Association, Executive Committee, College and University Department, National Catholic Education Association, Commission on Student Personnel, American Association of Junior Colleges. It is interesting to note that one authority on this point cited by the court (415 F.2d at 1088) is taken from a publication of the American College Personnel Association, one of the groups that has adopted the Joint Statement.

<sup>17</sup> Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1064 (1969).

<sup>18</sup> Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40 (1966).

<sup>19</sup> Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 592 (1968).

<sup>20</sup> Support for the proposition that student disciplinary rules should be specific rather than general is found in the nature of a second act that the college, sustained by the court, found sufficiently culpable to punish. This act was the writing of a letter by Robards to a Missouri state legislator that contained the following language:

I assure you, I do not stand alone in my disgust with this institution. From suppression of speech and expression to ridiculous, trivial regulations this college has done more to discourage democratic belief than any of the world's tyrants. . . . My comrades and I plan on turning this school into a Berkeley if something isn't done.

415 F.2d at 1081.

In this letter the court could find no expression of a grievance (*id.* at 1084) although the language in the second sentence about suppression of speech and trivial regulations certainly has a grievance-like ring. The court also found a flat threat contained in the seemingly-ambiguous third sentence (*id.*). Even assuming that the court was correct in asserting that correspondence to a state legislator is punishable if it either contains a veiled threat or does not with sufficient specificity articulate a grievance, the court by its approach dealt in reality with whether these acts could be punished at all rather than with whether they could be punished under the regulations involved in the case. A student would have to be almost

In addition to cases dealing with "vagueness" in governmental laws and rules, a second line of precedent involves the doctrine of unconstitutional conditions.<sup>21</sup> The courts have made it abundantly clear that the constitutional guarantees of freedom of speech,<sup>22</sup> assembly,<sup>23</sup> and press<sup>24</sup> operate with full vigor on college campuses. While a state is not required to provide subsidized higher education for its citizens,<sup>25</sup> it may not condition the enjoyment of such a privilege on the surrender of preferred constitutional rights, at least in the absence of a compelling state interest.<sup>26</sup> What must be settled is whether the constitutional guarantee of freedom of assembly extends to "unruly or unlawful" mass gatherings. It is fairly easy to maintain that it does not extend to unlawful gatherings,<sup>27</sup> but it is extremely difficult to say that the guarantee does not

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clairvoyant to anticipate that writing such a letter could be punished under either pertinent regulation. Perhaps a student should be expected to realize that politically sensitive school administrators might consider any complaint lodged with state legislators to be inherently "conduct unbecoming."

<sup>21</sup> Robards was on disciplinary probation at the time of the incident, a fact on which the court placed great emphasis. (415 F.2d at 1079, 1088). Although generally a college may not place unconstitutional conditions on the enjoyment of state-granted educational privileges, can such conditions be imposed pursuant to college disciplinary action by analogy to the case of a citizen who can be constitutionally deprived of certain fundamental rights while on probation or parole? *Cooper v. United States*, 91 F.2d 195 (5th Cir. 1937) (probationer is not a free man but is subject to such restrictions as a court may impose); *Adamo v. McCorkle*, 26 N.J. Super. 562, 98 A.2d 597 (1953) (right to travel may be restricted). Although there appear to be no cases involving this question, two distinctions between the situations seem to compel a negative response. First, state and federal courts are constitutionally established and invested with the full authority of the state or federal government to completely deprive an individual of his liberty in appropriate circumstances, a power which college disciplinary bodies do not possess. Second, state and federal courts must strictly observe the full range of procedural rights accorded by the Constitution and can punish only under laws drawn to satisfy constitutional specifications, limitations that do not all obtain on campus.

<sup>22</sup> *Bartels v. Iowa*, 262 U.S. 404 (1923).

<sup>23</sup> *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967).

<sup>24</sup> *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967). See generally *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), for a discussion of first-amendment rights in the educational context.

<sup>25</sup> *Hamilton v. Regents of Univ. of Calif.*, 293 U.S. 245 (1934); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 156 (5th Cir. 1961).

<sup>26</sup> *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968).

<sup>27</sup> In a context such as this one, stating that certain conduct is constitutionally protected means that the interest of the state is not sufficiently compelling to justify limitation of preferred freedoms, of which assembly is one. The state has an interest in the preservation of order on the campus, which can in some cases be of such importance that freedoms may be abridged. But at least one case, *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851

extend to "unruly" assemblies. In both *Edwards v. South Carolina*<sup>28</sup> and *Cox v. Louisiana*,<sup>29</sup> the crowds were dancing, clapping and singing loudly. Although in both situations the deportment of the crowds could reasonably be described as unruly, the Supreme Court held that the congregations involved were constitutionally protected by the right to freely assemble.<sup>30</sup> So, if indeed there is a constitutional right to participate in an unruly mass gathering, a statute promulgated in the non-academic world abridging that freedom would be fatally contrary to the demands of the Constitution. If the first amendment applies with full vigor on the campus, as the courts maintain,<sup>31</sup> a similar rule issued by a state college or university should also be void.

A final notion, perhaps not yet raised to the level of a constitutional doctrine, related to the rule-making power of a state university is that the school may discipline a student only for conduct that interferes with the institution's primary function—namely, "imparting and expanding the boundaries of knowledge."<sup>32</sup> This concept represents the furthest departure to date from the once-popular idea that the school stands *in loco parentis* to the student and has despotic power to regulate every phase of his life.<sup>33</sup> The primary-function theory holds, for example, that while a school may validly punish a student for plagiarism, an offense not punishable by general society but clearly a danger to the institution's teaching function, it should leave to the civil authorities such serious, but educationally unrelated, offenses as reckless driving or shoplifting. This principle has been widely accepted by legal scholars,<sup>34</sup> but it has accrued

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(1948), has held that anticipation of violence is not sufficient justification for preventing assemblies.

<sup>28</sup> 372 U.S. 229 (1963).

<sup>29</sup> 379 U.S. 536 (1965).

<sup>30</sup> See also *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

<sup>31</sup> *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

<sup>32</sup> Sherry, *Governance of the University: Rules, Rights and Responsibilities*, 54 CALIF. L. REV. 23, 38 (1966).

<sup>33</sup> *North v. Board of Trustees of the Univ. of Ill.*, 137 Ill. 296, 27 N.E. 54 (1891); *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

<sup>34</sup> McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558, 561-63 (1968); Sherry, *Governance of the University: Rights, Rules, and Responsibilities*, 54 CALIF. L. REV. 23, 38 (1966); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 3 LAW IN TRANS. Q. 1, 28-33 (1965); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 336 (1968).

only a small following among the courts.<sup>35</sup> It is interesting to note that the trial court that decided *Esteban* accepted this idea.<sup>36</sup> Despite its lack of universal acceptance, the primary-function principle serves as both an analytical tool and, perhaps, a preview of a soon-to-be-established rule of law. When the two regulations involved in *Esteban* are measured by this principle, the rule governing mass gatherings would be easily acceptable (assuming that it was not too vague) because colleges and universities have every right to suppress or prevent riots and disturbances that might interfere with the orderly pursuit of learning. The "conduct-befitting" rule, however, can only be tested by resorting to the particular factual situation so that it can be ascertained whether the school had any valid interest in the conduct that it sought to punish.

#### THE CULPABLE ACTS<sup>37</sup>

##### *Robards*

On the first night of disturbances, Robards was present as a spectator at the scene for thirty minutes; on the second, he was present for one hour, again as an observer. On both occasions he talked with other students in the crowd, and on the second night he discussed with others what was taking place and expressed his disgust with the college. He also *observed* some of the illegal acts of the crowd.<sup>38</sup> As a consequence of these acts, Robards was cited for "contributing to and participating in an unruly and unlawful mass gathering."<sup>39</sup>

One procedural right on which the courts have uniformly insisted for students appearing before college disciplinary boards is that they cannot be punished in the absence of "substantial evidence."<sup>40</sup> In light of this guarantee, how could the Eighth Circuit conclude that there was substantial evidence of participation by Robards in the crowd's unlawful acts when it was shown that he did nothing but stand in the crowd and

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<sup>35</sup> *Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 871, 57 Cal. Rptr. 463, 472 (1st Dist. Ct. App. 1967).

<sup>36</sup> 290 F. Supp. 622, 629 (1968).

<sup>37</sup> Space limitations prohibit a thorough discussion of all acts charged against Robards and *Esteban*, but all acts not analyzed in the text will be mentioned in the notes.

<sup>38</sup> 415 F.2d at 1080.

<sup>39</sup> *Id.* at 1082.

<sup>40</sup> *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967). See also *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968).

converse with his schoolmates? Cases cited by the court itself clearly establish the principle that a citizen may *not* be criminally punished for mere presence in a crowd that committed unlawful acts.<sup>41</sup> In *Rollins v. Shannon*<sup>42</sup> a district court stated unequivocally that "it is clear that mere presence at an unlawful assembly does not render one liable to arrest and prosecution. . . . One must intend to and in fact participate."<sup>43</sup> And in *Scoggin v. Lincoln University*<sup>44</sup> this same principle of "mere presence" was applied to a case involving a college demonstration. The court refused to uphold the expulsion of a student by the university because, while he had been active in organizing the incident and had been present throughout the violence that resulted, it was not shown that he had participated in any illegal activity.<sup>45</sup>

Choosing not to rely on decisions directly in point, the Eight Circuit in *Esteban* looked to cases from the nonacademic world for a principle that could be applied to campus activity.<sup>46</sup> The court adopted the "rational-connection" principle that was first announced in *Tot v. United States*<sup>47</sup> in 1943 and approved as late as May, 1969, in *Leary v. United States*<sup>48</sup> to uphold Robards' suspension. This test is stated in *United States v. Romano*<sup>49</sup> in the following manner: "Such a legislative determination would not be sustained if there was 'no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection . . . in common experience.'"<sup>50</sup> By adopting this test, the court in *Esteban* raised for itself the problem of deciding whether the fact of mere presence in a crowd is connected in common experience to actual participation in punishable activity. Does common experience indicate that each individual in a crowd of several hundred is guilty of every illegal act of the crowd? The court asserted that Robards "[m]ay not have stopped any automobile,

<sup>41</sup> *Barr v. Columbia*, 378 U.S. 146, 150 (1964); *Rollins v. Shannon*, 292 F. Supp. 580, 590 (E.D. Mo. 1968).

<sup>42</sup> 292 F. Supp. 580 (E.D. Mo. 1968).

<sup>43</sup> *Id.* at 590.

<sup>44</sup> 291 F. Supp. 161 (W.D. Mo. 1968).

<sup>45</sup> *Id.*

<sup>46</sup> While refusing to apply such fundamental principles as "void-for-vagueness" (see discussion pp. 945-48 *supra*) and "unconstitutional conditions" (see pp. 948-49 *supra*), the court unquestioningly applied a severely criticized doctrine of secondary importance.

<sup>47</sup> 319 U.S. 463 (1943).

<sup>48</sup> 395 U.S. 6 (1969).

<sup>49</sup> 382 U.S. 136 (1965).

<sup>50</sup> *Id.* at 139.

or rocked it or forced out its occupants or damaged property, but these incidents took place and were caused by the mob and he was a part of the mob."<sup>51</sup> Since in deciding whether the requisite "rationality" is present, subjective factors are probably determinative, it is impossible to say that the court was wrong. But even if its conclusion was correct, the result would seem to make every casual bystander guilty of any illegal act of that amorphous and ill-defined entity, the crowd. The court's rationale would force an individual contemplating attendance at a gathering to accurately forecast the presence or absence of violence in order to avoid punishment.<sup>52</sup> *Rollins v. Shannon*<sup>53</sup> and other cases establish the proposition that this result could not obtain outside the college environment, and *Scoggin v. Lincoln University*<sup>54</sup> indicates that it should not apply to activities related to the campus.

### *Esteban*

On the first evening of disturbances, Esteban left his dormitory about the time that the disruptions were subsiding and proceeded to within a short distance of the intersection that had been the center of the violence. There he encountered Dr. Meverden, a faculty member who was seeking to disperse the remaining students. Meverden twice asked Esteban to return to his dormitory; twice Esteban refused, insisting that he was breaking no law and that he "had a right to be out there."<sup>55</sup> Esteban argued with Meverden, questioned his authority, and said that there were no rules limiting the time men could stay outside the dormitories. Shortly thereafter, at the encouragement of other students present, Esteban did return to the dormitory.<sup>56</sup> At the college disciplinary proceeding, Esteban was charged, *inter alia*, with "contributing to and participation in an unruly and unlawful mass gathering . . . in that . . . [he] . . . did resist the efforts of one Dr. M. L. Meverden in dispersing said mass gathering. . . ." <sup>57</sup>

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<sup>51</sup> 415 F.2d at 1085. Judge Lay's dissenting opinion stated categorically that "there is no evidence whatsoever to show that Robards was a 'participant' in any unlawful disturbance or illegal demonstration." *Id.* at 1093.

<sup>52</sup> *Id.* at 1080. The dissent in *Esteban* strongly supported the idea that a student should not be forced to take this risk. The dissenting judge also seemed to feel that the chilling effect of this result on the exercise of first-amendment freedoms was not properly considered by the majority. *Id.* at 1094-96.

<sup>53</sup> 292 F. Supp. 580 (E.D. Mo. 1968).

<sup>54</sup> 291 F. Supp. 161 (W.D. Mo. 1968).

<sup>55</sup> 415 F.2d at 1080.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1081.

In considering the events that the Eighth Circuit found sufficient to warrant Esteban's suspension, it is important to note not only that there was no proof that Esteban took part in any of the illegal acts committed by members of the crowd but also that the facts established that he did not leave his dormitory until "about the time the 'disturbance' had subsided."<sup>58</sup> Yet he too was charged with "contributing to and participating in an unruly and unlawful mass gathering."<sup>59</sup> If it offends due process to discipline an individual who was merely present in a crowd when illegal acts were committed, a fortiori punitive action taken against a student who did not arrive at the scene until the disruption was almost over is similarly offensive.

The charge against Esteban was couched in terms seeming to indicate that it was the order-keeping function of the university upon which he encroached. But this position is clearly untenable because Esteban did eventually comply with Meverden's request that he return to his dormitory, thereby satisfying the university's interest in preventing further violence. Perhaps Esteban was really punished for his tardiness in returning. But Esteban had been in the dormitory until the disturbance had almost ended, and he may not have known that any illegal acts were committed. Moreover, it is unclear whether Esteban recognized Meverden as a member of the faculty or whether Meverden identified himself. It would seem that if such identity was not established, Esteban could not have been punished whether he complied promptly, slowly, or not at all with Meverden's instructions. These two factors would seem to provide abundant justification for Esteban's less-than-precipitous return to his dormitory.

A second possible basis for the charge is that Esteban was punished for failing to comply with a directive of an administrator. The opinion of the court is full of language supporting the idea that defiance of college authority is an offense in itself.<sup>60</sup> Apart from situations on the college campus, the proposition has been established that an individual may not be punished for failure to obey an official of the state unless the official's directive is supported by a valid statute.<sup>61</sup> In *Shuttlesworth v. Birmingham*,<sup>62</sup> the Supreme Court of the United States said, "Our decision makes

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<sup>58</sup> *Id.* at 1080.

<sup>59</sup> *Id.* at 1081.

<sup>60</sup> *Id.* at 1084, 1088 and 1089. The dissent agreed. *Id.* at 1092.

<sup>61</sup> *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (opinion dissenting in part and concurring in part).

<sup>62</sup> 382 U.S. 87 (1965).

it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense."<sup>63</sup> Therefore, it would appear that if Esteban's conduct were not punishable under a valid statute or university regulation, his defiance of proper authority could not, by itself, be punished.

One final possibility on which Esteban's suspension may have rested is that mere disrespect for a member of the faculty or representative of the administration is an offense in itself. At least one court has accepted this principle.<sup>64</sup> Others have not.<sup>65</sup> Perhaps the question that should be asked is what interest a school has in protecting the personal dignity of an individual faculty member. In a context such as the one in *Esteban*, in which the teaching functions of the school were not at stake, the university should have small or no interest,<sup>66</sup> especially since sanctions for disrespect cannot, standing alone, possibly confer respect.<sup>67</sup>

#### CONCLUSION

This note has shown that the standard of vagueness applied by the Eighth Circuit in *Esteban* to test a state college's regulations is not as strict as that normally applied to the ordinary criminal statute. It has also been suggested that the court failed to take proper notice of the doctrine of "unconstitutional conditions" and that the court found punishable some acts that would not have been punishable if committed away from the campus. These results occurred despite the fact that a generous measure of procedural fairness was given both students.

The relaxing of constitutional standards applicable to substantive regulations of state universities and colleges may seduce an unwary court into an almost cavalier attitude toward student rules, a trap that may have ensnared the Eighth Circuit. After asserting that the pertinent rules were not vague<sup>68</sup> and that vagueness is not a fatal flaw,<sup>69</sup> the court said, "the college's regulations, per se, do not appear to us to constitute the

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<sup>63</sup> *Id.* at 91.

<sup>64</sup> *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 195 (M.D. Tenn. 1968). The dissent in *Esteban* subscribed to this position. 415 F.2d at 1092.

<sup>65</sup> *Breen v. Kahl*, 296 F. Supp. 702, 708 (W.D. Wis. 1969); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613, 618 (M.D. Ala. 1967).

<sup>66</sup> See text at note 31 *supra*.

<sup>67</sup> Esteban was also disciplined for refusing to identify himself to Dr. Meverden and for threatening and using obscene language toward a resident advisor of his dormitory. 415 F.2d at 1081-82.

<sup>68</sup> See text at note 13 *supra*.

<sup>69</sup> See text at note 14 *supra*.

fulcrum of the plaintiff's discomfort. The charges against Esteban and Robards did not even refer to the regulations."<sup>70</sup> It is somewhat disturbing to find that an individual can be deprived of a college education on the basis of vague rules, but it is much more upsetting to discover that he may be deprived of it on the basis of some previously undefined common law rule governing the behavior of students. The federal and state courts have written numerous opinions concerning the procedural rules to be applied in college disciplinary proceedings; it is clear that they are concerned that students not be arbitrarily denied the advantages of a public college education. However, unfairness may not be purged from student disciplinary action without the strict application of accepted constitutional standards to the substantive rules. Professor Wright was very close to the heart of the matter when he said:

If rules of this generality are permissible then students have gained something, but not very much, from the decisions requiring procedural safeguards to be observed. It will do a student very little good to be given every protection of procedural due process ever thought of anywhere if, in the end, he may be expelled because the tribunal is free to apply a subjective judgment about what is acceptable conduct. This would be neither fair nor reasonable.<sup>71</sup>

J. CLINTON EUDY

### **Corporations—Recovery of Indemnity by Passively Negligent Directors**

The exact nature of the legal relationship of corporate directors to the corporation or its stockholders has long been a source of much confusion. Various legal theories have been developed:

The position of directors has been variously designated and described. Thus, they have been called agents; and they certainly are for some purposes agents of the corporation. They have also been called "managing partners;" but as they are obviously not partners at all, the phrase is helpful only by analogy. Again, they have been called "trustees." But a trustee is one who holds the title to property for the benefit of another, and as directors are not invested with the title to corporate property, the inaccuracy of the appellation is apparent. The truth is that the status of director and corporation is a

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<sup>70</sup> 415 F.2d at 1088.

<sup>71</sup> Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1065 (1969).