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## Colleges and Universities—Section 1983, Procedural Due Process and University Regulations: Any Relationship? *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 196)

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## Casenote

COLLEGES AND UNIVERSITIES—SECTION 1983,  
PROCEDURAL DUE PROCESS AND UNIVERSITY REGULATIONS:  
ANY RELATIONSHIP? *Esteban v. Central Missouri State College*,  
415 F.2d 1077 (8th Cir. 1969).

### I. INTRODUCTION

The relationship between the college student and the university has assumed added dimensions in recent years, and has been both the focal point of repeated litigation and a source of comment in legal periodicals. Historically, this relationship remained outside the scope of judicial scrutiny, and colleges and universities were left free to discipline and sanction students without a great deal of judicial restraint or interference. This judicial abstention was based for the most part upon theories of *in loco parentis*,<sup>1</sup> wherein the courts viewed the university as acting in a fatherly, counseling function, or upon theories of contract law.<sup>2</sup> In recent years several courts have repudiated or ignored these earlier theories, guaranteeing the student that, as a minimum, disciplinary action taken against him will conform to procedures strikingly similar to those observed in a criminal trial.<sup>3</sup> Administrative officials of

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<sup>1</sup> See, e.g., *Stetson University v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *North v. Board of Trustees*, 137 Ill. 296, 27 N.E. 54 (1891); *Anthony v. Syracuse University*, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

<sup>2</sup> *Anthony v. Syracuse University*, 224 App. Div. 487, 231 N.Y.S. 435 (1928); *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923).

<sup>3</sup> The fountainhead of the procedural due process requirements in a case involving a university disciplinary hearing is *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). Other courts have followed the *Dixon* precedent and have required procedural due process, including notice, the right to a hearing, the right to counsel, the right to confront witnesses and present testimony, the right to preserve a record, and the right to appeal the decision of the disciplinary board. *Barker v. Hardway*, 283 F. Supp. 228 (S.D.W. Va. 1968), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747 (W.D. La. 1968); *Buttney v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Jones v. Tennessee State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. granted*, --- U.S. --- (1969); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub. nom.*, *Troy State University v. Dickey*, 402 F.2d 515 (5th Cir. 1968); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967); *Wright v. Texas Southern University*, 277 F. Supp. 110 (S.D. Tex. 1967), *aff'd*, 392 F.2d

most colleges and universities and a rapid demise of disciplinary autonomy in today's institutions of higher learning seems to be occurring.<sup>4</sup>

This judicial stimulus is closely related to the numerous constitutional innovations of recent years, and it may in turn precipitate many more attacks against the "university establishment" by students who are dismissed for reasons which may seem, at least to them, completely arbitrary.<sup>5</sup> Further conflict seems imminent in today's educational system in which students are striving for personal recognition in the complex academic environment, advocating both social reform and ever-increasing campus freedoms.

Numerous articles and commentators have expounded upon the significance of college disciplinary sanctions in relation to the student, and have argued adamantly for increasing the procedural rights granted in disciplinary hearings.<sup>6</sup> But while the procedural

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728 (5th Cir. 1968); *Due v. Florida A. & M. University*, 233 F. Supp. 396 (N.D. Fla. 1963); *Schiff v. Hannah*, 282 F. Supp. 381 (W.D. Mich. 1966); *Knight v. Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961); *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); *Woody v. Burns*, 188 So. 2d 56 (Fla. 1966).

<sup>4</sup> See cases cited in note 3 *supra*. University administrators have traditionally viewed their autonomy as merely a continuation of the counseling function and as such they have felt they should be given a free rein to develop their respective institutions along lines most conducive to the goals of the particular institution. When the administrative, disciplinary function is looked upon in this manner, i.e., as mere guidance, it is argued that due process is totally irrelevant. See Monypenny, *University Purpose, Discipline, and Due Process*, 43 N.D.L. REV. 739 (1967). This view overlooks the fact that the interests involved are in reality conflicting, pitting the university against the student. It seems anomalous to suggest that the interests represented are in fact one and the same.

<sup>5</sup> See note 3 *supra*, for some of the most recent cases involving university disciplinary hearings.

<sup>6</sup> Johnson, *The Constitutional Rights of College Students*, 42 TEX. L. REV. 344 (1964); Monypenny, *University Purpose, Discipline, and Due Process*, 43 N.D.L. REV. 739 (1967); Seavy, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Sherry, *Governance of the University: Rules, Rights, and Responsibilities*, 54 CAL. L. REV. 23 (1966); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968); Van Alstyne, *The Student as a University Resident*, 45 DENVER L.J. 594 (1968); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Note, *The Scope of University Discipline*, 35 BROOKLYN L. REV. 486 (1969); Note, *Reasonable Rules Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301 (1968); *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Comment, *The College Student and Due Process in Dis-*

guarantees are wisely and rapidly being adopted by most colleges and universities across the nation, other problems loom on the horizon. These problems raise serious questions concerning the effectiveness of these procedural guarantees, the courts' role in the interrelationship between the student and the university and university regulations which attempt to proscribe first amendment activities. One case bringing these problems into focus is the recent decision by the Court of Appeals for the Eighth Circuit in *Esteban v. Central Missouri State College*.<sup>7</sup>

In *Esteban*, two students brought an action in federal district court to enjoin their suspension from Central Missouri State College, asserting jurisdiction under the civil rights laws.<sup>8</sup> Both had been suspended, based in part upon their "participation" in demonstrations which began on the public streets adjacent to the university campus and subsequently overflowed onto campus streets and sidewalks.<sup>9</sup> The students were suspended after a disciplinary hearing. The students alleged that they had been denied procedural due process; the court agreed, and they were granted a new hearing.<sup>10</sup> On rehearing, the students were again suspended, and for a

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*disciplinary Proceedings*, 13 S.D.L. REV. 87 (1968); Comment, *School Expulsions and Due Process*, 14 KAN. L. REV. 108 (1965); Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963); Symposium, *Student Rights and Campus Rules*, 54 CAL. L. REV. 1-174 (1966).

<sup>7</sup> 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969).

<sup>8</sup> Jurisdiction was asserted under 28 U.S.C. §§ 1331 and 1343 (1964), and under 42 U.S.C. §§ 1981 and 1983 (1964). The court granted jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. 415 F.2d 1077, 1079 (8th Cir. 1969).

<sup>9</sup> Some of the damage included broken school building windows and destroyed shrubbery. In addition, eggs were thrown, the Dean of Men was hanged in effigy and his "dummy" was set on fire. Traffic was halted, cars were rocked, and some of the occupants were ordered out into the street. The President of the college termed the activity as a "riot which blocked traffic on a state highway which caused considerable damage on the campus which had the citizens of Warrensburg very much worried with all the noise and turmoil that was caused." 290 F. Supp. 622, 625 n.3 (W.D. Mo. 1968).

<sup>10</sup> *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967). In the initial disposition, the district court was very explicit and unequivocally stated that by directing that a new hearing be granted with procedural safeguards, it did not mean that a formal court type judicial hearing as required in criminal cases was required, since the precise nature of the notice and hearing will vary in each case. The critical defect of the first hearing, in the court's view, was the inclusion on the determining board of a person to whom the students were permitted to make their showing. *Id.* at 651. Each plaintiff was granted a new hearing on the charges which the school desired to press, and the school was ordered to follow certain procedural features: "(1) a

second time filed a motion to enjoin enforcement of their suspension. The district court dismissed their complaint with prejudice<sup>11</sup> and the Court of Appeals for the Eighth Circuit affirmed.<sup>12</sup>

The result in *Esteban* is significant as it is demonstrative of the problems alluded to above, namely, the role of the federal district court in proceedings challenging university autonomy and disciplinary action, and the pragmatic effectiveness of procedural due process in light of university regulations.

## II. PROBLEMS PRESENTED UNDER SECTION 1983

The district court recognized that in actions under 42 U.S.C. section 1983,<sup>13</sup> the issues considered are limited to a determination of

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written statement of the charges to be furnished each plaintiff at least 10 days prior to the date of the hearing; (2) the hearing shall be conducted before the President of the college; (3) plaintiffs shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing; (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them; (5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, exhibits and witnesses as they desire; (6) plaintiffs shall be permitted to hear the evidence presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them; (7) the President shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his findings as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action; (8) either side may, at its own expense, make a record of the events at the hearing." *Id.* at 651-52 (citations omitted).

An argument would seem to be available to these students, or to future students, with respect to the sixth procedure enumerated, that is, that only plaintiffs, and not their attorney, could question the witnesses. Since counsel is not allowed to function properly, it could be asserted that the students were denied the *effective* assistance of counsel. The Supreme Court of the United States has held that the right to counsel is totally meaningless and no more than "an illusion, . . . unless counsel is given an opportunity to function." *Kent v. United States*, 383 U.S. 541, 561 (1966). The procedure adopted and approved in *Esteban* would seem to be no more than a ritualistic gesture, completely at odds with the constitutional requirement.

<sup>11</sup> *Esteban v. Central Missouri State College*, 290 F. Supp. 622 (W.D. Mo. 1968).

<sup>12</sup> *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969).

<sup>13</sup> 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

whether a student has been deprived of constitutional rights, privileges, or immunities under color of state law.<sup>14</sup> Unless there has been a deprivation of due process, or invidious discrimination, a denial of other constitutional rights, or clearly arbitrary action, federal courts should not interfere with the disciplinary process relevant to a lawful mission of the university.<sup>15</sup>

It would seem that the district court considers these actions *de novo*. Yet, it is not entirely clear from the court's language, approved by the court of appeals, that this is true,<sup>16</sup> especially in light of the dissent in the court of appeals. The court arguably suggests that the district court must rely upon the determination by university officials that there was "substantial evidence" upon which the sanction was based, which means in essence that they are relying upon the disciplinary board's factual determination. The problem presented at least on the surface by this language is obviated in *Esteban*, since counsel for both sides specifically adopted the "findings of fact." This language is confusing, however, with respect to future cases which may arise.<sup>17</sup>

Obviously the district judge may not ignore the "evidence" used by the disciplinary board against the student in making its "findings of fact." The extent to which these "findings" may be used, or to what extent they are binding on the judge in federal court is unclear. Although these "findings" should not be conclusive, they

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<sup>14</sup> *Esteban v. Central Missouri State College*, 290 F. Supp. 622, 628 (W.D. Mo. 1968).

<sup>15</sup> *Id.* at 631.

<sup>16</sup> The court states that "[a] federal district court will in appropriate circumstances review a student disciplinary proceeding to determine if the challenged disciplinary action was on grounds lacking support by substantial evidence." *Id.*

<sup>17</sup> For example, in a future case, counsel for the university might argue that the university was justified in disciplining the student based upon the facts presented to the disciplinary board, and under this language assert that the district court must confine its determination of the issue under 42 U.S.C. § 1983 to review of the facts upon which the disciplinary board made its determination. Thus the district court should be precluded from examining other factors not brought out at the time of the hearing which may have significant ramifications if considered by the court. In light of the function of the court under section 1983, that is, to determine if the subject of the constitutional attack did infringe upon constitutionally protected rights, it is submitted that such an argument is a correct interpretation of the court's function in such a proceeding. It is the determination made by the disciplinary board, based upon certain particular facts, which allegedly has infringed upon protected constitutional rights, and other factors, although relevant to the actual process of sanctioning the student, would seem totally irrelevant to the determination of whether the proceeding, as conducted, infringed upon the student's rights.

are of substantial importance as they do in fact constitute the subject of the constitutional attack in most disciplinary cases. The hearing, based upon these "findings" has caused the injury; it is upon these findings that the determination must be made as to whether the student should be "punished." If these findings do not support disciplinary action, or if they support that action only at the expense of infringing upon constitutionally protected rights, then it seems clear that the findings upon which the sanction is based should be given considerable weight in a section 1983 proceeding.

Federal courts should not arrogate to themselves an appellate power of review over the internal, *educational* affairs of an institution of higher learning. However, a *disciplinary* proceeding, challenged under section 1983, should not be classified as educational.<sup>18</sup> It is based upon certain determinations made by the administrative officials, and if that determination has infringed upon constitutionally protected rights, then the findings, as well as the ultimate determination, are quite clearly subject to review by the federal district court. Indeed, this is the very issue which the court must consider. In this view, then, it is submitted that the district court did not misconceive its function as the dissent suggests.

### III. PROCEDURAL SAFEGUARDS IN LIGHT OF REGULATIONS

The procedural safeguards afforded the students in *Esteban* considerably expand those required in *Dixon v. Alabama State Board of Education*,<sup>19</sup> the case most often cited for the requirement of procedural due process in a college disciplinary hearing. It appears that while the full panoply of formal judicial procedures has never been held to be required in any university disciplinary proceeding, the district court may have gone farther than any court in extending procedural guarantees.<sup>20</sup>

<sup>18</sup> See note 4 *supra*.

<sup>19</sup> 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The court of appeals in *Dixon* held specifically that due process requires, as a minimum, notice and some opportunity for a hearing before a student at a tax-supported college can be expelled for misconduct. *Id.* at 155. In dictum, however, the court further stated that in addition the student should have the names of the witnesses against him and an oral written statement of the facts to which each testifies, an opportunity to present a defense, the right to present witnesses in his own behalf, and the right to a report open to the student's inspection containing the results and findings of the hearing.

<sup>20</sup> See note 10 *supra*. The argument is well-founded that to require the full panoply of procedural safeguards would seemingly obviate the necessity for having the hearing before the university disciplinary board in the first place, since the same results could be had, and the student's rights could be better protected, in an actual trial.

Many far-sighted college and university administrators are adopting the procedures suggested in *Dixon* and subsequent cases which establish at least an appearance of "fundamental fairness." Additionally, many private universities, which present a totally different aspect to the disciplinary problem under section 1983,<sup>21</sup> are adopting such procedures. As important and revolu-

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<sup>21</sup> Private action, no matter how discriminatory or wrongful, is not subject to the limitations imposed by the fourteenth amendment. *Civil Rights Cases*, 109 U.S. 3 (1883). See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296 (1966). Successful attack of a disciplinary hearing instituted by a private university would initially depend upon whether the private institution had acted pursuant to, or under color of, state law. Since "state action" and "acting under color of state law" are treated as the same thing under the fourteenth amendment, *United States v. Price*, 383 U.S. 787 (1966), section 1983 would be applicable.

There are several ways in which this state action concept may be approached. One such approach is the indicia approach, that is, to show a series of connections between the private college and the state to support a holding of state action. It has recently been held that the mere receipt of state funds for use by the private university is insufficient to support a holding of state action, *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968), and it is submitted that this rationale is well-founded. Mere financial aid without more does not establish an interdependence between the state and the university. Creation pursuant to a state charter and tax exempt status have also been held insufficient to support a holding of state action. See *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969). See also *Powe v. Miles*, 294 F. Supp. 1269 (W.D.N.Y. 1968), *aff'd*, 407 F.2d 73 (2d Cir. 1968), where Alfred University was held not to have acted under color of state law, even though it was incorporated under New York law, received state aid, operated a ceramics college under a state contract, and was subject to regulatory powers exercisable by the state of New York.

A second approach is that the university is performing a public function, and as such constitutes state action. This argument would necessarily place considerable reliance upon such cases as *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Evans v. Newton*, 382 U.S. 296 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

Regardless of the method of attack, one factor remains obvious, that is, that heavy reliance must be placed upon the civil rights cases which have preceded these attacks under section 1983. These cases dealt directly with racial discrimination practiced by private associations, and they are distinguishable from the disciplinary proceeding cases because the state is not directly involved in the subject of the constitutional attack in the latter cases, that is, the disciplinary hearing. *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 548 (S.D.N.Y. 1968), *citing*, *Burton v. Wilmington Parking Authority*, 365 U.S. at 725. In the discrimination cases, the state involvement was found to be in the discrimination itself, which was the subject of the constitutional attack. See, e.g., *United States v. Guest*, 383 U.S. 745

tionary as these procedures may seem, however, their practical value may be seriously questioned in light of *Esteban*. The broad and vague nature of the regulations approved by the court, serving as the basis for the expulsion, seems to indicate that regardless of the procedures adopted, the regulation can be interpreted to cover almost *any* activity, including those arguably protected under the first amendment. In this respect then, the procedures are meaningless. College administrators are obviously aware that expulsion imposed under a similar vague regulation proscribing unbecoming conduct may be upheld by the courts, at least in the Court of Appeals for the Eighth Circuit, if only the appearance of "fundamental fairness" is maintained.

In *Esteban*, the court upheld the challenged regulations<sup>22</sup> on several grounds. Initially, the court argued that the regulations

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(1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

The public function approach was recently rejected in *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969), on the ground that the public function cases dealt only with the "delineation of public places for purposes of First Amendment activities," and were in no way concerned with the internal affairs of the private institution. *Id.* at 596. It is submitted, however, that a relatively sound analogy can be drawn between the "community" involved in *Marsh v. Alabama*, 326 U.S. 501 (1946), and the educational community involved on every university campus, be it public or private. In a very real sense the regulations governing such a community are the criminal law of the campus, and sanctions may have a very significant impact on the affected student. The university is much more responsible for ordering the lives of its residents than was the private organization involved in *Marsh*. It should be noted that this argument should be used as but merely one of the factors which a court should view when viewing the totality of the circumstances surrounding the state's involvement in the affairs of the private university.

<sup>22</sup> The regulations in effect at the time provided in part: "The conduct of the individual student is an important indication of character and future usefulness in life. It is therefore important that each student maintain the highest standards of integrity, honesty and morality. 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.

All students that enroll at C.M.S.C. assume an obligation to abide by the rules and regulations of the college as well as all local, state and federal laws. When a breach of regulations involves a mixed group, ALL MEMBERS ARE HELD EQUALLY RESPONSIBLE. Conduct unbecoming 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 inten-

were not "the fulcrum of [the student's] discomfiture,"<sup>23</sup> condemning the "childish behavior" of these students and the lack of "common sense" in their defiance of proper university administrative authority.<sup>24</sup> Although these statements do not in themselves answer the question, the least palatable aspect of the decision is the court's direct response to the vagueness allegation: that the

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tionally get involved in mob misconduct, but many so-called "spectators" get drawn into 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." *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1082 (8th Cir. 1969).

<sup>23</sup> *Id.* at 1088.

<sup>24</sup> *Esteban* was charged with "contributing to and participating in an unruly and unlawful mass gathering occurring . . . near [the College] in that [he] did resist efforts of one Dr. M. L. Meverden in dispersing said mass gathering; failed and refused to identify [himself] to [Dr. Meverden] as requested and used vile and obscene language towards and threatened a resident assistant of the College. . . ." Roberds, the other student involved in the suit, was "charged with contributing to and participating in an unruly and unlawful mass gathering occurring . . . near [the College]. . . ." Roberds was also charged with evidencing his intent to participate in the demonstration by correspondence and by direct confrontation. *Id.* at 1081, 1082.

From this language it seems apparent that at least with respect to Roberds, the disciplinary action was based primarily on his "participation" in the demonstrations. The president of the college specifically determined that Roberd's presence at the demonstrations constituted a violation of the regulation in question. *See id.* at 1093 (dissenting opinion). The ramifications of such an interpretation are seemingly in conflict with decisions of the United States Supreme Court which have upheld the right to picket and demonstrate with respect to union activity. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Thornhill v. Alabama*, 310 U.S. 88 (1940). If the student may be punished just for being a spectator at a "mass gathering," then it would seemingly conflict with these guaranteed rights. The regulation makes no distinction between violent and non-violent mass gatherings; rather, it reserves to the College the right to discipline any student for participation which *might* be considered unruly or unlawful. It may be argued that since there was violence in this case, the majority was correct in its holding as applied to these facts, having perhaps established the "clear and present danger" test with respect to first amendment freedoms. *Terminiello v. Chicago*, 337 U.S. 1 (1949). It may also be argued, at least in the eighth circuit, that first amendment freedoms do not enjoy the same "preferred position" on college campuses as required elsewhere, *Ashton v. Kentucky*, 384 U.S. 195 (1966), and that university regulations may not have to meet the narrow specificity requirement of many of the first amendment cases. *See N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960).

regulation is not that difficult to comprehend, since it asks for adherence to "standards which befit a student."<sup>25</sup> This, however, is precisely the point: the regulation does not delineate nor even remotely suggest what those standards are.

The regulation is phrased in extremely broad terms,<sup>26</sup> and the student may only speculate as to what is prohibited activity. Concededly, flexibility rather than "meticulous specificity" is desirable in university regulations, but it is quite clear that regulations requiring adherence to standards of "the highest . . . integrity, honesty, and morality," and adherence to standards of conduct "befitting a student at Central Missouri State College," may be too flexible. They do not in any manner inform the student as to what is prohibited conduct resulting in the adoption of the broadest possible standard. The phrasing of the regulation in this manner necessitates a determination of conduct *not* befitting a student at the college or university only after the conduct has taken place, and is in this sense an *ex post facto* determination.<sup>27</sup> In this manner the regulation sweeps within its scope activities protected by the first and fourteenth amendments, and forces the student to limit his activity to that which is unmistakably safe from possible disciplinary action.<sup>28</sup>

A similar regulation was upheld in *Goldberg v. Regents of the University of California*,<sup>29</sup> which is perhaps even more broad than the regulation involved in *Esteban*.<sup>30</sup> Such regulations, regardless of the judicial exposition in their behalf, clearly do not delineate the limitations of prohibited activities; rather, they leave disciplinary action to turn upon what may be a seemingly arbitrary administrative decision. Such regulations are no more definite and clear

<sup>25</sup> *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969).

<sup>26</sup> See note 21 *supra*.

<sup>27</sup> The resulting harm is that the student is unable to discern possible ramifications of his conduct, regardless of what it may be.

<sup>28</sup> *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

<sup>29</sup> 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

<sup>30</sup> In *Goldberg*, the pertinent regulation provided that "[i]t is taken for granted that each student . . . will adhere to acceptable standards of personal conduct; and that all students . . . will set and observe among themselves proper standards of conduct and good taste. . . . This presumption in favor of the students . . . continues until, . . . by misconduct, it is reversed, in which case the University authorities will take such action as the particular occurrence judged in the light of the attendant circumstances, may seem to require. . . ." *Id.* at 871 n.2, 57 Cal. Rptr. at 466 n.2. Acceptable standards of conduct at Central Missouri State College may be one thing; those same standards of conduct at the University of California at Berkeley may be quite another.

than the standard of "misconduct" recently condemned in *Soglin v. Kaufman*.<sup>31</sup> This is not to suggest that college regulations governing student conduct must meet the standard of conduct required of criminal statutes in every respect. But it is no answer to say, as the majority in *Esteban* does, that such regulations are not punitive in nature but rather act as a part of the educational system. The net effect of such regulations, the violation of which may result in the student's suspension from the university, is "punishment" in the sense that its consequences may prove to be ruinous to the individual in the same manner as a criminal conviction.<sup>32</sup> Both in terms of economics and in terms of the social stigma attaching to university expulsion, a denial of the opportunity to obtain a university education may indeed be of more significance than some criminal convictions.<sup>33</sup> To assert that the regulations are not punitive is to ignore the reality of the situation.

There can be no question but that colleges and universities must have the right, the inherent power, to maintain order and to discipline students. These normative orders are necessary to provide an orderly atmosphere and an environment conducive to the pursuit of higher learning.<sup>34</sup> But, as the district court in *Esteban* recognized, these rules and regulations which the institution seeks to impose upon the student must be relevant to a lawful mission or function of the university;<sup>35</sup> they should not sweep within their bounds protected activity "when the end can be more narrowly achieved."<sup>36</sup> Precisely because the task of demarcating a line between protected and unprotected activity is most difficult, courts should carefully scrutinize any regulation which might affect protected freedoms lest there be a tendency to over-react in some cases and sweep aside constitutionally protected rights.

#### IV. THE MASS GATHERING REGULATION

The final aspect of *Esteban* deals with a separate regulation, approved by the majority, which was the crux of the college's case. The mass gathering regulation subjects a student to possible dis-

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<sup>31</sup> 295 F. Supp. 973 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

<sup>32</sup> See Sherry, *Governance of the University: Rules, Rights, and Responsibilities*, 54 CAL. L. REV. 23, 36-37 (1966).

<sup>33</sup> *Id.*

<sup>34</sup> *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Brooks v. Auburn University*, 296 F. Supp. 188 (E.D. Ala. 1969), *aff'd*, 412 F.2d 1171 (5th Cir. 1969); *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747 (E.D. La. 1967).

<sup>35</sup> *Esteban v. Central Missouri State College*, 290 F. Supp. 622, 629 (W.D. Mo. 1967).

<sup>36</sup> See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

missal for “[p]articipation in mass gatherings which might be considered as unruly or unlawful. . . .”<sup>37</sup> By interpretation, the regulation draws within the ambit of its proscription those individuals who were merely spectators, as well as those who directly participated in the demonstration. One of the students in *Esteban* specifically challenged this aspect of the regulation, as the college president stated unequivocally that the regulation did sanction mere presence at mass gatherings.<sup>38</sup> The district court found that the president could have reasonably inferred from the evidence that the student was a “participant” and not a mere spectator.<sup>39</sup> However, this conclusion seems clearly erroneous in light of the statement by the president as well as additional observations made by the district court which show that mere spectator status was sufficient to bring the student within the proscription of the regulation.<sup>40</sup>

*Tinker v. Des Moines Independent Community School District*,<sup>41</sup> is cited by both the majority and the dissent for their respective positions which are at odds with respect to the constitutional validity of the regulation. The majority first assumes that the regulation is valid when applying the language of *Tinker*, and then assumes that the violent conduct which was absent in *Tinker* was not only present in *Esteban*, but directly involved the students who were before the court. The dissent attacks the regulation as a prior restraint on the students’ freedom, citing *Tinker* for the proposition that no ban may be placed on “demonstrations simply because they may incite some students to unlawful acts.”<sup>42</sup>

The analysis of the dissent seems to be on firmer ground than that of the majority. The difficulty with the regulation is that by its terms it holds anyone at a mass gathering responsible for the

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<sup>37</sup> *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1082 (8th Cir. 1969).

<sup>38</sup> *Id.* at 1093 (dissenting opinion).

<sup>39</sup> 290 F. Supp. at 631.

<sup>40</sup> The district court makes reference to statements made by the college president which indicates that participation in the demonstration was not necessary. These were considered as part of the substantial evidence: “(1) Earlier [Roberds] had inquired as to what would happen if he were to be a participant. This is indicative of his interest in being a participant. (2) He wrote a letter . . . indicating he was *considering* action not consistent with that of being a mere spectator. (3) He *witnessed* the unlawful and destructive actions over a substantial period of time on two evenings and did not withdraw and disassociate on either of them from the unruly and destructive group.” *Esteban v. Central Missouri State College*, 415 F.2d at 1094 (dissenting opinion), *quoting*, 290 F. Supp. at 631.

<sup>41</sup> 393 U.S. 503 (1969).

<sup>42</sup> 415 F.2d at 1095 (dissenting opinion).

conduct of anyone else who may act in a violent or disruptive manner, thus resulting in the erection of a subtle obstacle to those who do have a sincere belief in peaceful protest and who do not support the violent action taken by some students. By adopting this regulation, the university has succeeded in stigmatizing and penalizing thought and speech of perhaps unpopular beliefs, a result which has been clearly condemned by the United States Supreme Court.<sup>43</sup> The regulation also inhibits the right to peacefully picket, which has long been recognized as protected under the first amendment,<sup>44</sup> because of the possible disciplinary action which may result for those students who merely attend a mass gathering. In most instances involving a university campus demonstration, any picket line would qualify as such a gathering and the regulation would seem to have a chilling effect on the exercise of these freedoms.

## V. CONCLUSION

Although procedural guarantees were implemented in *Esteban*, the students were sanctioned on the basis of regulations which, perhaps in other factual circumstances, would not have so readily received the stamp of approval by the court of appeals. Any regulation prohibiting conduct unbecoming to a student at the college or university can in no way be said to convey to the student the nature of prohibited activity.<sup>45</sup> Additionally, the mass gathering regulation seemingly infringes upon the students' right to picket, and as such would be in violation of the decisions of the United States Supreme Court.<sup>46</sup>

The right to discipline unruly students is unquestioned. But the regulations proscribing that conduct which is prohibited should not be so broadly drawn. There seems to be an inherent conflict between the approaches of the Courts of Appeals for the Seventh and Eighth Circuits with respect to the type of university regulations which may be implemented, a conflict which, it is hoped, may soon be resolved by the United States Supreme Court. In the interim, it is submitted that college and university administration officials should seriously consider implementing new regulations to avoid the allegation of unconstitutionality. In the Eighth Circuit it would not be absolutely mandatory. But a regulation which guarantees to the student the right to protest and picket peacefully while specifically condemning violent activity, such as property damage,

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<sup>43</sup> Cf. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>44</sup> *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

<sup>45</sup> See text accompanying footnotes 21 to 25 *supra*.

<sup>46</sup> See note 42 *supra*.

interference with ingress to and egress from campus facilities, prohibitions against student takeover of administrative facilities, and the interruption of classes would clearly be within lawful limits, and would avoid future problems which are certain to arise under present law. The university must be granted the right to protect itself, its traditions, and its property to assure the protection of students and the continuity of the educational process. This right should not, however, supersede the rights and interests of the students when the same end can ultimately be achieved by simply adopting more specific regulations.

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