UNCERTAINTY IN COLLEGE DISCIPLINARY REGULATIONS

This year more than 1.5 million young adults[1] began their studies at nearly 2,500 colleges[2] in the United States. Prior to the beginning of classes the new student received a handbook or catalogue for his reference, guidance and orientation containing a regulation such as the following:

> Individuals and organizations must consider themselves obligated at *all* times and *all* places to conduct themselves, individually and as groups, as to reflect *only credit on the University.*[3]

It may strike the young student as unusual that all his actions, whether on the campus or in his own home, must now be marshalled toward the university's benefit rather than his own. If such demand seems too oppressive to the prospective student, he can simply enroll elsewhere, although it is doubtful he will escape such a provision so easily. The catalogue is also likely to contain this kind of rule:

> It 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. . . .[4]

Casual scrutiny will indicate that "good taste," "proper conduct" and "acceptable conduct" are required of the student if he is to remain in good standing at the university. The thoughtful young man may wonder to whom his conduct must be "acceptable," what is "proper" and what "good taste" requires. Is it in good taste to demonstrate against the Viet Nam war? Or is he required to support it?[5] Is criticism of the general conduct rule "proper?" May the editor of the student newspaper criticize the governor of the state?[6]

1 L. LONG, 1968 WORLD ALMANAC, 153. Total enrollment in institutions of higher education in 1966 was 6.5 million.

2 *Id.*

3 THE OHIO STATE UNIVERSITY, STUDENT HANDBOOK RULES AND INFORMATION 8 (1968) (emphasis added).

4 General Catalog of the University of California at Berkley, as set forth in Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 870, 57 Cal. Rptr. 463, 466 n.2 (1967).

5 *See* Appellants' Opening Brief, Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967), at 11.

6 *See* Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967).

To a lawyer, general conduct regulations such as those mentioned above appear to have fatal deficiencies. Problems of vagueness and overbreadth come immediately to mind.[7] The lawyer will recognize that the state university is an administrative arm of government for some purposes.[8] He may recall the recent emphasis on higher education[9] and the great investments of federal and state funds in both public and private institutions.[10] These facts coupled with state licensing and degree-granting practices may convince him that the due process limitations on vagueness and overbreadth must be applicable to nearly all of the 2,500 colleges and universities in the United States, whether publicly or privately owned.

A study of American case law will indicate a history quite different from these expectations. The courts have seldom overturned disciplinary actions, whether taken by public or private universities.[11] Little regard has been paid to the reasons for which the actions were taken, since an "academic judgments rule"[12] has reposed broad discretion in administrators. The 1934 United States

---

7 *See generally* Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MT. L. REV. 275, 287 (1957); Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531 (1950); Comment, *Legislation—Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264 (1954); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); 28 BROOKLYN L. REV. 333 (1962); 61 HARV. L. REV. 1208 (1948).

8 Administrative regulations are subject to the requirement of specificity as if they were statutes. Pike v. CAB, 303 F.2d 353 (8th Cir. 1962).

9 See President Johnson's statements, N.Y. Times, Jan. 13, 1965, at 20, col. 1.

10 Federal aid to education in 1966 totalled 10.6 billion dollars. L. LONG, 1968 WORLD ALMANAC 157.

11 *E.g.*, Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Dehaan v. Brandeis Univ. 150 F. Supp. 626 (D. Mass. 1957); People *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403, *rev'd* 17 A.D.2d 632, 231 N.Y.S.2d 410, *aff'd* 12 N.Y.2d 802, 187 N.E.2d 18 (1962); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928); People *ex rel.* Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y.S. 349 (1921); Koblitz v. Western Reserve Univ., 11 Ohio C. Dec. 515 (Ct. App. 1901).

12 The tendency of the decisions listed *supra* note 11, and many others, has been to treat the academic administrator's judgment in the same fashion as the business judgments of a corporate director. The deference has extended, however, from the academic realm to the conduct area, in which the expertise of the court is unsurpassed. Such rules of deference should be extended only to areas where the courts lack expertise and are unable to easily become knowledgeable.

Supreme Court decision in *Hamilton v. Regents of the University of California*[13] approved nearly unlimited discretion for administrators in student disciplinary matters. This situation moved Professor Seavey to observe that a college student is denied even "the rights accorded a pickpocket."[14]

The lawyer who is consulted by a college student about a disciplinary matter today will find himself involved in a rapidly developing area of the law. Pressures[15] and decisions[16] are forcing reevaluation of student rights. In 1961 the right to a hearing was accorded college students in *Dixon v. Alabama State Board of Education*.[17] This landmark case was the genesis of many recent examinations by commentators which have attempted to determine theories and rules of law to be applied in the growing number of cases presenting student claims.[18]

Application of constitutional principles to institutions of higher learning is a delicate task. The university is not generally heavily staffed with lawyers to draft its regulations, man its courts and advise its administrators. The dean of students is trained in education and counselling, not in jurisprudence. College students are historically carefree and hyperactive, and sanctions are essential tools to assure the maintenance of order and decorum. However, since the university is properly termed an agency of the state,[19] the Constitution protects the student from its arbitrary action,[20] and requires its rules to meet certain standards.[21]

---

13 293 U.S. 245 (1934).

14 Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

15 *See Symposium: Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966), for a discussion of the early activities at Berkeley, including the filthy speech movement that was the subject of the disciplinary action challenged in Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

16 *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Hammond v. So. Carolina State College, 272 F. Supp. 947 (D.S.C. 1967); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Civ. App. 1966).

17 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

18 See the extensive bibliography in 54 CALIF. L. REV. 177 (1966); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

19 Slochower v. Bd. of Higher Educ. of New York City, 350 U.S. 551 (1956); McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950).

20 Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

21 *See generally* Van Alstyne, *Student Academic Freedom and the Rule-Making*

The due process clause protects persons from the enforcement of vague[22] and overly broad[23] statutes and regulations. The uncertainty of application inherent in such rules presents *ex post facto* dangers[24] familiar to early legal scholars:

> In Dwar. St. 652 it is laid down "that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters."[25]

The common law development of this principle was based on concepts of fair play and the courts' abilities to apply statutes without usurpation of the legislative function.[26] Since the courts' tasks were limited to construction and application of legislative enactments, where use of devices of construction failed to eliminate vagueness application was refused.[27]

Due process analysis, on the other hand, focuses on the adequacy of notice.[28] It must be sufficient to forewarn that sanctions will be imposed upon contemplated conduct.[29] Thus a regulation must set ascertainable standards of conduct.[30] While the requirement of *scienter* may often be implied in the criminal law, it may not be presumed where no ascertainable standard exists from which guilty knowledge might derive.[31] Notice is defective where a statute

---

Powers of Public Universities: Some Constitutional Considerations, 2 LAW IN TRANS. Q. 1 (1965). *See also* Ashton v. Kentucky, 384 U.S. 195, 200 (1966).

22 *See* sources cited note 7 *supra*. *See also* NAACP v. Button, 371 U.S. 415 (1963); Cramp v. Bd. of Public Instruction of Orange County, 368 U.S. 278 (1961); Smith v. California, 361 U.S. 147 (1959); United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

23 Whitehill v. Elkins, 389 U.S. 54 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

24 See text accompanying note 52 *infra*.

25 Chicago & N.W. Ry. Co. v. Dey, 35 F. 866, 876 (1888).

26 Cline v. Frink Dairy Co., 274 U.S. 445 (1927); Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403, *rev'd* 17 A.D.2d 632, 231 N.Y.S.2d 410, *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18 (1962); Patten v. Aluminum Castings Co., 105 Ohio St. 1, 136 N.E. 426 (1922).

27 *See* Comment, *Legislation—Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264, 265 n.2 (1954) (hereinafter cited as Comment). *See also* cases cited note 26 *supra*.

28 As will be seen, while the fact of notice is the hornbook focal point, the issues of standing and justiciability do not, in fact, depend on actual notice. See the standard suggested in Comment *supra* note 27, at 268 n.17.

29 Niemotko v. Maryland, 340 U.S. 268 (1951); Winters v. New York, 333 U.S. 507, 524 (1948) (dissenting opinion).

30 Cramp v. Bd. of Public Instruction of Orange County, 368 U.S. 278 (1961).

31 McBoyle v. United States, 283 U.S. 25, 27 (1931).

> either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .[32]

Where tools are available for an educated guess, statutes have been upheld against a vagueness attack. Thus, where an allegedly vague term has a common law meaning, it is not indefinite for constitutional purposes.[33] The interpretation by a judicial or administrative body can cure the vagueness, if the construction is reasonable.[34] And where a statute has long been consistently applied, its ambiguities may have been dissipated.[35]

An allegation of failure of notice requires standing. Thus, if a statute is not vague as applied, the party before the court usually may not assert its indefiniteness when applied to a hypothetical party.[36] Notwithstanding this principle, if the vagueness is of a nature to permit of a chilling effect upon the exercise of first amendment rights, the statute must fall.[37]

> [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.[38]

The due process requirements of notice apply to civil as well as criminal regulations.[39] Thus, vagueness limitations exist upon any civil enactment, since

> It is not the penalty . . . that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.[40]

While the test of vagueness is the existence of an ascertainable

---

32 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

33 Nash v. United States, 229 U.S. 373 (1913).

34 Fox v. Washington, 236 U.S. 273, 277 (1915); Smiley v. Kansas, 196 U.S. 447 (1905).

35 FTC v. R. F. Keppel & Bro. Inc., 291 U.S. 304, 312-313 (1934).

36 Fox v. Washington, 236 U.S. 273, 277 (1915). *But see* Winters v. New York, 333 U.S. 507, 518-20 (1948); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 96-104 (1960) (hereinafter cited as *Void-for-Vagueness*).

37 NAACP v. Button, 371 U.S. 415 (1963); Cramp v. Bd. of Public Instruction of Orange County, 368 U.S. 278 (1961); Smith v. California, 361 U.S. 147 (1959); Herndon v. Lowry, 301 U.S. 242 (1937).

38 Smith v. California, 361 U.S. 147, 151 (1959).

39 Pike v. CAB, 303 F.2d 353 (8th Cir. 1962).

40 Champlin Ref. Co. v. Corp. Comm'n of Oklahoma, 286 U.S. 210, 243 (1932).

standard,[41] the degree of certainty with which such standard may be ascertained must necessarily vary. The delicate due process balancing necessary to determine a vagueness question[42] has produced a few general rules.[43] As mentioned, a high degree of specificity is necessary in the first amendment area.[44] The means of execution[45] and severity of sanctions[46] are also determinants of the extent of permissible vagueness. Where a regulation requires a showing of culpability it is thought to require less definiteness,[47] apparently due to natural law emphasis on punishment for acts denominated *mala in se*. If greater specificity may be easily achieved, the statute is more likely to be declared void.[48]

An understanding of the dangers of vagueness will permit a court to study the context in which an allegedly vague regulation is applied, and determine the question on the basis of the existence of those dangers. While the vagueness doctrine is a branch of the due process notice requirement,[49] principles of uncertainty of application[50] and fear of governmental abuse[51] are at its heart. It is conceptually linked to the prohibition of *ex post facto* laws, though not doctrinally related.[52] The tyranny and arbitrariness inherent in after-the-fact lawmaking can be as easily perpetuated by administrative action where general or ambiguous statutes exist. Vagueness of written regulations may allow nearly any construction which an administrator finds convenient, and permit punishment for any conduct with which he takes issue. It appears a more dangerous standard exists in the case of vague regulations than in the case of government

41 Herndon v. Lowry, 301 U.S. 242, 264 (1937).

42 *See Void-for-Vagueness, supra* note 36, at 94-96 for a thorough analysis of the Court's balancing processes in the vagueness area.

43 *Id.* at 88 n.103; Comment, *supra* note 27, at 270-75.

44 Cases cited note 37 *supra*.

45 *See* Comment, *supra* note 27, at 270-72.

46 Winters v. New York, 333 U.S. 507, 515 (1948).

47 Screws v. United States, 325 U.S. 91 (1945); United States v. Ragen, 314 U.S. 513 (1942).

48 *See Void-for-Vagueness, supra* note 36, at 95 n.150; United States v. Cardiff, 344 U.S. 174 (1952).

49 Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

50 *See* Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937).

51 *See* Smith v. California, 361 U.S. 147 (1959); Watkins v. United States, 354 U.S. 178 (1957).

52 The more recent cases speak of vagueness as a due process defect, though there was early reference to the sixth amendment's notice requirement in United States v. Cohen Groc. Co., 255 U.S. 81, 89 (1921).

without written regulations. This is due to the false sense of security created by written regulations which, in effect, allows easy entrapment of an administrator's chosen victims with apparent legitimacy. The rule of law then becomes a subtler vehicle for repression.

A branch from the same tree is the doctrine of overbreadth.[53] It requires that legislation be drawn narrowly enough to achieve a permissible purpose without infringing upon protected liberties.[54] While the state may legitimately protect itself from subversion, for example, it may not do so by punishing any person who contributes to an organization associated with the Communist Party.[55] The statute which is drawn broadly, even if never utilized to limit personal freedoms, often has an inhibiting effect upon exercise of those freedoms through its mere existence.[56] This is the "chilling effect" spoken of in the overbreadth cases.[57] Though the party before the court has engaged in conduct which the state might legitimately regulate, he has standing to challenge the regulation for its overbreadth.[58] The inhibiting effect of some statutory restraints on speech, association and travel are thought to be sufficiently dangerous that courts will not punish violators and will allow challenges against these statutes for overbreadth or vagueness.[59] Thus, there exists a constitutional right not to be punished pursuant to a vague or overly broad statute.

In determining vagueness questions, the applicable standard is not one of wholly consistent academic definition of abstract terms. The practical criterion of fair notice must be met, and fairness is to be judged in the light of the statute's direction. The particular context is all-important. Thus, a license revocation is not void where

---

53 *See* Collings, *supra* note 7, at 218-219; *Void-for-Vagueness*, *supra* note 36, at 75-85; *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), where the line between overbreadth and vagueness becomes extremely fuzzy.

54 Dombrowski v. Pfister, 380 U.S. 479 (1965); Shelton v. Tucker, 364 U.S. 479 (1960); Thornhill v. Alabama, 310 U.S. 88 (1940).

55 Shelton v. Tucker, 364 U.S. 479 (1960).

56 Dombrowski v. Pfister, 380 U.S. 479 (1965); Shelton v. Tucker, 364 U.S. 479 (1960).

57 Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). The injunction against enforcement of such statutes provided in Dombrowski is thoughtfully analyzed in Stickgold, *Variations on the Theme of Dombrowski v. Pfister . . .*, 1968 WIS. L. REV. 369.

58 Staub v. Baxley, 355 U.S. 313 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1940).

59 Academic freedom might reasonably be added to this list of first amendment freedoms. *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957). *See also* Keyishian v. Bd. of Regents of the Univ. of the State of New York, 385 U.S. 589 (1967).

done pursuant to a statute permitting discipline for "manifest incapacity," since such term has an ascertainable meaning to the medical profession, whose members are subject to its provision.[60] "Moral turpitude" was held to be a sufficiently specific standard as applied in a deportation proceeding to an alien convicted twice of conspiracy to defraud the United States of taxes on distilled spirits.[61] However, the term might be declared vague in another context under the doctrines elicited in *United States v. Petrillo*.[62]

Attorneys and doctors are regularly disciplined for "unprofessional" and "disreputable" conduct. Such terms have been declared vague in *Czarra v. Bd. of Medical Supervisors*,[63] and sufficiently definite in *Phillips v. Ballinger*.[64] The term "unprofessional" may be provided with content by the canons of ethics in the medical and legal professions; but no such referents are available to the average citizen. Though the term "subversive" may have specific content when applied to employees of a defense plant, it was held vague as applied to teachers.[65]

Terms commonly used in college regulations include "acceptable," "proper," and "good taste." While such terms have highly subjective meanings, that is not necessarily determinative. If acceptability is construed to mean that conduct must conform with that commonly thought appropriate by a specific group, the term may have meaning. However, no referent is provided in most regulations. Is it the conduct of the community, the administration, the faculty, or one's fellow students one must use as a standard of acceptability? Even if that question is determined, the chilling effect of such a regulation can be awesome. Its overbreadth presents a danger, since, though one's ideas are unacceptable to an entire community, the first amendment assures protection of the conduct of speaking in defense of those ideas.

"Good taste" provides yet another nebulous standard. In the present era of changing values, past concepts of morality and ethics

---

60 Dilliard v. State Medical Examiners, 69 Colo. 575, 196 P. 866 (1921). But see Hewitt v. State Medical Examiners, 148 Cal. 590, 84 P. 39 (1906); Matthews v. Murphy, 23 Ky. L. Rep. 750, 63 S.W. 785 (1901).

61 Jordan v. De George, 341 U.S. 223 (1951).

62 332 U.S. 1 (1947). *See also* Cameron v. Johnson, 390 U.S. 611 (1968).

63 25 App. D.C. 443 (1905).

64 37 App. D.C. 46 (1911).

65 Keyishian v. Bd. of Regents of New York, 385 U.S. 589 (1967). Regulations of the Board of Regents which controlled employment of teachers were held void for vagueness.

are of dubious validity. This appears to be especially true on the campus at the present time. Reassessment by the student of his role in society results in unfamiliar pressures on established institutions. While the exertion of such pressure is itself "distasteful" to the existing power structure, the right to express grievances and advocate reforms is constitutionally protected. It appears that the very institutions which are being challenged may, under existing regulations, insulate themselves from criticism by silencing their critics. While such a result may not seem entirely distasteful, the method of its achievement is indefensible. The administrator may simply conclude that those who cast doubt upon the value of his role or his ability to carry out his functions are not acting in "good taste." It is surprising that the theory that the king can do not wrong could remain an enforceable mandate on the American campus.[66]

Many college regulations appear to provide such power, being both vague and overly broad.[67] Though the vagueness of a regulation might not be fatal when standing alone, the added inhibitions upon speech and association often appear to require invalidation. The recent surge in student litigation has brought the often ancient and previously unchallenged systems of college regulations under judicial scrutiny. In *Goldberg v. Regents of University of California*,[68] participants in the Berkeley filthy speech movement attempted to gain readmission to the university. Though the major issues in the case concerned free speech, procedural due process and equal protection, the general conduct regulation was also challenged for vagueness. Upon finding the university had "inherent power" to dismiss the students for their actions, the court refused to consider the extensively briefed vagueness claim.[69] While the one-sentence holding on the question provides little insight into the court's rea-

66 For a striking illustration see Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967) reviewing expulsion of a student for his writings in a student newspaper which violated a rule prohibiting criticism of the governor or legislature of Alabama.

67 *See* text accompanying note 4 *supra* and 81 *infra*.

68 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

69 *Id.* at 881, 57 Cal. Rptr. at 473. The challenged rule is reprinted in the text accompanying note 4 *supra*. The reasoning and decision in *Goldberg* were followed in Jones v. State Bd. of Education, 279 F. Supp. 190, 202 (M.D. Tenn. 1968). In *Jones*, in addition to the inherent power theory, the court indicates that university regulations for students need not meet the requirements of specificity imposed upon state statutes, since the goals and purposes of the university as well as the nature of the institution are peculiarly different. See the discussion of such arguments in the text accompanying notes 81 to 92 *infra*.

soning, it is possible that the disruptive actions of the students, being considered *mala in se*, were likened to the conduct in *Williams v. United States*.[70] In that case, though the Court conceded the statute might be vague as to a future defendant, the inherent "evil" of this defendant's conduct (beating a prisoner to death) was such as to prevent his escape from its sanctions. The reason for the failure of Williams to prevail appears to be that the term alleged to be vague was not vague as to his conduct. Thus, he had adequate notice that his conduct was proscribed.[71] However, successful attacks on vague regulations have generally been allowed by any party subject to their provisions where a substantial chilling effect has been present.[72] It appears that if first amendment rights are endangered by the statute, culpability is not a relevant consideration, and the vagueness is fatal. The "inherent powers" of a state agency are, of course, subject to the limitations in the Constitution. To couch the result in such terms, as did the *Goldberg* court, is simply to avoid the constitutional question. The police power is an inherent power of each state, yet punishments are invalid if prescribed under such power pursuant to a vague regulation. This must also be true in the case of the university's inherent powers, however defined.

Another recent case involving vagueness of college regulations is *Buttny v. Smiley*.[73] The court there held the hazing regulation which was utilized to dismiss students who blocked admission to CIA recruiters was not vague or broad on its face. The rule authorizes discipline for "any interference with the public or private rights of citizens."[74] The court said,

> Since the 'Hazing' rule is not constitutionally vague, it is not necessary for us to make a specific finding regarding the other rules involved. Certainly their language is broad; however, we are unable to find any cases, nor were any called to our attention which have held university regulations such as these to be invalid because they are so vague as to deny due process of law. In fact the recent cases have not denied the validity and reasonableness of some very broad disciplinary regulations.[75]

---

70 341 U.S. 97 (1951).

71 *See also* Dennis v. United States, 341 U.S. 494 (1951).

72 Staub v. Baxley, 355 U.S. 313 (1958); Superior Films Inc. v. Dep't. of Educ., 159 Ohio St. 315, 112 N.E.2d 311 (1953), *aff'd per curiam*, 346 U.S. 587 (1954). For a conclusion that Goldberg is correct, see Note, 5 HOUSTON L. REV. 541, 547 (1968).

73 281 F. Supp. 280 (D. Colo. 1968).

74 *Id.* Note the similarity of the challenge in Williams v. United States, 341 U.S. 97 (1951).

75 Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

If this decision had come a bit later, its dicta might have been different. The only case found which holds a university regulation void for vagueness on due process grounds is *Dickson v. Sitterson*,[76] decided five days after *Buttny*. The North Carolina statutes, procedures and regulations adopted by the university's board of trustees to restrict speakers on the campus were held to be "facially unconstitutional because of vagueness."[77]

> In order to withstand constitutional attack . . . [the regulations must] . . . impose a purely ministerial duty upon the person charged with approving or disapproving the invitation to a speaker falling within the statutory classifications, or contain standards sufficiently detailed to define the bounds of discretion. Neither criteria [sic] has been met with respect to the procedures and regulations in question.[78]

The regulations in *Sitterson* created a substantial chilling effect on first amendment rights and provided for use of the subjective censor condemned by the Court in *Kunz v. New York*.[79]

Sitterson was an obvious case for application of the vagueness doctrine. The first amendment dangers were inherent in the regulations, while the mere "chilling effect" was passed over in *Goldberg*. Many cases that will arise in the future will require the courts to engage in close scrutiny of potential chilling effects on academic freedom.[80] The nature and prevalence of the general conduct regulation[81] makes it most amenable to scrutiny at this juncture, though it is not the only type of college regulation open to challenge.

---

76 280 F. Supp. 486 (M.D.N.C. 1968). In Snyder v. Bd. of Trustees of Univ. of Illinois, 286 F. Supp. 927, 933 (N.D. Ill. 1968), similiar statutory restraints were subject to a successful vagueness attack.

77 Dickson v. Sitterson, 280 F. Supp. 486, 498 (M.D.N.C. 1968).

78 *Id.*

79 340 U.S. 290, 295 (1951).

80 See note 59 *supra*. In Scoggin v. Lincoln University, 37 U.S.L.W. 2187 (W.D. Mo. 1968), a statement of principles to be applied in future student disciplinary cases was issued. That statement concluded that overbreadth was not normally a defect in student conduct regulations. This conclusion was premised upon the "provocative" nature of "detailed codes of student conduct." "The validity of the form of standards of student conduct, relevant to the lawful mission of higher education, ordinarily should be determined by recognized educational standards." The "academic judgments" rule apparently continues to be applied by some courts to areas where no educational standards exist. As indicated in note 12 *supra*, judicial standards are readily available in questions of student discipline. In addition, in Ashton v. Kentucky, 384 U.S. 195, 200 (1966), it was said that "vague laws in any area suffer a constitutional infirmity."

81 Examination of about twenty student handbooks and catalogues has indicated

The reason for retention of the general conduct rule is apparently the fear of failing to enumerate every foreseeable act the university would consider offensive. If specificity and narrowness are required, educators imagine that the ingenuity of college students would require constant adoption of silly but specific rules to prohibit new and unorthodox behavior. Educational institutions are seldom equipped with full time legislative service commissions or law clerks. It appears that the drafting of a comprehensive but sufficiently specific and narrow university disciplinary code might present a significant burden to the university.

However, while the catch-all regulation avoids the initial inconvenience to the college, and allows its dean of students to rule with an iron fist, it does substantial damage to the academic administration, the student government, individual students and the academic community in general.

The dependence of the state institution and its administrators upon the legislature and governor for funds and employment creates political pressures upon the administration.[82] The politician who responds to public demands will exert pressure upon administrators to discipline students whose activities are offensive to the public.[83] The existence of general conduct regulations often permits such pressures to be effectively applied, with the result that students with unpopular views are dismissed from college for expressing those views. It is fair to suggest that the most severe sanctions may be imposed upon students who come nearest the truth, since the heaviest public response is often forthcoming where the challenged value hangs by the most carefully preserved emotional thread.[84] The preservation of freedom to challenge such values is essential if the university is to preserve its intellectual independence. If general conduct regulations did not exist, the administration could often fairly and happily plead helplessness in the face of unreasonable political pressures.

---

the presence of such a regulation at nearly every college. This is true even though the Attorney General of Ohio has advised state universities that rules which "merely prohibit without penalty are susceptible for the criticism of vagueness." See limited circulation opinion of the Attorney General of Ohio, *Student Discipline at State Universities* at 13 (August, 1967).

82 For a discussion of the usual chain of command and allegiance, see Bean, *What is the State University?*, in RELIGION AND THE STATE UNIVERSITY 58, 62-64 (E. Walter ed. 1958). *See also* R. MACIVER, ACADEMIC FREEDOM IN OUR TIME 237 (1955).

83 For a well known example of high level pressure against students who challenge local norms, see Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 153 (1961).

84 *Id.*

The student governing bodies in some schools formulate and administer most rules for regulation of student conduct.[85] No matter how responsible such governments may be, the administration will undermine their effectiveness, independence and significance by retention of general conduct regulations.

Where these regulations exist, the individual must conform his conduct to an undefined standard to survive in the university. Failure to do so may mean expulsion. A student who is expelled from college will find himself with few prospects of entry into any of the professions or any other school. The college record is a universal reference for employment, and any disciplinary action appearing on the student's record can substantially affect his future. The student who is aware of these facts is unlikely to violate regulations during his college years. Fear of the consequences will motivate him to avoid controversial issues and activities where general conduct regulations make him subject to punishment if he displeases the dean of students. While arbitrary disciplinary action may be the exception rather than the rule, the chilling effect of such regulations upon student conduct can be significant.

The inhibitions created in members of the academic community by such rules are inherently in conflict with its manifest goals, since

> 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.[86]

The existence of the general conduct regulation creates the atmosphere about which the Court was concerned. The seekers of "new maturity and understanding" in the present college era are doing so by hurling challenges at the traditions and conventions of society.[87] Free inquiry and activism are the losers where the challengers are stifled.

The threat of use of such regulations is not idle. Responses to a questionnaire sent to all accredited colleges and universities in Ohio indicate the following facts about general conduct regulations: (a) Each responding institution has such a regulation; (b) many of

85 *See, e.g.*, WITTENBERG UNIVERSITY STUDENT HANDBOOK 1967-68; see also Linde, *Campus Law—Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40, 67-72 (1966).

86 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

87 *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Goldberg v. Bd. of Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

the regulations are vague or provide no standard at all; most provide simply that "good conduct," "good citizenship," "respect for the college's principles," or "accord with high moral and ethical standards" are required; or "conduct unbecoming a student is punishable;"[88] (c) in the 805 disciplinary actions reported in 1966 and 1967 by the 20 responding institutions, 150 or 18.6% were taken pursuant to general conduct regulations by admission of those institutions. These figures are probably conservative and force the conclusion that such rules are significantly used.

The large state universities in Ohio uniformly failed to respond to the questionnaire. Observation of the Student Court at The Ohio State University and consultation with student defenders indicate the general conduct rule[89] is heavily utilized in non-traffic cases.

CONCLUSION

Application of the due process principles of vagueness and overbreadth to college regulations is essential if other new-found rights are to have any vitality. The right to a hearing, accorded in *Dixon v. Alabama State Board of Education*,[90] is meaningless if the fact-finding tribunal need only determine whether an act was done in "good taste" or "reflects *only* credit on the university." First amendment freedoms, recognized in *Dickey v. Alabama State Board of Education*,[91] are of little value if they may be denied by a finding that a speech or editorial was not entirely "acceptable" nor locally "proper."

General terminology has admitted conveniences to administrators, but its use reflects an obsessive fear that a single student may go unpunished for an unforeseen and unacceptable departure from the norms of campus behavior. Such fears widen the gap of mistrust on the American campus, breeding greater discord and stronger rebellions. Judicial enforcement of the rules of vagueness and overbreadth on the campus would force administrative re-evaluation of the university's role in the regulation of student conduct and provide needed breathing space for student freedoms.

The University of Oregon is one institution which has abolished its general conduct regulation. An excellent set of rules was adopted

88 These "requirements" are gleaned from student handbooks, catalogues and cases.

89 See text accompanying note 3 *supra*.

90 294 F.2d 150 (5th Cir. 1961).

91 273 F. Supp. 613 (M.D. Ala. 1967).

in 1963 which seems adequate for disciplinary purposes without apparently being subject to challenge for vagueness or overbreadth.[92] Such rules provide the certainty desired by students, required by the Constitution, and essential to true academic freedom.

R. Raymond Twohig, Jr.

92 Linde, *Campus Law—Berkeley Viewed From Eugene*, 54 CAL. L. REV. 40, 67-72 (1966). The rules there set forth are recommended for adoption by colleges and universities whose rules create uncertainty and may be unconstitutionally vague.